MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

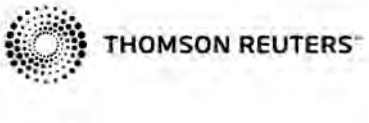
MICHIGAN

FROM

May 17, 2013, through August 5, 2013

CORBIN R. DAVIS
REPORTER OF DECISIONS

VOL. 494
FIRST EDITION



2013

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2015
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2015

Commissioners

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

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

State Court Administrator

CHAD C. SCHMUCKER

Clerk: LARRY S. ROYSTER[1]
Reporter of Decisions: CORBIN R. DAVIS[2]
Crier: DAVID G. PALAZZOLO

[1] From May 28, 2013.

[2] From May 28, 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[1]

[1] To May 28, 2013.

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
	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
	CYNTHIA GRAY HATHAWAY	2017
	MICHAEL M. HATHAWAY	2017
	SUSAN L. HUBBARD	2017

		Term Expires January 1 of
	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
	MARTHA M. SNOW	2017
	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
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015
	DENISE LANGFORD-MORRIS	2019

		Term Expires January 1 of
	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
	KATHY HOOGSTRA	2015[1]
	WILLIAM C. MARIETTI	2017
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2019
	RICHARD L. CARETTI	2017
	MARY A. CHRZANOWSKI	2017
	DIANE M. DRUZINSKI	2015

[1] From June 24, 2013.

		Term Expires January 1 of
	JENNIFER FAUNCE	2019[2]
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	DAVID VIVIANO	2019[3]
	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

[2] From July 23, 2013.

[3] To July 23, 2013.

		Term Expires January 1 of
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
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[4]
37.	ALLEN L. GARBRECHT	2017[5]
	JAMES C. KINGSLEY	2015
	BRIAN KIRKHAM	2017[6]
	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.	NICK O. HOLOWKA	2017
	BYRON KONSCHUH	2015
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	STEPHEN CARRAS	2013[7]

[4] To August 2, 2013.

[5] To July 19, 2013.

[6] From July 19, 2013.

[7] From July 1, 2013.

		Term Expires January 1 of
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2011
	GEORGE J. MERTZ	2015
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
	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

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
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
14B.	CHARLES POPE	2015
15.	JULIE CREAL	2013

		Term Expires January 1 of
	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
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019

		Term Expires January 1 of
	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
	JOHN M. CHMURA	2019
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2017
	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
	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

		Term Expires January 1 of
	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
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

		Term Expires January 1 of
	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
	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

		Term Expires January 1 of
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
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

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	2017
Kalamazoo	DONALD R. HALSTEAD	2015[1]
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

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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

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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
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Marquette	Marquette	25
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ADMINISTRATIVE ORDER No. 2007-3

6TH CIRCUIT COURT

Entered May 22, 2013, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the 6th 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 August 1, 2007, or as soon thereafter as is possible, and shall remain in effect until July 30, 2013, or further order of this Court. The 6th 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 6th Circuit Court Electronic Document Filing Pilot Project, the 6th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 6th 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.

On further order of the Court, the relevant contents of Administrative Order No. 2009-1 having been combined in this order, Administrative Order No. 2009-1 is rescinded, effective immediately.

[This administrative order is effective immediately and supersedes the order that entered October 20, 2011. Changes are indicated in underlining and overstrike.]

1.-4. [Unchanged.]

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

(a) [Unchanged.]

(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.~~ A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

(c) [Unchanged.]

6.-15. [Unchanged.]

Staff Comment: Administrative Order No. 2007-3 has been revised to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachments exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER
No. 2007-3

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2007-3
(EXTENSION OF E-FILING IN THE 6TH CIRCUIT COURT)

Entered June 19, 2013, effective immediately (File No. 2002-27)—REPORTER.

AMENDMENT TO ORDER

On order of the Court, Administrative Order No. 2007-3 is amended to extend the Sixth Circuit Court's e-filing pilot project through June 30, 2015.

ADMINISTRATIVE ORDER
No. 2009-4

42ND CIRCUIT COURT

Entered May 22, 2013, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the 42nd Circuit Court is authorized to implement an electronic filing pilot project to study, in asbestos cases, the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin May 19, 2009, or as soon thereafter as is possible, and shall remain in effect until July 30, 2013, or further order of this Court. The 42nd Circuit Court acknowledges that certain rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of this pilot project, the 42nd Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 42nd Circuit Court will track the participation in and effectiveness of this pilot project and shall report to and provide such information upon request by the State Court Administrative Office.

[This administrative order is effective immediately and supersedes the order that entered May 19, 2009. Changes are indicated in underlining and overstrike.]

1.-4. [Unchanged.]

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

(a) [Unchanged.]

(b) The electronic submission of a motion and brief through this pilot project 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.~~ A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

(c) [Unchanged.]

6.-15. [Unchanged.]

Staff Comment: Administrative Order No. 2009-4 has been revised to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachments exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER No. 2010-3

OAKLAND CIRCUIT COURT, FAMILY DIVISION

Entered May 22, 2013, effective immediately (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, 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.

[This administrative order is effective immediately and supersedes the order that entered January 23, 2013. Changes are indicated in underlining and overstrike.]

1.-4. [Unchanged.]

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

(a) [Unchanged.]

(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 a request of the Court, the filing party shall promptly provide a traditional paper Judge's Copy to chambers.~~ A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

(c) [Unchanged.]

6.-15. [Unchanged.]

Staff Comment: Administrative Order No. 2010-3 has been revised to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachments exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER No. 2010-4

13TH CIRCUIT COURT

Entered May 22, 2013, effective immediately (File No. 2002-37)—REPORTER.

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, 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.

[This administrative order is effective immediately and supersedes the order that entered September 19, 2012. Changes are indicated in underlining and overstrike.]

1.-4. [Unchanged.]

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

(a) [Unchanged.]

(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.~~ A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

(c) [Unchanged.]

6.-15. [Unchanged.]

Staff Comment: Administrative Order No. 2010-4 has been revised to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachment exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER No. 2010-6

16TH CIRCUIT COURT

Entered May 22, 2013, effective immediately (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, 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 is effective immediately and supersedes the order that entered January 23, 2013. Changes are indicated in underlining and overstrike.]

1.-4. [Unchanged.]

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

a.-b. [Unchanged.]

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.~~ A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

d. [Unchanged.]

6.-15. [Unchanged.]

Staff Comment: Administrative Order No. 2010-6 has been revised to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachment exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER No. 2011-1

3RD CIRCUIT COURT

Entered May 22, 2013, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the 3rd 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 January 1, 2011, or as soon thereafter as is possible, and shall remain in effect until July 1, 2015, or further order of this Court. The 3rd 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 3rd Circuit Court Electronic Document Filing Pilot Project, the 3rd Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 3rd 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 is effective immediately and supersedes the order that entered April 4, 2012. Changes are indicated in underlining and strikeover.]

1.-4. [Unchanged.]

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

a. [Unchanged.]

b. The electronic submission of a motion and brief through this pilot project 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.~~ A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

c. [Unchanged.]

6.-15. [Unchanged.]

Staff Comment: Administrative Order No. 2011-1 has been revised to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachment exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER
No. 2011-4

20TH CIRCUIT COURT, OTTAWA COUNTY PROBATE COURT, 58TH DISTRICT COURT

Entered May 22, 2013, effective immediately (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.

[This administrative order is effective immediately and supersedes the order that entered September 22, 2011. Changes are indicated in underlining and overstrike.]

1.-4. [Unchanged.]

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

a. [Unchanged.]

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 participating courts, the filing party shall promptly provide a traditional judge's copy to chambers.~~ A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

c.-d. [Unchanged.]

6.-15. [Unchanged.]

Staff Comment: Administrative Order No. 2011-4 has been revised to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachments exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER No. 2011-6

OAKLAND COUNTY PROBATE COURT

Entered May 22, 2013, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the Oakland County Probate 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 in certain instances. The pilot project shall begin September 1, 2011, or as soon thereafter as is possible, and shall remain in effect until July 31, ~~2013~~2018, or further order of this Court. The Oakland County Probate 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 Oakland County Probate Court Electronic Document Filing Pilot Project, the Oakland County Probate Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The Oakland County Probate 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.-4. [Unchanged.]

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

(a) [Unchanged.]

(b) The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy where applicable under the MCR. ~~Upon request by the court, the filing party shall promptly provide a traditional judge's copy to chambers. A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.~~

(c) [Unchanged.]

6.-8 .[Unchanged.]

9. Official Court Record; Certified Copies.

(a)-(b) [Unchanged.]

(c) At the conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the register shall ~~convert all e-filings to paper form~~ maintain all records in accordance with MCR 8.119(D)(1)(d) and the State Court Administrative Office Records Management policies and procedures. Where necessary, participating ~~Participating~~ at-

torneys shall provide reasonable assistance in constructing ~~the~~ a ~~paper~~ record.

(d) [Unchanged.]

10.-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 July 31, ~~2013~~2018.

Staff Comment: The revisions of Administrative Order No. 2011-6 regarding Oakland County Probate Court's e-filing project both extend the expiration date of the project until July 31, 2018, and revise paragraph 9(c) to delete the requirement that all e-filings must be converted to paper records at the conclusion of the pilot project. In addition, the order is updated to allow a judge to require a paper copy in the limited circumstances in which the motion is dispositive or the motion with brief and attachments exceeds 40 pages in length.

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

ADMINISTRATIVE ORDER No. 2013-6

IMPLEMENTATION OF BUSINESS COURT STANDARDS

Entered June 5, 2013, effective September 1, 2013 (File No. 2012-36)—REPORTER.

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

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 Insti-

tute. 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 administrative order establishes 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.

ADMINISTRATIVE ORDER No. 2013-7

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 38TH CIRCUIT COURT, THE 1ST DISTRICT COURT, AND THE MONROE COUNTY PROBATE COURT

Entered June 19, 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 38th Circuit Court, the 1st District Court, and the Monroe 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*.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted May 22, 2013, effective September 1, 2013 (File No. 2008-21)—REPORTER.

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A)-(B) [Unchanged.]

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

(1)-(9) [Unchanged.]

(D) [Unchanged.]

Staff Comment: The amendments require the prosecutor's consent to placing a juvenile on the consent calendar and prohibit the court from considering on the consent calendar an offense that includes an "assaultive crime" as defined in the Juvenile Diversion Act.

The staff comment is not authoritative construction by the court.

Adopted June 5, 2013, effective September 1, 2013 (File No. 2012-36)—REPORTER.

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

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 verify on the face of 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 verify on the face of the party's pleading that the case meets the statutory requirements to be assigned to the business court.

(2) If a party files a pleading alleging a business or commercial dispute as defined in MCL 600.8031 but fails to verify that the case meets the statutory requirements to be assigned to the business court as required in subsection (1) of this subrule, any party to the action may thereafter file a motion for determination that the case is eligible for assignment to the business court.

(3) On the motion of a party or the court's own initiative, 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 review a decision made under subsection 3. The chief judge's ruling is not an order that may be appealed.

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

(A)-(G) [Unchanged.]

(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 to be taken from 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 and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; 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)-(2) [Unchanged.]

(I)-(L) [Unchanged.]

Staff Comment: The amendments of MCR 2.112 provide a means to identify business court cases and the placement of those matters on the business court docket. The amendment of MCR 8.119 allows business court opinions to be published.

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

October 24, 2012, amendment of Rule 3.101(B) and (E) retained; Rule 3.101(F) amended June 5, 2013, effective immediately (File No. 2011-25)—REPORTER.

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(E) [Unchanged.]

(F) Service of Writ.

(1) The plaintiff shall serve the writ of garnishment, a copy of the writ for the defendant, the disclosure form, and any applicable fees, on the garnishee within ~~91~~ 182 days after the date the writ was issued in the manner provided for the service of a summons and complaint in MCR 2.105.

(2) [Unchanged.]

(G)-(T) [Unchanged.]

Staff Comment: The Court retains the amendment of MCR 3.101, which extended the effective period for a writ of garnishment. This order further adopts a similar conforming amendment of MCR 3.101(F).

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

Amended June 5, 2013, effective September 1, 2013 (File No. 2012-19)—REPORTER.

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

RULE 3.913.

(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, 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 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). 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) 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 the 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 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. 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, the court 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 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 changes of MCR 3.913, 3.963, 3.965, and 3.974 incorporate the statutory changes enacted in 2012 Public Act 163.

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

Amended June 5, 2013, effective September 1, 2013 (File No. 2012-28)—REPORTER.

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

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. That prohibition is codified in MCR

7.203(D). Note that the decision to assign a case to a business court is appealable to the court's chief judge under the amendment of MCR 2.112 adopted in ADM File No. 2012-36.

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

Amended June 5, 2013, effective September 1, 2013 (File No. 2012-27)—REPORTER.

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

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. When SCAO is considering recommending appointment of a chief judge of a specific group of courts, SCAO shall inform and seek input from those courts. Any judge of a court or group of courts may submit an application or recommendation to SCAO regarding the selection of a chief judge for that court or group of courts. ~~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 amendment of MCR 8.110 updates the rule to reflect today's emphasis on collaboration and local sharing of resources, and the revisions also clarify who is required to fulfill the statutory "chief" probate judge obligations.

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

Entered June 19, 2013 (File No. 2011-30)—REPORTER.

On order of the Court, the proposed amendments of Rules 5.801, 7.102, 7.103, 7.108, and 7.109 of the Michigan Court Rules having been published for comment at 490 Mich 1244 (2012), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendments. This administrative file is closed without further action.

AMENDMENT OF MICHIGAN CODE OF JUDICIAL CONDUCT

Amended May 29, 2013, effective August 1, 2013 (File No. 2005-11)—REPORTER.

On order of the Court, the order of May 1, 2013 is amended to provide that the amendments of Canons 2, 4, 5, and 7 of the Code of Judicial Conduct and the amendment of Rule 8.2 of the Michigan Rules of Professional Conduct are effective August 1, 2013.

SUPREME COURT CASES

PEOPLE v KOON

Docket No. 145259. Decided May 21, 2013.

Rodney Lee Koon was charged in the 86th District Court with operating a motor vehicle with any amount of a schedule 1 controlled substance in his body in violation of MCL 257.625(8). When defendant was stopped for speeding, he informed the police officer that he had a medical marijuana registry card and admitted that he had smoked marijuana five to six hours earlier. A blood test showed that defendant had tetrahydrocannabinol (THC), the physiologically active component of marijuana, in his bloodstream when operating the vehicle. The court, Thomas J. Phillips, J., concluded that defendant's registration under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., protected him from prosecution under MCL 257.625(8) unless the prosecution was able to prove that defendant was actually impaired by the presence of marijuana in his body. The Grand Traverse Circuit Court, Philip E. Rodgers, Jr., J., affirmed that ruling, concluding that the MMMA superseded the zero-tolerance provision of MCL 257.625(8). The prosecution appealed by leave granted. The Court of Appeals, SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ., reversed, noting that the MMMA prohibits registered medical marijuana patients from operating a motor vehicle while under the influence of marijuana and reasoning that under MCL 257.625(8) a person is under the influence of marijuana if he or she has any amount of marijuana in his or her body. 296 Mich App 223 (2012). Defendant sought leave to appeal.

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

Under the MMMA, a qualifying registered patient is not subject to arrest, prosecution, or penalty for the medical use of marijuana in accordance with the act, provided that the patient possesses an amount of usable marijuana that does not exceed 2.5 ounces. The statutory definition of "medical use" includes internal possession. Therefore, the MMMA shields registered patients from prosecution for the internal possession of marijuana, provided that the patient does not otherwise possess more than 2.5 ounces of usable marijuana. MCL 333.26427(b), however, provides a list of

activities that are not protected by the MMMA, which includes driving while under the influence. Engaging in those activities removes a registered patient from the MMMA's protection because the patient is no longer acting in accordance with the MMMA. The MMMA does not define what it means to be "under the influence," but the phrase clearly contemplates something more than having any amount of marijuana in one's system and requires some effect on the person. Thus, the MMMA's protections extend to a registered patient who internally possesses marijuana while operating a vehicle unless the patient is under the influence of marijuana. The immunity from prosecution provided under the MMMA to a registered patient who drives with indications of marijuana in his or her system but is not otherwise under the influence of marijuana inescapably conflicts with MCL 257.625(8), which prohibits a person from driving with any amount of marijuana in her or system. Under the MMMA, all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marijuana. Consequently, MCL 257.625(8) does not apply to the medical use of marijuana. The Court of Appeals incorrectly concluded that defendant could be convicted under MCL 257.625(8) without proof that he had acted in violation of the MMMA by operating a motor vehicle while under the influence of marijuana.

Judgment of the Court of Appeals reversed, judgment of the Grand Traverse Circuit Court reinstated, and case remanded to the district court for further proceedings.

CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — OPERATING A VEHICLE WITH ANY AMOUNT OF A CONTROLLED SUBSTANCE IN THE DRIVER'S BODY — DRIVING UNDER THE INFLUENCE OF MARIJUANA.

The Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq*., immunizes from prosecution registered patients acting in accordance with the MMMA who internally possesses marijuana while operating a vehicle unless the patient is under the influence of marijuana; the Michigan Vehicle Code's zero-tolerance provision, MCL 257.625(8), which prohibits a person from operating a motor vehicle with any amount of marijuana in his or her body, does not apply to the medical use of marijuana in accordance with the MMMA.

Alane & Chartier, P.L.C. (by *Mary Chartier* and *Natalie Alane*), *Newburg Law, PLLC* (by *Matthew Newburg* and *Eric Misterovich*), and *Thomas Loeb* for defendant.

PER CURIAM. The Michigan Medical Marihuana Act (MMMA)[1] prohibits the prosecution of registered patients who internally possess marijuana, but the act does not protect registered patients who operate a vehicle while "under the influence" of marijuana. The Michigan Vehicle Code[2] prohibits a person from driving with any amount of a schedule 1 controlled substance, a list that includes marijuana, in his or her system. This case requires us to decide whether the MMMA's protection supersedes the Michigan Vehicle Code's prohibition and allows a registered patient to drive when he or she has indications of marijuana in his or her system but is not otherwise under the influence of marijuana. We conclude that it does. Accordingly, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the judgment of the Grand Traverse Circuit Court, and remand this case to the 86th District Court for further proceedings not inconsistent with this opinion.

Defendant, Rodney Lee Koon, was stopped for speeding in Grand Traverse County. During the traffic stop, defendant voluntarily produced a marijuana pipe and informed the arresting officer that he was a registered patient under the MMMA and was permitted to possess marijuana. A blood test to which defendant voluntarily submitted several hours later revealed that his blood had a THC[3] content of 10 nanograms per milliliter (ng/ml).

The prosecution charged defendant with operating a motor vehicle with the presence of a schedule 1 controlled substance in his body under MCL 257.625(8).

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[1] MCL 333.26421 *et seq*.

[2] MCL 257.1 *et seq*.

[3] Tetrahydrocannabinol, or THC, is the physiologically active component of marijuana. See *Stedman's Medical Dictionary* (26th ed), p 1791.

The prosecution sought a jury instruction that the presence of marijuana in defendant's system resulted in a per se violation of the Michigan Vehicle Code. Defendant argued that the zero-tolerance provision could not possibly apply to MMMA registered patients because the MMMA prevents the prosecution of registered patients for the medical use of marijuana, including internal possession,[4] and only withdraws its protection when the patient drives while "under the influence" of marijuana.[5] Moreover, the MMMA resolves conflicts between all other acts and the MMMA by exempting the medical use of marijuana from the application of any inconsistent act.[6]

The district court and circuit court agreed with defendant. Both courts concluded that the MMMA's prohibition against driving while under the influence of marijuana was inconsistent with the Michigan Vehicle Code's zero-tolerance provision, that the MMMA superseded the zero-tolerance provision, and that defendant was protected from prosecution unless the prosecution could prove that he was impaired by the presence of marijuana in his body. The Court of Appeals reversed,[7] reasoning that the MMMA yielded to the Legislature's determination, as set forth in MCL 257.625(8), that it is unsafe for a person to drive with *any* marijuana in his or her system. The Court of Appeals explained that

> while the MMMA does not provide a definition of "under the influence of marijuana," MCL 257.625(8) essentially does, establishing that any amount of a schedule 1 controlled substance, including marijuana, sufficiently influ-

[4] MCL 333.26423(f); MCL 333.26424(a).

[5] MCL 333.26427(b)(4).

[6] MCL 333.26427(e).

[7] *People v Koon*, 296 Mich App 223; 818 NW2d 473 (2012).

> ences a person's driving ability to the extent that the person should not be permitted to drive.[8]

Thus, the Court of Appeals determined that the MMMA permitted defendant's prosecution under the zero-tolerance statute even though he possessed a valid medical marijuana registration card. We now reverse.

The statute under which the prosecution charged defendant prohibits a person from driving with any amount of marijuana in his or her system:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214.[9]

Despite the MMMA's enactment, marijuana remains a schedule 1 controlled substance.[10]

The MMMA, rather than legalizing marijuana, functions by providing registered patients with immunity from prosecution for the medical use of marijuana:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana . . . .[11]

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[8] *Id*. at 227-228.

[9] MCL 257.625(8).

[10] MCL 333.7212(1)(c).

[11] MCL 333.26424(a).

The statutory definition of "medical use" includes "internal possession."[12] Therefore, the MMMA shields registered patients from prosecution for the internal possession of marijuana, provided that the patient does not otherwise possess more than 2.5 ounces of usable marijuana.

But the MMMA does not provide carte blanche to registered patients in their use of marijuana. Indeed, MCL 333.26427(b) provides a list of activities that are not protected by the MMMA. Engaging in one of those activities removes a registered patient from the MMMA's protection because he or she is no longer acting in accordance with the MMMA.[13] One prohibited activity is driving while under the influence of marijuana:

> This act shall not permit any person to do any of the following:
>
> * * *
>
> (4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.

The MMMA, however, does not define what it means to be "under the influence" of marijuana. While we need not set exact parameters of when a person is "under the influence," we conclude that it contemplates something more than having any amount of marijuana in one's system and requires some effect on the person.[14] Thus,

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[12] MCL 333.26423(f).

[13] See MCL 333.26427(a).

[14] Significantly, "under the influence" is a term of art used in other provisions of the Michigan Vehicle Code. See, e.g., MCL 257.625(1)(a) (stating that a person is "operating while intoxicated" if he or she is "under the influence of . . . a controlled substance . . ."). See also *People v*

taking the MMMA's provisions together, the act's protections extend to a registered patient who internally possesses marijuana while operating a vehicle unless the patient *is* under the influence of marijuana. In contrast, the Michigan Vehicle Code's zero-tolerance provision prohibits the operation of a motor vehicle by a driver with an infinitesimal amount of marijuana in his or her system even if the infinitesimal amount of marijuana has no influence on the driver.

The immunity from prosecution provided under the MMMA to a registered patient who drives with indications of marijuana in his or her system but is not otherwise under the influence of marijuana inescapably conflicts with the Michigan Vehicle Code's prohibition against a person driving with any amount of marijuana in his or her system. When the MMMA conflicts with another statute, the MMMA provides that "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana . . . ."[15] Consequently, the Michigan Vehicle Code's zero-tolerance provision, MCL 257.625(8), which is inconsistent with the MMMA, does not apply to the medical use of marijuana. The Court of Appeals incorrectly concluded that defendant could be convicted under MCL 257.625(8) without proof that he had acted in violation of the MMMA by "operat[ing] . . . [a] motor vehicle . . . while under the influence" of marijuana.[16] If defendant is shown to have been under the influence of marijuana,

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Lambert, 395 Mich 296, 305; 235 NW2d 338 (1975) (concluding that an acceptable jury instruction for "driving under the influence of intoxicating liquor" included requiring proof that the person's ability to drive was "substantially and materially affected"); Black's Law Dictionary (9th ed), p 1665 (defining "under the influence" as "deprived of clearness of mind and self-control because of drugs or alcohol").

[15] MCL 333.26427(e).

[16] MCL 333.26427(b)(4).

then the MMMA's protections will not apply, and the prosecution may seek to convict defendant under any statute of which he was in violation, including MCL 257.625(8).[17]

It goes almost without saying that the MMMA is an imperfect statute, the interpretation of which has repeatedly required this Court's intervention.[18] Indeed, this case could have been easily resolved if the MMMA had provided a definition of "under the influence."[19] As the Legislature contemplates amendments to the MMMA, and to the extent it wishes to clarify the specific circumstances under which a registered patient is per se "under the influence" of marijuana, it might consider adopting a "legal limit," like that applicable to alcohol,[20] establishing when a registered patient is outside the MMMA's protection.[21]

In sum, we conclude that the MMMA is inconsistent with, and therefore supersedes, MCL 257.625(8) unless

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[17] Indeed, if defendant is subsequently shown at trial to have been under the influence of marijuana, he would also necessarily have been in violation of MCL 257.625(1), which prohibits a person from operating a vehicle while intoxicated and defines "operating while intoxicated" as operating a vehicle while "under the influence of . . . a controlled substance . . . ."

[18] See, e.g., *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012); *People v Bylsma*, 493 Mich 17; 825 NW2d 543 (2012); *Michigan v McQueen*, 493 Mich 135; 828 NW2d 644 (2013).

[19] Presently, under the Michigan Vehicle Code, whether a person was under the influence at the time of a violation is a question for the finder of fact. See MCL 257.625(18) (requiring a written finding from the jury or a finding from the court when the defendant is convicted without a jury regarding whether the person was "under the influence of a controlled substance").

[20] See MCL 257.625(1)(b) (establishing 0.08 grams of alcohol per 100 milliliters of blood as the legal limit).

[21] For example, Washington has set a legal limit for the blood concentration of THC at 5 ng/ml. See Wash Rev Code 46.61.502(1)(b). Notably, defendant's THC level was 10 ng/ml.

a registered qualifying patient loses immunity because of his or her failure to act in accordance with the MMMA.[22] Accordingly, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate the judgment of the Grand Traverse Circuit Court, and remand this case to the 86th District Court for further proceedings not inconsistent with this opinion.

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

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[22] While neither party raised the issue, we conclude that the MMMA's enactment without republishing MCL 257.625(8) did not run afoul of Const 1963, art 4, § 25, which states that "[n]o law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Assuming, without deciding, that this provision applies to voter-initiated laws, we conclude that the MMMA is an "act complete in itself" and, therefore, falls within a well-settled exception to Const 1963, art 4, § 25. *People ex rel Drake v Mahaney*, 13 Mich 481, 497 (1865) ("But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."). See also *In re Constitutionality of 1972 PA 294*, 389 Mich 441, 477; 208 NW2d 469 (1973) (concluding that the no-fault insurance act was an act complete in itself and, thus, did not violate Const 1963, art 4, § 25, though it affected provisions that were not republished).

ADMIRE v AUTO-OWNERS INSURANCE COMPANY

Docket No. 142842. Argued November 14, 2012 (Calendar No. 2). Decided May 23, 2013. Rehearing denied, 494 Mich 880.

Kenneth Admire, through his guardian Russ Admire, brought an action in the Ingham Circuit Court against Auto-Owners Insurance Company, seeking payment of personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*. Kenneth was seriously injured when the motorcycle he was riding collided with a car being operated by an insured of Auto-Owners. Following the accident, Kenneth required wheelchair-accessible transportation. On three prior occasions, Auto-Owners had agreed to pay the full cost of purchasing a van modified to accommodate Kenneth's wheelchair. Under the agreements, Auto-Owners would purchase the van and pay for the necessary modifications with the expectation that the van would last for seven years. At the end of that period, Kenneth's guardian would give notice of his intent to purchase a new van and the parties would enter a new transportation purchase agreement. In December 2006, Kenneth's guardian gave Auto-Owners notice of his intent to purchase a new van. In response, Auto-Owners stated that it was not obligated to pay the base purchase price of a new van, but that it would pay for the necessary modifications if Kenneth's guardian purchased a new vehicle for him. Kenneth's guardian purchased the new van for Kenneth, and after the cost of the modifications was reimbursed and the trade-in value was applied, Kenneth was left with $18,388.50 in out-of-pocket expenses for the modified van. Kenneth brought suit seeking reimbursement. Auto-Owners moved for summary disposition. The Ingham Circuit Court, Thomas L. Brown. J., denied the motion and, instead, granted summary disposition in favor of Kenneth. Auto-Owners appealed. The Court of Appeals, METER, P.J., and FITZGERALD and M. J. KELLY, JJ., affirmed in an unpublished opinion per curiam, issued February 15, 2011 (Docket No. 289080). Auto-Owners sought leave to appeal. The Supreme Court granted and heard oral argument on the application, 490 Mich 871 (2011), and subsequently granted leave to appeal, 491 Mich 874 (2012).

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

MCL 500.3107(1)(a) permits an injured person to recover PIP benefits from an insurer for allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for the injured person's care, recovery, or rehabilitation. Ordinary, everyday products, services, and accommodations are not compensable under the statute because those expenses are not for the claimant's care, recovery, or rehabilitation. A mere change in the injured person's postaccident expenses is insufficient to satisfy the statutory criteria. A new expense must be of a wholly different essential character than expenses borne by the person before the accident to show that it is for the injured person's care, recovery, or rehabilitation. If an expense is new in its essential character, the statute requires that it be covered in full regardless of whether the expense represents an increase or decrease in the person's preaccident costs. A combined product or accommodation results from an ordinary expense, unchanged as a result of the injury, being joined with an accommodation or product that is actually for the injured person's care, recovery, or rehabilitation. An integrated product or accommodation involves the blending of an ordinary expense with one that is for the injured person's care, recovery, or rehabilitation in a way that the resulting product or accommodation cannot be separated easily into unit costs. MCL 500.3107(1)(a) requires the insurer to cover integrated products and accommodations in full because the entire expense, including those portions of the expense that might otherwise be considered ordinary, is necessary for the person's care, recovery, or rehabilitation. However, a combined product or accommodation can be easily separated into components related to the injured person's care, recovery, or rehabilitation and components unrelated to that care, recovery, or rehabilitation. When considering a combined product or accommodation only the expenses for those components related to the injured person's care, recovery, or rehabilitation are actually compensable. In this case, the base price of the van is an ordinary transportation expense of the same essential character as Kenneth would have incurred regardless of whether he was injured in an accident. Accordingly, the statute does not require that Auto-Owners reimburse Kenneth for the base price of the van. Auto-Owners met its statutory obligation to pay for the transportation expenses recoverable under the statute, including transportation to and from Kenneth's medical appointments, by paying for the van's modifications and reimbursing him for mileage to and from his medical appointments. The Court of Appeals erred by concluding that the base price of the van was compensable. To the extent that Court of Appeals opinions in *Ward v Titan Ins Co*, 287 Mich App 552 (2010),

Hoover v Mich Mut Ins Co, 281 Mich App 617 (2008), and *Begin v Mich Bell Tel Co*, 284 Mich App 581 (2009), were inconsistent with the opinion in this case, they were overruled. The Court of Appeals also erred by unnecessarily concluding that the parties' most recent transportation purchase agreement was ambiguous regarding whether Auto-Owners was contractually obligated to reimburse Kenneth for the base price of the van regardless of the requirements of the no-fault insurance act. Kenneth had waived that argument by failing to raise it in his complaint or argue it to the trial court.

Judgment of the Court of Appeals reversed in part and vacated in part; case remanded to the circuit court for entry of summary disposition in favor of Auto-Owners.

Justice CAVANAGH, dissenting, rejected the majority's interpretation of MCL 500.3107(1)(a), asserting that Justice MARILYN KELLY set forth the proper interpretation of the statute in her dissent in *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005). Justice CAVANAGH would have affirmed the judgment of the Court of Appeals because Kenneth was entitled to PIP benefits under the *Griffith* dissent's interpretation of the relevant statutory provisions. The majority's contrary interpretation was not supported by the statutory language, was inconsistent with the legislative intent, and provided little assistance to bench and bar. Moreover, even under the majority's faulty statutory interpretation, Kenneth was entitled to reimbursement for the full cost of the van because, using the definition articulated by the majority, it was an integrated product. Because of the accident Kenneth could only use a modified van for personal transportation. Thus, the van itself and the modifications were both necessary for Kenneth's care and could not be easily separated.

Justices MCCORMACK and VIVIANO took no part in the decision of this case.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — CARE, RECOVERY, OR REHABILITATION — ORDINARY EXPENSES.

Under the personal protection insurance provisions of the no-fault automobile insurance act, an insurer is liable for allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for the injured person's care, recovery, or rehabilitation; ordinary, everyday products, services, and accommodations are not compensable under the statute because those expenses are not for the injured person's care, recovery, or rehabilitation; a new expense must be of a wholly different essential character than expenses borne by the person

before the accident to show that it is for the injured person's care, recovery, or rehabilitation; if an expense is new in its essential character, the statute requires that it be covered in full regardless of whether the expense represents an increase or decrease in the person's preaccident costs (MCL 500.3107[1][a]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — CARE, RECOVERY, OR REHABILITATION — INTEGRATED PRODUCTS AND ACCOMMODATIONS — COMBINED PRODUCTS AND ACCOMMODATIONS.

Under the personal protection insurance provisions of the no-fault automobile insurance act, an insurer is liable for allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for the injured person's care, recovery, or rehabilitation; a combined product or accommodation results from an ordinary expense, unchanged as a result of the injury, being joined with an accommodation or product that is actually for the injured person's care, recovery, or rehabilitation; an integrated product or accommodation involves the blending of an ordinary expense with one that is for the injured person's care, recovery, or rehabilitation in a way that the resulting product or accommodation cannot be separated easily into unit costs; the act requires the insurer to cover integrated products and accommodations in full because the entire expense, including those portions of the expense that might otherwise be considered ordinary, is necessary for the person's care, recovery, or rehabilitation; however, when considering a combined product or accommodation only the expenses for those components related to the injured person's care, recovery, or rehabilitation are actually compensable (MCL 500.3107[1][a]).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas* and *Stephen H. Sinas*), for Kenneth Admire.

Willingham & Coté, P.C. (by *John A. Yeager* and *Kimberlee A. Hillock*), for Auto-Owners Insurance Company.

Amici Curiae:

Kerr Russell and Weber PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*) for the Coalition Protecting Auto No-Fault.

Dykema Gossett PLLC (by *Lori McAllister*) for the Michigan Insurance Coalition and the Insurance Institute of Michigan.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Joseph Erhardt*) for the Michigan Catastrophic Claims Association.

ZAHRA, J. At issue in this case is whether Michigan's no-fault insurance act[1] requires defendant, Auto-Owners Insurance Company, to pay the entire cost of a van modified to accommodate the plaintiff's wheelchair, including both the base price of the van and the separately introduced modifications. We conclude that defendant is only required to pay for the modifications because only the modifications are allowable expenses "for an injured person's care, recovery, or rehabilitation" under MCL 500.3107(1)(a). Because the base price of the van is an ordinary transportation expense—an expense that is as necessary for the uninjured as the injured—and is easily separated from the modifications, defendant is not required to pay for it under the no-fault insurance act. Accordingly, we reverse the Court of Appeals' decision to the extent it held otherwise. Furthermore, at the trial court, plaintiff, Kenneth Admire, never argued that defendant had contractually agreed to reimburse him for the base price of the van, thereby waiving that issue. Thus, we need not determine whether the Court of Appeals correctly concluded that the parties' agreement was ambiguous, and we vacate that portion of the Court of Appeals' judgment. Plaintiff's application for leave to appeal as cross-appellant is denied, and the case is remanded to the trial court for entry of summary disposition in defendant's favor.

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[1] MCL 500.3101 *et seq*.

I. FACTS AND PROCEEDINGS

In 1987, plaintiff suffered catastrophic injuries when the motorcycle he was riding collided with a car being operated by an insured of defendant. Plaintiff's injuries left him unable to speak or walk and rendered his entire right side virtually useless. A family member tends to all of plaintiff's personal and financial affairs.

Plaintiff requires wheelchair-accessible transportation to go to work five days a week, visit his family, attend medical appointments, and get around the community. On three prior occasions, defendant agreed to pay the full cost of purchasing a van large enough for plaintiff to get in and out while remaining in his wheelchair. Defendant also agreed to pay the cost of modifying the vehicle to make it wheelchair-accessible. In 1988, 1994, and 2000, plaintiff and defendant entered into contracts under which defendant purchased a van and paid for the necessary modifications with the expectation that the van would last for seven years. At the end of the van's life, plaintiff would give defendant notice of his intent to purchase a new van, and the parties would enter a new agreement. The most recent "Transportation Purchase Agreement" was executed on April 26, 2000. It specified that plaintiff was to notify defendant 60 days before purchasing a new van and that the old van's value would be applied to the purchase price of the new van.

In December 2006, plaintiff, through his guardian, notified defendant that it was time to purchase a new van. In January 2007, defendant informed plaintiff by letter that it had determined that it was not obligated to pay the base purchase price of a new van under the transportation purchase agreement or the no-fault insurance act. Defendant acknowledged that, pursuant to the transportation purchase agreement, the "current

van should be traded in toward the price of a new van" should plaintiff choose to purchase a new van himself. Defendant further stated that it would "pay for the necessary medical modifications needed on any vehicle purchased . . . as well as . . . any medical mileage incurred in relation to Mr. Admire's motor vehicle accident . . . ." Plaintiff's guardian purchased the van for him, and after the modifications were reimbursed and the trade-in value was applied, plaintiff was left with out-of-pocket expenses of $18,388.50.

Plaintiff sued defendant for reimbursement of the $18,388.50, claiming that it was an allowable expense under Michigan's no-fault insurance act. Defendant moved for summary disposition, arguing that this Court's decision in *Griffith v State Farm Mutual Automobile Insurance Co*[2] required it to pay for medically necessary modifications, but not the base price of the van. Plaintiff argued that conflicting precedent interpreted the no-fault insurance act to require reimbursement for the entire modified van. The Ingham Circuit Court denied defendant's motion for summary disposition and instead granted summary disposition in favor of plaintiff.

Defendant appealed by right in the Court of Appeals, which affirmed in an unpublished decision.[3] In dicta, the Court of Appeals panel concluded that the transportation purchase agreement was ambiguous regarding who had the responsibility to pay the base price of a new van:

> On its face, the contract does not provide that defendant is required to buy a new van. It says that the van shall be

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[2] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005).

[3] *Admire v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2011 (Docket No. 289080).

> traded in on a replacement van but it does not say that defendant will pay for the replacement. However, the contract also does not say that plaintiff is responsible for buying the new van.[4]

Accordingly, the panel held that "the trial court erred in evidently concluding that the transportation purchase agreement mandated that it grant summary disposition to plaintiff."[5]

The Court of Appeals panel then proceeded to address whether Michigan's no-fault insurance act required reimbursement for both the purchase price of a van and the modifications to accommodate the insured's disability. Defendant again relied primarily on this Court's decision in *Griffith*, which held that the no-fault insurance act did not require the insurer to reimburse the insured for food costs absent evidence that the food was somehow different than what was required before the plaintiff's accident.[6] So, reasoned defendant, the base price of the van was not compensable because plaintiff required transportation before and after the accident; the modifications were, however, compensable because they were not required before the accident.

The panel disagreed with defendant's characterization of *Griffith*, instead relying on its own decision in *Begin v Michigan Bell Telephone Co*.[7] As in this case, *Begin* involved an insurer that had refused to compen-

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[4] *Id.* at 3.

[5] *Id.* The Court of Appeals erred by considering the implications of the transportation purchase agreement because plaintiff never raised that issue in his complaint or argued it at the trial court. Therefore, the issue was waived. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("Michigan generally follows the 'raise or waive' rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court.") (citation omitted).

[6] *Griffith*, 472 Mich at 535-536.

[7] *Begin v Mich Bell Tel Co*, 284 Mich App 581; 773 NW2d 271 (2009).

sate a claimant for a modified van. The panel in this case agreed with the reasoning in *Begin* that a van and its modifications are "so blended . . . that the whole cost is an allowable expense if it satisfies the statutory criteria for being sufficiently related to injuries sustained in a motor vehicle accident . . . ."[8] Thus, like the *Begin* Court, the panel reasoned that a modified van was more like food provided at a care facility (which *Griffith* acknowledged was covered by the no-fault insurance act) than ordinary food eaten at home by an injured person (which *Griffith* determined was not covered). The panel concluded that because plaintiff could not drive an unmodified vehicle, unlike the *Griffith* plaintiff who could still eat ordinary food, the modified vehicle must be covered in its entirety.[9]

Defendant sought leave to appeal. After hearing oral arguments on the application,[10] we granted leave to appeal to determine whether the no-fault insurance act requires reimbursement for the entire cost of the modified vehicle.[11]

II. STANDARD OF REVIEW

Whether MCL 500.3107(1)(a) requires an insurer to reimburse an insured claimant for the full cost of a vehicle and modifications necessary to accommodate the insured claimant's disability is a question of statutory interpretation that this Court reviews de novo.[12]

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[8] *Id.* at 596-597.

[9] *Admire*, unpub op at 5.

[10] *Admire v Auto-Owners Ins Co*, 490 Mich 871 (2011).

[11] *Admire v Auto-Owners Ins Co*, 491 Mich 874 (2012).

[12] *Griffith*, 472 Mich at 525-526.

III. ANALYSIS

A. LEGAL BACKGROUND

MCL 500.3107(1)(a) permits an injured person to recover personal injury protection (PIP) benefits from an insurer for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." This Court has often been called on to determine the reach of this provision.[13] This case particularly implicates our 2005 decision in *Griffith*, in which we interpreted the clause "for an injured person's care, recovery, or rehabilitation."[14] The plaintiff's husband in *Griffith*, Douglas Griffith, suffered from severe brain damage stemming from a motor vehicle accident.[15] For the duration of Griffith's hospitalization and his stay at a 24-hour nursing facility, his insurer, State Farm Mutual Automobile Insurance Company, covered ordinary expenses, including Griffith's food.[16] On his return home he still required assistance with basic tasks like eating and bathing. State Farm refused to reimburse the plaintiff for Griffith's food

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[13] See, e.g., *Johnson v Recca*, 492 Mich 169, 178-180; 821 NW2d 520 (2012) (holding that replacement services did not qualify as allowable expenses); *Douglas v Allstate Ins Co*, 492 Mich 241, 277-278; 821 NW2d 472 (2012) (explaining the dichotomy between allowable expenses and replacement services as it related to spousal care); *Krohn v Home-Owners Ins Co*, 490 Mich 145, 163-167; 802 NW2d 281 (2011) (holding that an experimental procedure was not an allowable expense); *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 6; 795 NW2d 101 (2009) (holding that the reasonableness requirement of MCL 500.3107 did not apply to MCL 500.3104(2)).

[14] *Griffith*, 472 Mich at 534-540.

[15] *Id.* at 524.

[16] *Id.* at 524-525.

because it determined that the food costs were not an "allowable expense" under MCL 500.3107(1)(a).[17]

In determining whether the particular expense was for " 'reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation,' " this Court defined the terms "care," "recovery," and "rehabilitation."[18] This Court gave "recovery" and "rehabilitation" their dictionary definitions, defining "recovery" as " 'restoration or return to any former and better condition, [especially] to health from sickness, injury, addiction, etc.,' " and "rehabilitate" as " 'to restore or bring to a condition of good health, ability to work, or productive activity.' "[19] Defining "care" required this Court to consider the term's meaning in light of the statutory terms "recovery" and "rehabilitation":

> Generally, "care" means "protection; charge," and "to make provision." *Random House Webster's College Dictionary* (2001). Thus, taken in isolation, the word "care" can be broadly construed to encompass *anything* that is reasonably necessary to the provision of a person's protection or charge. But we have consistently held that "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). Therefore, we must neither read "care" so broadly as to render nugatory "recovery and rehabilitation" nor construe "care" so narrowly that the term is mere surplusage. "Care" must have a meaning that is related to, but distinct from, "recovery and rehabilitation."

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[17] *Id.* at 525.

[18] *Id.*, at 532-536, quoting MCL 500.3107(1)(a). Because there was no dispute that Griffith was an injured person, the key issue was whether the ordinary food he was eating was reasonably necessary for his care, recovery, or rehabilitation.

[19] *Griffith*, 472 Mich at 534, citing *Random House Webster's College Dictionary* (2001).

> As an initial matter, it is important to note that the statute does not require compensation for any item that is reasonably necessary to a person's care in general. Instead, the statute specifically limits compensation to charges for products or services that are reasonably necessary "for an *injured person's* care, recovery, or rehabilitation." (Emphasis added.) This context suggests that "care" must be related to the insured's injuries.
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> "Care" must have a meaning that is broader than "recovery" and "rehabilitation" but is not so broad as to render those terms nugatory. As noted above, both "recovery" and "rehabilitation" refer to an underlying injury; likewise, the statute as a whole applies only to an "injured person." It follows that the Legislature intended to limit the scope of the term "care" to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident. "Care" is broader than "recovery" and "rehabilitation" because it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state.[20]

Having determined at the outset that Griffith's food could not be for recovery or rehabilitation because it lacked curative properties, this Court proceeded to explain that ordinary food also could not be for Grif-

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[20] *Griffith*, 472 Mich at 533-535. Justice CAVANAGH would employ the analysis from Justice MARILYN KELLY's dissent in *Griffith*, defining "care" as "the provision of what is necessary for the welfare and protection of someone," to conclude that defendant should reimburse plaintiff for the cost of a van because transportation is necessary for plaintiff's welfare. *Id.* at 547 (KELLY, J. dissenting) (citation and quotation marks omitted). While Justice CAVANAGH's position is unsurprising—he, after all, supported the dissent in *Griffith*—it was rejected by the collective wisdom of this Court as inconsistent with MCL 500.3107(1)(a) in *Griffith*, and we reject it again here. We reiterate that the *Griffith* dissent defined "care" so broadly that "recovery and rehabilitation" were impermissibly stripped of meaning. See *id.* at 534 n 10.

fith's care. This Court determined that Griffith's food costs failed to satisfy the requirements of MCL 500.3107(1)(a) because the food was Griffith's "ordinary means of sustenance" and "if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now."[21] Therefore, this Court concluded, the food costs were not an allowable expense under the statute.[22]

This Court drew an important distinction between ordinary food eaten by an injured person at home and ordinary food provided by a hospital during the injured person's stay, stating that

> it is "reasonably necessary" for an insured to consume hospital food during in-patient treatment given the limited dining options available. Although an injured person would need to consume food regardless of his injuries, he would not need to eat *that particular food* or bear the cost associated with it. Thus, hospital food is analogous to a type of special diet or select diet necessary for an injured person's recovery. Because an insured in an institutional setting is required to eat "hospital food," such food costs are necessary for an insured's "care, recovery, or rehabilitation" while in such a setting. Once an injured person leaves the institutional setting, however, he may resume eating a normal diet just as he would have had he not suffered any injury and is no longer required to bear the costs of hospital food, which are part of the unqualified unit cost of hospital treatment.[23]

This Court specifically noted that MCL 500.3107(1)(a) requires insurers to cover hospital food as an allowable expense for the care of an injured person because the person is required to eat hospital food precisely because of

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[21] *Id.* at 536.

[22] *Id.*

[23] *Id.* at 537-538.

his or her need for care in the hospital.[24] Finally, this Court concluded that requiring an insurer to reimburse the insured for ordinary, everyday expenses merely because of a remote relationship to the insured's care undermines the no-fault insurance act's goal of cost containment.[25]

Several Court of Appeals decisions have attempted to interpret MCL 500.3107(1)(a) in light of *Griffith*, yet they have taken inconsistent approaches in *Griffith*'s application. For instance, the Court of Appeals applied *Griffith* to housing expenses in *Ward v Titan Insurance Co*.[26] The majority adopted an incremental approach to allowable expenses and stated the following:

> Under the *Griffith* analysis, plaintiff's housing costs are only compensable to the extent that those costs became greater as a result of the accident. Plaintiff must show that his housing expenses are different from those of an uninjured person, for example, by showing that the rental cost for handicapped accessible housing is higher than the rental cost of ordinary housing. In the absence of that kind of factual record, the trial court erred by concluding that plaintiff was entitled to housing costs compensation merely on the basis of the amount plaintiff was currently paying in rent, for a residence that the record does not even demonstrate was handicapped accessible.[27]

As a result, the court reversed the trial court's award of the entire amount of the insured's postinjury housing, instead holding that an insurer is only liable for the increase in housing costs attributable to the injury.

Similarly, in *Hoover v Michigan Mutual Insurance Co*,[28] the Court of Appeals applied *Griffith* to other

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[24] *Id.* at 538 n 14.

[25] *Id.* at 539.

[26] *Ward v Titan Ins Co*, 287 Mich App 552; 791 NW2d 488 (2010).

[27] *Id.* at 557-558 (citation omitted).

[28] *Hoover v Mich Mut Ins Co*, 281 Mich App 617; 761 NW2d 801 (2008).

household expenses, including real estate tax bills, utility bills, homeowner's insurance, home maintenance, telephone bills, and security system costs. The *Hoover* Court understood *Griffith* as requiring "but for" causation between the claimed expense and the injury:

> At its core, the holding in *Griffith* requires a court to determine whether expenses would not have been incurred *but for* the accident and resulting injuries. Stated otherwise, the question is whether the expenses would have been incurred in the course of an ordinary life unmarred by an accident. And if they would have been incurred, like the ordinary food costs at issue in *Griffith*, a causal connection between the expenses and the accidental bodily injury would be lacking and it could not be said that the act of providing products, services, and accommodations was necessitated by the accidental bodily injury.[29]

The *Hoover* Court understood *Griffith* as requiring a comparison of the injured person's preinjury expenses to the injured person's postinjury expenses, with the insurer covering the difference.[30]

But the Court of Appeals adopted a different approach in *Begin*, which presented a similar factual situation to the instant case: a dispute over whether an insurer was responsible for the base price of a van for the insured plaintiff.[31] The *Begin* Court disavowed any interpretation of *Griffith* that required a comparison to the injured person's preinjury expenses:

> [T]he *Griffith* Court, when discussing the cost of food provided to an injured person in an institutional setting, did not suggest that only the marginal increase in the cost of such food served in an institutional setting would be an allowable expense. Nor did the Court suggest that only the

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[29] *Id.* at 628.

[30] *Id.* at 629-631.

[31] *Begin*, 284 Mich App at 583-584.

> marginal cost of modifying regular shoes would be a recoverable "allowable expense" under MCL 500.3107(1)(a). Rather, in each example, the product, service, or accommodation used by the injured person before the accident is so blended with another product, service, or accommodation that the whole cost is an allowable expense if it satisfies the statutory criteria of being sufficiently related to injuries sustained in a motor vehicle accident and if it is a reasonable charge and reasonably necessary for the injured person's care, recovery, or rehabilitation under MCL 500.3107(1)(a).[32]

Thus, *Begin* held, if a particular product, service, or accommodation satisfies the requirements of MCL 500.3107(1)(a), then the insurer must also cover as "allowable expenses" all associated expenses that are "blended" with the qualifying expense.[33] This view directly conflicts with the "setoff" analysis promulgated in *Ward* and *Hoover*. Because the statutory language plainly cannot support these divergent interpretations, we now seek to clarify the reach of MCL 500.3107(1)(a).

B. INTERPRETATION

As stated, MCL 500.3107(1)(a) permits an injured person to recover PIP benefits from an insurer for, "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Under *Griffith*, this provision requires that "an 'allowable expense' must be 'for' one of the following: (1) an injured person's care, (2) his recovery, or (3) his rehabilitation."[34]

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[32] *Id.* at 596-597.

[33] *Id.*

[34] *Griffith*, 472 Mich at 532 n 8.

This case requires us to clarify when a particular product, service, or accommodation is actually "for" the injured person's "care, recovery, or rehabilitation." In this context, the word "for" as a preposition "implies a causal connection"[35] and is defined as " 'with the object or purpose of . . . .' "[36] Accordingly, a claimant can recover as an allowable expense the charge for a product, service, or accommodation that has the object or purpose of effectuating the injured person's care, recovery, or rehabilitation. The causal connection is further implied in the statutory language making compensable only those products, services, or accommodations that are "for an *injured person's* care, recovery, and rehabilitation."[37] This language suggests that any product, service, or accommodation consumed by an *uninjured person* over the course of his or her everyday life cannot qualify because it lacks the requisite causal connection with effectuating the injured person's care, recovery, or rehabilitation. An ordinary, everyday expense simply cannot have the object or purpose of effectuating an *injured person's* care, recovery, or rehabilitation because it is incurred by *everyone* whether injured or not. For instance, *Griffith* explained that "the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his 'care, recovery, or rehabilitation,' " because "if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now."[38] In sum, an ordinary, everyday product, service, or accommodation is not compensable under

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[35] *Id.* at 531.

[36] *Id.* at 531 n 6, quoting *Random House Webster's College Dictionary* (1997). The same definition is found in *Random House Webster's College Dictionary* (2005).

[37] MCL 500.3107(1)(a) (emphasis added).

[38] *Griffith*, 472 Mich at 536.

MCL 500.3107(1)(a) because that expense cannot be *for* the claimant's care, recovery, or rehabilitation.[39]

Further, nothing in the statutory language of MCL 500.3107(1)(a) supports the notion that postinjury allowable expenses should be reduced by the margin of the injured person's preinjury expenses of the same character. Complying with MCL 500.3107(1)(a) and determining what products, services, and accommodations are actually *for* the injured person's care, recovery, or rehabilitation requires a careful examination of the injured person's postaccident expenses. A mere change in the injured person's postaccident expenses is insufficient to satisfy MCL 500.3107(1)(a); the new expense must be of a wholly different essential character than expenses borne by the person before the accident to show that it is *for* the injured person's care, recovery, or rehabilitation. But if an expense is new in its essential character, and thus actually *for* the injured person's care, recovery, or rehabilitation, MCL 500.3107(1)(a) requires that it be covered in full regardless of whether the expense represents an increase or decrease in the injured person's preaccident costs.[40] Indeed, the provision states that allowable expenses consist of "*all* reasonable charges incurred for reasonably necessary

[39] The noncompensability of the ordinary food the insured in *Griffith* consumed at home exemplifies this principle.

[40] For example, if before an accident the claimant wore budget shoes costing $10 but as a result of the accident required custom medical shoes costing $100, the claimant would be entitled to the full $100, not merely the $90 difference between the pre- and postaccident shoe expenses. But if before the accident the claimant wore designer shoes costing $300, the claimant would still be entitled to the full $100 cost of the custom shoes because the custom shoes represent a change in character from the claimant's preinjury needs and are thus *for* the claimant's care, recovery or rehabilitation. Of course, MCL 500.3107(1)(a) also requires allowable expenses to be "reasonable charges" and they must be "reasonably necessary" for the claimant's care, recovery, or rehabilitation.

products, services and accommodations . . . ."[41] Thus, if a product, service, or accommodation satisfies the statutory criteria, it is *fully* compensable.

Special accommodations or modifications to an ordinary item present a particular challenge. A "combined" product or accommodation results from an ordinary expense, unchanged as a result of the injury, being joined with an accommodation or product that is actually *for* the injured person's care, recovery, or rehabilitation. An "integrated" product or accommodation involves the blending of an ordinary expense with one that is for the injured person's care, recovery, or rehabilitation in a way that the resulting product or accommodation cannot be separated easily into unit costs. Unlike an integrated product or accommodation, a combined product or accommodation can be separated easily, both conceptually and physically, so that the fact-finder can identify which costs are of a new character and are thus *for* the injured person's care, recovery, or rehabilitation and which costs are ordinary, everyday expenses that are unchanged after the accident. As this Court suggested in *Griffith*, MCL 500.3107(1)(a) requires the insurer to cover a truly integrated product or accommodation in full because the entire expense, including the portions that might otherwise be considered ordinary, is necessary for the injured person's care, recovery, or rehabilitation.[42] But because a combined product or accommodation can be easily separated into components related to the injured person's care, recovery, or rehabilitation and components unrelated to that care, recovery, or rehabilitation, only the

[41] MCL 500.3107(1)(a) (emphasis added).

[42] See *Griffith*, 472 Mich at 537-538.

related expenses are actually compensable.[43] MCL 500.3107(1)(a) mandates this result because, when the product or accommodation can be easily separated into an ordinary expense and an expense *for* care, recovery, or rehabilitation, requiring the insurer to pay for the ordinary expenses would destroy the cost-containment aspect of the no-fault insurance act, something of which this Court has long been mindful.[44]

This analysis is consistent with this Court's application of MCL 500.3107(1)(a) in *Griffith*. In its discussion of insurance coverage for hospital food during the insured's hospital stay, the *Griffith* Court stated that compensation was required because the insured was required to eat "*that particular food*."[45] This is an example of an integrated accommodation. The food, clothing, shelter, and any other ordinary products that are provided by the hospital as part and parcel of the hospital stay are not easily separated from the products,

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[43] For an example of a combined product or accommodation, consider a medical insole that an injured person might have to put in his or her shoe following an accident. Certainly the insole is compensable as a product or accommodation for the injured person's care, recovery, or rehabilitation. But the easy physical and conceptual separability of the insole and the actual shoe means that the shoe itself—an ordinary expense—will not be compensable because it is not *for* the injured person's care, recovery, or rehabilitation.

[44] See, e.g., *Griffith*, 472 Mich at 539 ("We have always been cognizant of this potential problem [obliterating cost containment] when interpreting the no-fault act . . . ."); *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996) (stating that "the no-fault insurance system . . . is designed to provide victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system"); *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 547; 273 NW2d 829 (1979) ("Because the first-party insurance proposed by the act was to be compulsory, it was important that the premiums to be charged by the insurance companies be maintained as low as possible. Otherwise, the poor and the disadvantaged people of the state might not be able to obtain the necessary insurance.").

[45] *Griffith*, 472 Mich at 537.

services, and accommodations provided by the hospital for the injured person's care. Thus, the statute requires the insurer to pay the entire cost. The same could be said for the custom medical shoes briefly discussed in *Griffith*.[46] When a medical products company produces a custom shoe, the shoe is an integrated product because the medical nature of the shoe, which is for the injured person's care, recovery, or rehabilitation, cannot be separated from the ordinary need for shoes by an uninjured person. Thus, the entire cost of the shoe is an allowable expense.

In sum, MCL 500.3107(1)(a) only requires an insurer to pay for products, services, and accommodations that are reasonably necessary to the object or purpose of "an injured person's care, recovery, or rehabilitation." Post-accident expenses of a wholly new essential character satisfy the statutorily required causal connection that expenses be *for* the injured person's care, recovery, or rehabilitation. Ordinary expenses that are the same for an injured and an uninjured person are not recoverable at all because the claimant cannot show that the expense is *for* his or her care, recovery, or rehabilitation. However, if an expense satisfies the statute, then it is recoverable in full; there is no setoff based on the injured person's preinjury expenses of the same character. Some products, services, or accommodations might otherwise be ordinary but are so integrated with a product, service, or accommodation that is actually *for* the injured person's care, recovery, or rehabilitation that the entire product, service, or accommodation must be included as an allowable expense under MCL 500.3107(1)(a). But if the ordinary expense is merely combined with a product, service, or accommodation for the injured person's care, recovery, or rehabilitation in

[46] *Id.* at 535 n 12.

a way that is physically and conceptually separable, the ordinary expense fails to satisfy the statute and is not compensable.[47]

C. APPLICATION

Applying this standard here, we conclude that the base price of the van is not an allowable expense under MCL 500.3107(1)(a). The statute only entitles plaintiff to reimbursement for products, services, and accommodations that are actually for his care, recovery, or rehabilitation, and only the van's modifications rise to that standard. The base price of the van is an ordinary transportation expense of the same essential character as plaintiff would have incurred regardless of whether he was injured in an accident. While plaintiff's choice of transportation before his injury might not have been a van, the essential character of plaintiff's preinjury need for transportation has not changed. Like Griffith's need for sustenance, had plaintiff never sustained his injury, or were he to fully recover, his need for ordinary transportation would be unchanged. Accordingly, the

[47] Justice CAVANAGH suggests that our interpretation injects language into the statute. Quite the opposite. As this Court has often done, we merely highlight guideposts inherent in the statutory language to assist Michigan's citizens—inside and outside the litigation context—in faithfully administering the statute's plain language in the myriad situations in which it applies. See, e.g., *Krohn v Home-Owners Ins Co*, 490 Mich 145, 163-164; 802 NW2d 281 (2011) (concluding that a surgical procedure cannot be "reasonably necessary" under MCL 500.3107(1)(a) unless a plaintiff provides objective and verifiable evidence of the procedure's efficacy); *Frazier v Allstate Ins Co*, 490 Mich 381, 385-386; 808 NW2d 450 (2011) (expounding on the beginning and end of the process of "alighting" as that term is used in MCL 500.3106(1)(c)); *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986) (explaining that an injury arises out of the use of a motor vehicle as a motor vehicle under MCL 500.3105(1) 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' ").

statute does not require that defendant reimburse plaintiff for the base price of the van.

Certain transportation expenses may be recoverable under MCL 500.3107(1)(a) because they are part of plaintiff's care, recovery, or rehabilitation. For instance, plaintiff requires some form of transportation to and from his medical appointments. Medically necessary transportation needs represent a change in character from plaintiff's preinjury requirements because the trips would not have been necessary in a life unmarred by injury. But by paying for the van's modifications and so-called medical mileage, defendant has met its statutory obligations. Indeed, defendant has made it possible—through mileage and modifications—for plaintiff to use his otherwise ordinary transportation to reach medical appointments. But plaintiff cannot show that the van itself, an ordinary form of transportation, is actually for his care, recovery, or rehabilitation. Thus, MCL 500.3107(1)(a) does not require defendant to compensate plaintiff for the base price of the van.

This Court's decision in *Griffith* leads inexorably to this result. The van itself is akin to the food that Griffith was eating at home. The character of plaintiff's general need for transportation—like Griffith's food requirements—did not change as a result of the accident. And unlike the hospital food in *Griffith*, the van does not constitute an integrated product because the modified van, as a whole, was not actually for plaintiff's care, recovery, or rehabilitation. Hospital food is compensable because the injured person is required to eat *that particular food* during the hospital stay for his or her care and recovery.[48] The Court likened hospital food to a special diet.[49] But plaintiff only requires *some form*

[48] *Id.* at 537.

[49] *Id.*

of transportation for his care, not any *particular form*, so his transportation needs are not akin to a special diet. Indeed, if defendant provided plaintiff with a taxi service that accounted for his disability, defendant would only be required to provide that service for those trips that had the object or purpose of plaintiff's care, recovery, or rehabilitation.

The parties agreed that plaintiff should have a vehicle with modifications as the means for transporting plaintiff on his medically necessary trips. But because the van and the modifications are easily separable, we must determine which expenses are actually for plaintiff's care, recovery, and rehabilitation and which are not.[50] The modifications indisputably have the object or purpose of effectuating plaintiff's care, recovery, or rehabilitation because without the modifications plaintiff could not make use of his ordinary transportation for medically necessary trips. Thus, defendant was required to and did compensate plaintiff for the cost of the modifications pursuant to MCL 500.3107(1)(a). But the van is just a van; and while a van may not have been plaintiff's transportation preference, it remains an ordinary means of transportation used by the injured and uninjured alike.[51]

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[50] Justice CAVANAGH argues that defendant must pay for the van because the van cannot be separated from plaintiff's general need for transportation and the van itself is for plaintiff's care. But we never suggest that the van can be separated from the general need for transportation. Indeed, driving a van is consistent with plaintiff's general need for transportation. Our focus is on the medically necessary modifications and medical mileage, which *are* separable from plaintiff's general need for transportation. Thus, because only the modifications and medical mileage are *for* plaintiff's care, recovery, or rehabilitation, they are the only items for which defendant must reimburse plaintiff.

[51] Justice CAVANAGH says that the van must be compensable because plaintiff did not require a van before the accident, similar to how the van's medical modifications were unnecessary before the accident. But

Because the character of plaintiff's ordinary transportation needs remains unchanged, he is free to meet those needs in the way that best suits him. If plaintiff had already owned a van, defendant could have modified that van. If plaintiff wanted a Mercedes van, he could pay for the added luxury, and defendant could modify the van as required by statute. However, only the modifications and medical mileage—separable elements that actually represent a change in character from plaintiff's general preinjury transportation requirements—must be compensated pursuant to MCL 500.3107(1)(a).

IV. CONCLUSION

Our decision in *Griffith* was sound, and we reaffirm that decision here. To the extent that the Court of Appeals' opinions in *Ward*, *Hoover*, or *Begin* are inconsistent with this opinion, they are overruled. In concluding that the base price of the van was compensable, the Court of Appeals in this case misapplied our holding in *Griffith*. We therefore reverse that portion of the Court of Appeals' judgment.

Furthermore, the Court of Appeals erred by unnecessarily concluding that the parties' transportation purchase agreement was ambiguous regarding whether defendant was contractually obligated to reimburse plaintiff for the base price of the van regardless of the no-fault insurance act's requirements. In fact, plaintiff waived the contractual argument by failing to raise it in

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this argument misconstrues why the modifications are compensable. What makes the modifications compensable is that they represent a change in character from plaintiff's preinjury transportation needs, without which plaintiff could not use ordinary transportation, so they must be *for* plaintiff's care, recovery, or rehabilitation. But the van itself is an ordinary means of transportation, just like the motorcycle plaintiff used for transportation before his accident.

his complaint or argue it to the trial court at any point.[52] Accordingly, we vacate the portion of the Court of Appeals' judgment regarding the parties' contract. Plaintiff's application for leave to appeal as cross-appellant is denied, and the case is remanded to the trial court for entry of summary disposition in favor of defendant.

YOUNG, C.J., and MARKMAN and KELLY, JJ., concurred with ZAHRA, J.

CAVANAGH, J. (*dissenting*). For nearly a decade now, a majority of this Court has employed what I believe to be an erroneous and confusing statutory interpretation of MCL 500.3107(1)(a). I have often dissented from this approach to Michigan's no-fault act, MCL 500.3101 *et seq*. See, e.g., *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 542-554; 697 NW2d 895 (2005) (MARILYN KELLY, J., dissenting), *Krohn v Home-Owners Ins Co*, 490 Mich 145, 179-197; 802 NW2d 281 (2011) (HATHAWAY, J., dissenting), *Johnson v Recca*, 492 Mich 169, 207; 821 NW2d 520 (2012) (CAVANAGH, J., concurring in the result proposed by HATHAWAY, J., dissenting), and *Douglas v Allstate Ins Co*, 492 Mich 241, 279-295; 821 NW2d 472 (2012) (CAVANAGH, J., dissenting). Instead, I have argued in favor of Michigan's previously well-established interpretation of MCL 500.3107(1)(a). See, e.g., *Griffith*, 472 Mich at 549 (MARILYN KELLY, J., dissenting) (citing *Manley v Detroit Auto Inter–Ins Exch*, 425 Mich 140, 168; 388 NW2d 216 (1986) (BOYLE, J., concurring in part), and *Reed v Citizens*

[52] See *Walters*, 481 Mich at 387 ("Michigan generally follows the 'raise or waive' rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court.") (citation omitted); *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987) ("A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal.").

Ins Co of America, 198 Mich App 443; 499 NW2d 22 (1993), overruled by *Griffith*, 472 Mich 521). Because the majority's opinion today is an extension of the *Griffith* majority's erroneous interpretation, I respectfully dissent.

I. APPLYING THE *GRIFFITH* DISSENT

The key provisions of the no-fault act applicable to this case are MCL 500.3105(1)[1] and MCL 500.3107(1)(a).[2] I continue to believe that Justice MARILYN KELLY provided the proper interpretation of these statutes in her *Griffith* dissent. See *Griffith*, 472 Mich at 542-554 (MARILYN KELLY, J., dissenting). Specifically, MCL 500.3105(1) establishes that an insured is eligible for certain benefits as long as the insured is injured in a motor vehicle accident. Thus, the only limitations placed on the benefits are the limitations stated in MCL 500.3107(1)(a). *Id*. at 543-546. This is true because "the Legislature did not expressly limit the expenses recoverable in no-fault cases to those that the injured person did not require before the injury." *Id.* at 548. Thus, it was the *Griffith* majority, not the Legislature, that created the additional restriction that personal injury

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[1] MCL 500.3105(1) states:

> Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

[2] MCL 500.3107(1) states in relevant part:

> [P]ersonal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

protection (PIP) benefits are not recoverable for expenses that were necessary before the injury. *Id*.

Applying the *Griffith* dissent's interpretation of the relevant statutory provisions to this case, plaintiff clearly satisfied MCL 500.3105(1) given the catastrophic injuries plaintiff suffered in the motor vehicle accident. Next, it is necessary to determine whether the cost of the van is "reasonably necessary" for plaintiff's "care." As Justice MARILYN KELLY explained, in order to ensure that the word "care" in MCL 500.3107(1)(a) has a meaning independent of the words "rehabilitation" and "recovery," the word "care" should be defined as "the provision of what is necessary for the welfare and protection of someone." *Griffith*, 472 Mich at 547 (citation and quotation marks omitted).[3] Although a van is not as obviously necessary for a person's "welfare and protection" as the food at issue in *Griffith*, I think that the facts presented in this case adequately indicate that the van is reasonably necessary for plaintiff's care because a van is the only mode of personal transportation available that will accommodate plaintiff's severe injuries resulting from the motor vehicle accident.

The simplicity of applying the *Griffith* dissent's interpretation of the plain language of MCL 500.3105 and MCL 500.3107(1)(a) is consistent with the long-held principle that the Legislature intended that the no-fault

[3] The majority repeats the *Griffith* majority's unfounded claim that this definition of "care" engulfs "rehabilitation" and "recovery." *Griffith*, 472 Mich at 534 n 10. However, as Justice MARILYN KELLY explained, under the doctrine of *noscitur a sociis*, " 'care' fits with 'recovery' and 'rehabilitation' when 'care' is interpreted broadly to mean 'the provision of what is necessary for the welfare and protection of someone' " because "[t]he Legislature intended that an injured person's needs be furnished ('care') until 'recovery' has been accomplished through 'rehabilitation.' " *Id.* at 547 (MARILYN KELLY, J., dissenting). The majority's overly narrow definition of "care," however, "turns 'care' into a mere redundancy." *Id.*

act be construed liberally "in favor of the persons intended to benefit from it." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995). Likewise, the *Griffith* dissent's approach addresses this Court's oft-repeated concern regarding cost containment, because the dissent's approach would eliminate much of the costly litigation spawned by the *Griffith* majority's erroneous analysis, which will only be perpetuated by the majority opinion's modifications to the *Griffith* majority's analysis in this case.[4] Accordingly, I would affirm the judgment of the Court of Appeals because plaintiff is entitled to PIP benefits under MCL 500.3107(1)(a).

II. THE MAJORITY'S ERRONEOUS ANALYSIS

The straightforward application of the statutes' plain language under the *Griffith* dissent stands in stark contrast to the majority's effort to apply the *Griffith* majority's confusing analysis to this case because, in attempting to clarify *Griffith*, the majority takes an approach that is divorced from the statutory language. Specifically, I agree with the majority that "nothing in the statutory language of MCL 500.3107(1)(a) supports the notion that postinjury allowable expenses should be reduced by the margin of the injured person's preinjury expenses of the same character." *Ante* at 27. However, the majority is forced to inject a variety of terms and phrases not found in the statutory language in an effort to "clarify" *Griffith* in its purported attempt to avoid an incremental approach to allowable expenses. The result

[4] One need only examine this Court's recent docket to see that *Griffith* continues to engender confusion and, thus, litigation regarding allowable expenses. See, e.g., *Krohn*, 490 Mich 145, *Johnson*, 492 Mich 169, *Douglas*, 492 Mich 241, and *Wilcox v State Farm Mut Auto Ins Co*, 488 Mich 930, 930-932 (2010) (CAVANAGH, J., dissenting).

is an overly narrow construction of the statute that is inconsistent with the Legislature's intent regarding MCL 500.3107(1)(a).

For example, the majority states that an "ordinary, everyday expense" cannot qualify as an allowable expense under MCL 500.3107(1)(a). However, the phrase "ordinary, everyday expense" is amorphous and, more importantly, absent from the statutory language. Rather, the statute simply provides that allowable expenses are "*all reasonable charges* incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a) (emphasis added). In my view, "all reasonable charges" could encompass a so-called "ordinary, everyday expense" and thus satisfy MCL 500.3107(1)(a) if that expense is reasonable and reasonably necessary for the injured person's welfare and protection.

The majority also proclaims that "the new expense must be of a *wholly different essential character* than expenses borne by the person before the accident . . . ." *Ante* at 27 (emphasis added). Again, this undefined statement of what an insured must now show to be eligible for benefits finds no support in the statutes or caselaw. Moreover, the majority's explanation of expenses that satisfy MCL 500.3107(1)(a) will not add clarity to this area of the law because the majority's examples are not truly "of a wholly different essential character." For instance, the majority states that a "custom shoe" would qualify as an allowable expense. However, no matter how much a shoe is customized or modified, it retains its "essential character" as a shoe, i.e., it protects a person's foot while walking. I question how the bench and bar are to apply the majority's opinion consistently and fairly when the majority itself struggles to do so.

Next, the majority attempts to draw a distinction between a "combined" product, which it deems insufficient to satisfy MCL 500.3107(1)(a), and an "integrated" product, which, according to the majority, does satisfy MCL 500.3107(1)(a).[5] Again, that distinction does not appear in the statutory language, and the majority is unable to cite any support for its judicially created distinction. Moreover, the majority's explanation of the difference between a "combined" product and an "integrated" product evidences that the majority's approach is entirely standardless.

Specifically, the majority defines a "combined" product as one that "can be separated easily, both conceptually and physically, so that the fact-finder can identify which costs are of a new character and are thus *for* the injured person's care, recovery, or rehabilitation and which costs are ordinary, everyday expenses that are unchanged after the accident." *Ante* at 28. Given the unique nature of modified products, however, this explanation provides little assistance to the bench and bar. Indeed, the majority concludes that "[w]hen a medical products company produces a custom shoe, the shoe is an integrated product because the medical nature of the shoe . . . cannot be separated from the ordinary need for shoes by an uninjured person." *Ante* at 30. Presumably, the majority considers a "custom shoe" integrated because it cannot be separated "conceptually or physically." Yet, the majority reaches a different conclusion in this case despite the fact that, as explained later in this opinion, the same is true of plaintiff's modified, or "custom," van. In short, al-

[5] The majority also states that a product must be "truly integrated" to satisfy its interpretation of MCL 500.3107(1)(a), but the majority does not explain, and it is unclear to me, whether there is a difference between "combined," "integrated," and "truly integrated" products.

though the majority claims to reject the "incremental" approach used in *Ward v Titan Ins Co*, 287 Mich App 552; 791 NW2d 488 (2010), and *Hoover v Mich Mut Ins Co*, 281 Mich App 617; 761 NW2d 801 (2008), the majority implicitly adopts that very rule by defining the preinjury need too broadly while simultaneously defining an "integrated product" too narrowly. The majority's further deviation from the clear statutory language will only perpetuate the confusion that began with the *Griffith* majority's erroneous analysis.[6]

III. APPLYING THE MAJORITY'S NEW RULE

Although I would apply the *Griffith* dissent, I believe that plaintiff is entitled to benefits even under the majority's faulty statutory interpretation. As the majority acknowledges, what might otherwise be considered an "ordinary, everyday expense" could constitute, under certain circumstances, an "integrated" product. Specifically, under the *Griffith* majority, food provided in an institutional setting is an "integrated" product, despite the fact that the exact same food is merely an "ordinary, everyday expense" when provided in a non-institutional setting. Likewise, although plaintiff's van is at its core "transportation," it is nevertheless an "integrated" product because plaintiff is required to use "*that particular*" form of transportation, given that

[6] The majority claims to merely "highlight guideposts" so that Michigan's citizens may faithfully administer the statute's plain language. See *ante* at 31 n 47. However laudable that goal might be, I disagree with establishing "guideposts" that bear no connection to the "plain language" of the statute. The majority opinion represents the latest example of the majority's deviating from the actual language of MCL 500.3107. See, e.g., *Douglas*, 492 Mich at 279-287 (CAVANAGH, J., dissenting) (explaining that the majority erroneously injected language not found in, and inconsistent with, the statutory language of MCL 500.3107(1)(a)); and *Krohn*, 490 Mich at 186-187 (2011) (HATHAWAY, J., dissenting) (same).

plaintiff is ventilator dependent and wheelchair bound as a result of the motor vehicle accident. *Griffith*, 472 Mich at 537.

The majority apparently believes that plaintiff is not limited to a particular form of transportation, but that is simply not true, as even defendant conceded.[7] Thus, plaintiff's need for transportation cannot be easily separated from *a van* on conceptual grounds because no other type of vehicle can accommodate plaintiff's wheelchair. Stated differently, contrary to the majority's unsupported conclusion that "the character of plaintiff's ordinary transportation needs remains unchanged," *ante* at 34, because of his injuries the only personal vehicle that plaintiff can travel in is a van. Thus, plaintiff's postaccident transportation needs are significantly different from his preaccident transportation needs. In fact, it bears repeating that the van itself is *for* plaintiff's care because a van is the only type of vehicle that can accommodate plaintiff's postaccident condition. Before the accident, plaintiff did not require the modifications that the majority concedes are covered by MCL 500.3107(1)(a) because the modifications are *for* plaintiff's care. Likewise, before the accident, plaintiff did not require a van. After the accident, however, plaintiff cannot operate a personal vehicle unless it is modified *and it is a van*. Thus, there is no meaningful difference between the modifications and the van itself for purposes of the majority's analysis. Plaintiff required neither before the accident, but, because of his motor-vehicle-related injuries, plaintiff now requires both *for* his care.[8]

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[7] See defendant's answer to plaintiff's request for admissions, dated September 24, 2008 (admitting that plaintiff "has required and currently *requires a modified van* that accommodates his wheelchair if [plaintiff] is to drive a motor vehicle with his currently [sic] disabilities") (emphasis added).

[8] The majority concludes that plaintiff's postaccident transportation needs are no different from his preaccident transportation needs, just as

The majority implicitly acknowledges that plaintiff's condition limits him to transportation in a van when it states that "[i]f plaintiff had already owned *a van*, defendant could have modified *that van*. If plaintiff wanted *a Mercedes van*, he could pay for the added luxury . . . ." *Ante* at 34 (emphasis added). Fear that an insurer could be automatically required to pay for the full cost of *any* van an insured selects is misplaced because, as the plain language of MCL 500.3107(1) establishes, the cost of the van must be "reasonable," and "the question whether expenses are reasonable . . . is generally one of fact for the jury . . . ." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55; 457 NW2d 637 (1990). Thus, if an insured selects "a Mercedes van," the insurer would be free to argue to the jury that the insured's choice is not reasonable under MCL 500.3107(1)(a). Likewise, an insurer would be free to argue that any type of personal van is not reasonable because wheelchair-accessible public transportation is reasonable under the specific circumstances. See *Wilcox*, 488 Mich at 932 (CAVANAGH, J., dissenting). How-

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the *Griffith* majority concluded that the plaintiff's postaccident food needs were no different from his preaccident food needs. Perhaps the majority is correct that the *Griffith* plaintiff could, after recovering in the hospital, return to his home, open the refrigerator, and eat the exact same food that he had before his injury. However, could plaintiff in this case return home after recovering in the hospital and use the exact same mode of transportation he had before his injury? Clearly, the answer is no, because the character of plaintiff's transportation needs changed as a result of the accident, contrary to the majority's claim that a van is no different than the motorcycle plaintiff used for transportation before his accident. In fact, plaintiff could no longer ride a motorcycle or even operate a passenger car because plaintiff requires a van that is suitable for modification. Yet, by erroneously focusing on a person's general transportation needs before an accident and defining that need too broadly, the majority's interpretation will regrettably leave some injured parties without postaccident transportation, given the likely increased expense of purchasing a modifiable van, which many accident victims will not be able to afford.

ever, as the majority admits, the parties in this case agreed that plaintiff should have a personal vehicle for transportation. Thus, because a van is the only mode of personal transportation available to plaintiff given the injuries he sustained in the motor vehicle accident, plaintiff's need for transportation cannot be easily separated from *a van* on conceptual grounds. Thus, the van itself is *for* plaintiff's care, and plaintiff is entitled to reimbursement for the full cost of the van even under the majority opinion because the modified van is an "integrated" product.

IV. PLAINTIFF DID NOT WAIVE THE CONTRACT ISSUE

Finally, I disagree with the majority's conclusion that plaintiff waived the argument that defendant had contractually agreed to reimburse plaintiff for the base price of the van. As the Court of Appeals noted, the basis for the trial court's decision to deny defendant's motion for summary disposition and instead grant plaintiff summary disposition was not a model of clarity. However, in my view, the transcript of the hearing on the motion for summary disposition reveals that the trial court based its decision on its conclusion that the "Transportation Purchase Agreement" (TPA) required defendant to pay for the reasonable purchase price of a van.[9] Moreover, the Court of Appeals opinion clearly considered the issue and ultimately determined that the TPA is ambiguous. See *Admire v Auto-Owners Ins Co*,

[9] The parties executed the first TPA in 1988, shortly after plaintiff's 1987 motor vehicle accident. After hearing arguments, the trial court granted summary disposition in plaintiff's favor, explaining that defendant became "involved in this in '87 and it's gone on for some time, what, 22 years, and I'm afraid [defendant is] going to have to remain involved." Thus, the trial court seemingly relied on the parties' contractual history dating back to 1988 regarding the cost of the van rather than no-fault principles in granting summary disposition in favor of plaintiff.

unpublished opinion per curiam of the Court of Appeals, issued February 15, 2011 (Docket No. 289080), pp 2-3. Accordingly, both the trial court and Court of Appeals addressed the issue of whether the TPA contractually requires defendant to pay for the purchase price of the van. Thus, although I do not think that it is necessary to reach the issue because, in my view, plaintiff is entitled to the purchase price of the van under the no-fault act, even accepting the majority's contrary conclusion on the no-fault issue, I would remand to the trial court for further consideration of the contractual issue.

V. CONCLUSION

I dissent from the majority's decision to expand the erroneous majority opinion in *Griffith*. Moreover, even under the majority's faulty statutory interpretation, I believe plaintiff is entitled to benefits because the van in this case is no different from the "integrated" products that the majority offers as examples of allowable expenses under MCL 500.3107(1)(a). Finally, because both lower courts considered the argument that defendant contractually agreed to reimburse plaintiff for the base price of the van, I would not hold that the issue was waived. Accordingly, I dissent and would affirm the judgment of the Court of Appeals, or, at a minimum, remand to the trial court for further consideration of the contractual issue.

MCCORMACK and VIVIANO, JJ., took no part in the decision of this case.

HILLSDALE COUNTY SENIOR SERVICES, INC v
HILLSDALE COUNTY

Docket No. 144630. Argued March 13, 2013 (Calendar No. 3). Decided May 31, 2013.

Hillsdale County Senior Services, Inc. (HCSS), Ella Asaro, Lyle Green, and others, filed an action in the Hillsdale Circuit Court against Hillsdale County, seeking mandamus to enforce the terms of a property-tax ballot proposition that provided for the levy of an additional 0.5 mill property tax in Hillsdale County to fund HCSS. The Hillsdale County voters approved the millage proposition in 2008 to raise funds for the provision of services to older persons by HCSS. Defendant entered into a contract with HCSS from January 1, 2009 through December 31, 2010, but did not levy and spend the full, voter-approved, 0.5 mill. The circuit court, Michael, R. Smith, J., granted plaintiffs' writ for mandamus and ordered defendant to levy the entire 0.5 mill for the length of time approved by the voters. In an unpublished opinion per curiam, issued January 3, 2012 (Docket No. 301607), the Court of Appeals, MARKEY, P.J., and FITZGERALD and BORRELLO, JJ., reversed the order, concluding that the circuit court lacked subject-matter jurisdiction over the case because the Tax Tribunal had exclusive and original jurisdiction over the matter. The Supreme Court granted plaintiffs' application for leave to appeal. 493 Mich 852.

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

The Tax Tribunal possessed exclusive and original jurisdiction over plaintiffs' claim for mandamus because the claim, which sought to enforce the terms of a property-tax ballot proposition, was a proceeding for direct review of a final decision of an agency relating to rates under Michigan's property tax laws.

1. Under MCL 205.731(a), the Tax Tribunal has original and exclusive jurisdiction of a claim when it involves: (1) a proceeding for direct review of a final decision, finding, ruling, determination, or order; (2) of an agency; (3) relating to an assessment, valuation, rate, special assessment, allocation, or equalization; (4) under the property tax laws. In this case, the Tax Tribunal has original and exclusive

jurisdiction over plaintiffs' claim pursuant to MCL 205.731(a). The appeal involved a proceeding for direct review of a final decision of the Hillsdale County Board of Commissioners not to levy and spend the full 0.5 mill and the board constitutes an agency for purposes of MCL 205.731(a). Because MCL 400.576 allows defendant to levy up to 1 mill of property tax for services to older citizens, the issue arose under the property tax laws. The board's decision not to levy and spend the full 0.5 mill authorized by the ballot proposition related to "an assessment, valuation, rate, special assessment, allocation, or equalization" because plaintiffs' claim that the ballot proposition mandated defendant to levy and spend the full 0.5 mill approved by the voters constituted a dispute pertaining to the amount of a charge or payment with reference to some basis of calculation, which is a challenge to a "rate." The Court of Appeals correctly determined that the circuit court lacked subject-matter jurisdiction over plaintiffs' mandamus claim.

2. When proceeding under MCL 205.731(a), the Tax Tribunal's jurisdiction is determined by the subject matter of the proceeding, not by the type of relief requested. Accordingly, the involved parties may not affirmatively divest the tribunal of jurisdiction by seeking an equitable remedy. In this case, plaintiffs' request for mandamus did not divest the tribunal of jurisdiction.

Court of Appeals decision affirmed.

Justice CAVANAGH concurred in the result only.

1. TAXATION — TAX TRIBUNAL — JURISDICTION — RATE.

Under MCL 205.731(a), the Tax Tribunal has original and exclusive jurisdiction over a claim when it involves: (1) a proceeding for direct review of a final decision, finding, ruling, determination, or order; (2) of an agency; (3) relating to an assessment, valuation, rate, special assessment, allocation, or equalization; (4) under the property tax laws; a claim for mandamus to challenge an agency's decision to not levy and spend millage funds authorized by a ballot proposition constitutes a challenge to a "rate" when determining the tribunal's jurisdiction because it pertains to the amount of a charge or payment with reference to some basis of calculation.

2. TAXATION — TAX TRIBUNAL — JURISDICTION — EQUITABLE REMEDY.

When proceeding under MCL 205.731(a), the Tax Tribunal's jurisdiction is determined by the subject matter of the proceeding, not by the type of relief requested; the parties to a case may not affirmatively divest the tribunal of jurisdiction by seeking an equitable remedy.

Brian Kaser, PLC (by *Brian A. Kaser* and *Christopher P. Garfield*), for Hillsdale County Senior Services Center, Inc, Ella Asaro, Lyle Green, Ruth Green, Donelda Potts, John Potts, and Kerby Rushing.

Cohl, Stoker & Toskey, P.C. (by *David Stoker*, *Richard D. McNulty*, and *Sherry L. Hendrington*), for Hillsdale County.

Amici Curiae:

Miller, Canfield, Paddock & Stone, PLC (by *Michael P. McGee*, *Steven D. Mann*, and *Emma T. Chen*), for Michigan Municipal League, Michigan Townships Association, Michigan Association of Counties, Michigan Association of School Boards, and State Bar of Michigan Public Corporation Law section.

MARKMAN, J. This case concerns whether the Michigan Tax Tribunal possesses jurisdiction over plaintiffs' claim for mandamus to enforce the terms of a property-tax ballot proposition that provided for the levy of an additional 0.5 mill property tax in Hillsdale County to fund plaintiff Hillsdale County Senior Services, Inc. (HCSS). Because that claim falls within the scope of MCL 205.731(a) as a "proceeding for direct review of a final decision . . . of an agency relating to . . . rates . . . under the property tax laws of this state," we conclude that the tribunal possesses exclusive and original jurisdiction. Accordingly, we affirm the judgment of the Court of Appeals, which vacated and reversed the circuit court's judgment for mandamus for lack of subject-matter jurisdiction.

I. FACTS AND HISTORY

Under the activities or services for older persons act (ASOPA), MCL 400.571 *et seq*., "[a] local unit of gov-

ernment may appropriate funds to public or private nonprofit corporations or organizations for the purposes of planning, coordinating, evaluating, and providing services to older persons." MCL 400.573. ASOPA further provides:

> A governing body of a local unit of government may submit a millage proposition to the electorate to levy up to 1 mill for services to older citizens. This proposition may be submitted at any election held by the local unit of government, but shall not be submitted at a special election of the local unit of government called solely for the purpose of submitting this millage proposition. [MCL 400.576]

Pursuant to the foregoing provision, the Hillsdale County Board of Commissioners, as defendant's legislative body, submitted a millage proposition to the county's voters in August 2008 to raise funds for the provision of services to older persons by HCSS. The proposition posed the following question:

> Shall the limitation on the amount of taxes on the general ad valorem taxes within the County of Hillsdale imposed under Article IX, Section 6, of the Michigan Constitution be increased for said County by .5 mill ($0.50 per $1000 of taxable value) for the period of 2008 to 2022, inclusive, for the intended purpose of planning, coordinating and providing services to older persons by Hillsdale County Senior Services Center, Inc., as provided by Public Act 39 of 1976 [ASOPA]? Shall the county levy such increase in millage for this purpose during such period which will raise in the first year an estimated $676,532?

The proposition was approved at the August 5, 2008 election. Thereafter, in November 2009, HCSS entered into a contract with defendant for the latter to provide services for older persons from January 1, 2009, through December 31, 2010. *Hillsdale Co Senior Servs*

Ctr, Inc v Co of Hillsdale, unpublished opinion per curiam of the Court of Appeals, issued January 3, 2012 (Docket No. 301607) at 2-3. However, in the two fiscal years 2009-2011, for budgetary reasons defendant declined to levy and spend the full 0.5 mill.[1] In response, plaintiffs filed a "Verified Complaint for Mandamus with Request for Temporary Restraining Order, Order to Show Cause, and Request for Preliminary Injunction" in the circuit court, requesting in part that the court:

> Issue its permanent Order of Mandamus directing the Defendant, its Board and all of its officers to instruct all pertinent tax billing authorities or agencies (e.g., city or township officials) to levy the full 0.5 mill required by the Proposal, in 2010 and all future years covered by the proposal. . . .
>
> * * *
>
> [A]ppropriate the full amount of the proceeds of the levy to [HSSC] for the provision of services to the older population of the County of Hillsdale.

The circuit court ruled in pertinent part that "the Plaintiffs' Writ for Mandamus shall be granted and Defendant shall levy the entire 0.5 mill forthwith, to be reflected on the December, 2010, tax notices and every year hereafter until 2022, inclusive, as set forth in the voter approved ballot proposal."[2] Defendant appealed, arguing that the circuit court lacked subject-matter jurisdiction over the case because it falls within the

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[1] In 2009-2010, defendant levied and spent 0.15 mill, and in 2010-2011, defendant budgeted to levy and spend 0.25 mill.

[2] The ruling did not, as requested by plaintiffs, order the appropriation of "the full amount of proceeds of the levy" to HCSS. That is, the circuit court did not order defendant to *spend* the full 0.5 mill by transferring the proceeds to HCSS.

exclusive and original jurisdiction of the Tax Tribunal.[3] The Court of Appeals agreed with defendant and vacated the circuit court's judgment. Plaintiff then applied for and was granted leave to appeal to this Court. *Hillsdale Co Senior Servs Ctr, Inc v Co of Hillsdale*, 493 Mich 852 (2012).

II. STANDARD OF REVIEW

Whether a court has subject-matter jurisdiction is a question of law reviewed de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). Issues of statutory interpretation are also reviewed de novo. *Id.*

III. ANALYSIS

This Court is charged with determining whether the circuit court or the Tax Tribunal possesses subject-matter jurisdiction over this case. As always, we begin by considering the relevant constitutional and statutory provisions.

A. STATUTORY TEXT

The jurisdiction of the circuit court is governed by Const 1963, art 6, § 13, which provides:

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[3] Defendant did not raise the jurisdictional issue in the circuit court. However, as the Court of Appeals asserted:

> Although defendant included lack of subject-matter jurisdiction as an affirmative defense, defendant neither briefed nor argued the issue of subject-matter jurisdiction in the trial court. Consequently, the trial court did not rule on whether it had subject-matter jurisdiction. However, the "[l]ack of jurisdiction of the subject matter may be raised at any time and the parties to an action cannot confer jurisdiction by their conduct or action nor can they waive the defense by not raising it.". [*Hillsdale* unpub op at 3-4, quoting *Paulson v Secretary of State*, 154 Mich App 626, 630-631; 398 NW2d 477 (1986).]

> The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

MCL 600.605 further provides:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

MCL 205.731 provides an exception for jurisdiction in tax cases:

> The tribunal has exclusive and original jurisdiction over all of the following:
>
> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency[4] relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.
>
> (b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.
>
> * * *
>
> (e) Any other proceeding provided by law.

---

[4] MCL 205.703(a) defines "agency" as "a board, official, or administrative agency empowered to make a decision, finding, ruling, assessment, determination, or order that is subject to review under the jurisdiction of the tribunal or that has collected a tax for which a refund is claimed."

Thus, for the tribunal to have jurisdiction pursuant to MCL 205.731(a), four elements must be present: (1) a proceeding for direct review of a final decision, finding, ruling, determination, or order; (2) of an agency; (3) relating to an assessment, valuation, rate, special assessment, allocation, or equalization; (4) under the property tax laws. Where all such elements are present, the tribunal's jurisdiction is both original and exclusive.

The instant appeal is a proceeding for direct review of a "final decision"-- the board's decision not to levy and spend the full 0.5 mill. The board constitutes an "agency" pursuant to the definition set forth in MCL 205.703(a). And the issue here is one arising "under the property tax laws." See MCL 400.576 (specifically allowing defendant to "levy up to 1 mill [property tax] for services to older citizens"); Const 1963, art 9, § 6 (governing property taxes).[5] Thus, the central issue in this case is whether the board's decision not to levy and spend the full 0.5 mill "relat[es] to assessment, valuation, rates, special assessments, allocation, or equalization."

None of the listed terms is statutorily defined, so we begin by consulting a dictionary. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). On

[5] The ballot proposition explicitly referenced Const 1963, art 9, § 6, which provides in part:

> Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. Under procedures provided by law, which shall guarantee the right of initiative, separate tax limitations for any county and for the townships and for school districts therein, the aggregate of which shall not exceed 18 mills on each dollar of such valuation, may be adopted and thereafter altered by the vote of a majority of the qualified electors of such county voting thereon, in lieu of the limitation hereinbefore established.

initial review of this list, "rates" appears to be the most relevant term under the facts of this case. "Rate" means "the amount of a charge or payment with reference to some basis of calculation." *Random House Webster's College Dictionary* (1997). During the pertinent time periods, the board levied 0.15 and 0.25 mills, although plaintiffs claim that the ballot proposition mandated a 0.5 mill levy. Thus, the heart of the dispute pertains to the "amount of a charge" by defendant to its property taxpayers. Although plaintiffs conceded at oral argument that this case *does* pertain to rates,[6] they argued to the contrary in their briefs on the grounds that the ballot proposition could achieve only two ends: either it absolutely required the levy of the full 0.5 mill or it required nothing. However, despite plaintiffs' all-or-nothing approach, the instant dispute *does* involve rates for the simple fact that both "all" and "nothing" constitute rates-- 0 percent and 100 percent of the full 0.5 mill-- and in any case, defendant *did* levy and spend portions of the 0.5 mill: 30 percent of the 0.5 mill in 2009-2010 and 50 percent of the 0.5 mill in 2010-2011. Plaintiffs simply argue that defendant is required to levy and spend *more*-- that defendant must levy a larger "amount of charge," 100 percent of the full 0.5 mill. Accordingly, this case does pertain to "rates."[7] Thus, all four elements of MCL 205.731(a) are satisfied, and

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[6] For example, plaintiffs' counsel stated:

> The County decided not to follow the mandate [in the proposition] but to impose a lesser amount and that's what the County's board did. They believed they have the discretion to do so. So why is it not a rate? It is a rate, but what they've done to resolve this dispute is not going to draw on any of the expertise of the Tax Tribunal that underlay the creation of the Tribunal in the first place.

[7] Because we conclude that this case pertains to rates, we need not address the other terms listed in MCL 205.731(a).

the tribunal possesses exclusive and original jurisdiction in this case.

B. CASELAW

Despite the foregoing, confusion has arisen from earlier caselaw-- namely, our decisions in *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982), and *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728; 322 NW2d 152 (1982), and the Court of Appeals' decision in *Jackson Dist Library v Jackson Co No 2*, 146 Mich App 412; 380 NW2d 116 (1985) (*Jackson*); rev'd on other grounds, *Jackson Dist Library v Jackson Co*, 428 Mich 371; 408 NW2d 801 (1987) (*Jackson II*). We take this opportunity to clarify the general import of those decisions as to the jurisdiction of the tribunal.

Wikman and *Romulus* were companion cases addressing "special assessments" under MCL 205.731.[8] In *Wikman*, the plaintiff taxpayer filed suit against the defendant city in circuit court, seeking injunctive relief and claiming that special assessments levied against him for paving a portion of a road had been calculated in an arbitrary and inequitable manner. After issuing a preliminary injunction enjoining the collection of the special assessment, the court declared the special assessment void and permanently enjoined the defendant from its collection. The Court of Appeals reversed and remanded to the tribunal, concluding that the latter possessed jurisdiction, and this Court affirmed. Much of our analysis considered the particularities of special assessments. *Wikman*, 413 Mich at 633-635 ("We recognize that significant differences exist between special

[8] "Special assessments" are "pecuniary exactions made by the government for a special purpose or local improvement, apportioned according to the benefits received." *Wikman*, 413 Mich at 632-633.

assessments and other forms of taxation."). However, *Wikman*, *id*. at 647-648, explained more generally:

> [The] Tax Tribunal lacks the power to issue an injunction. The issuance of an injunction is an exercise of judicial power. The constitution limits the Legislature's power to transfer judicial power to administrative agencies, see Const 1963, art 3, § 2, *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959). . . . MCL 205.732 . . . does not expressly grant the tribunal the power to issue injunctions, and such power will not be extended by implication.

Still, *Wikman* clarified:

> Although injunctive relief may not be directly available, the tribunal is empowered to issue "writs, orders, or directives," see MCL 205.732,[9] and nothing in the Tax Tribunal Act prohibits one from seeking equitable relief to enforce a tribunal decision. [*Id.* at 648 (citations omitted).]

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[9] MCL 205.732 provides:

> The tribunal's powers include, but are not limited to, all of the following:
>
> (a) Affirming, reversing, modifying, or remanding a final decision, finding, ruling, determination, or order of an agency.
>
> (b) Ordering the payment or refund of taxes in a matter over which it may acquire jurisdiction.
>
> (c) Granting other relief or issuing writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction.
>
> (d) Promulgating rules for the implementation of this act, including rules for practice and procedure before the tribunal and for mediation as provided in [MCL 205.747], under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.
>
> (e) Mediating a proceeding before the tribunal.
>
> (f) Certifying mediators to facilitate claims in the court of claims and in the tribunal.

Wikman then concluded that the plaintiffs' "requests for preliminary and permanent injunctions in these proceedings do not take them out of the exclusive jurisdiction of the tribunal" because the tribunal "has the jurisdiction and ability to resolve all the claims presented." *Id.* at 648-649.

In *Romulus*, the plaintiffs, township and city treasurers and landowners, challenged special assessments for drain taxes, alleging that the defendants, the county and its board, drain commissioner, and treasurer, all committed constructive fraud by using drain funds to pay administrative expenses.[10] At the time of the suit, several hundred thousand dollars were held in escrow and controlled by the plaintiff treasurers. The plaintiffs sought a preliminary injunction prohibiting the defendants from enforcing the special assessments and from using the drain funds for administrative expenses, and an order that the funds held in escrow be returned to the landowner plaintiffs. In circuit court, the defendants moved for accelerated judgment on the grounds that the circuit court lacked subject-matter jurisdiction. The circuit court granted the motion, concluding that the claims were within the tribunal's jurisdiction. The Court of Appeals then reversed in part because it concluded that the tribunal lacked equitable jurisdiction. *Romulus City Treasurer v Wayne Co Drain Comm'r*, 86 Mich App 663, 669-670; 273 NW2d 514 (1978). This Court granted leave to appeal to consider "whether the Michigan Tax Tribunal is the only forum in which relief can be sought . . . ." *Romulus City Treasurer v Wayne Co Drain Comm'r*, 406 Mich 976, 976-977 (1979). *Romulus*, 413 Mich at 746, answered that question in the negative and affirmed the Court of Appeals, concluding:

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[10] This issue was apparently rendered moot when the Drain Code, MCL 280.1 *et seq*., was amended. *Romulus*, 413 Mich at 733 n 2.

> [I]t is apparent that under extraordinary circumstances a city or township treasurer may not be required to fulfill his or her ministerial duties.[11] If the instant case presents such circumstances, so as to justify the withholding from the county of the funds now in escrow, the circuit court will need to determine what should be done with the funds. We conclude that, if the funds in escrow have been justifiably withheld from the county, the landowner plaintiffs' claim that the funds should be repaid to them because of defendants' constructive fraud is not a claim for a tax refund [pursuant to MCL 205.731(b)] within the exclusive jurisdiction of the Tax Tribunal.

The *Romulus* Court further explained that the "Tax Tribunal Act does not prevent a court of equity from determining what should be done with funds that in extraordinary circumstances have been properly withheld from the county."[12] *Id*. at 747. However, *Romulus* also stated:

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[11] *Romulus* cited two cases involving such "extraordinary circumstances." Both involved situations in which courts had refused to issue writs of mandamus compelling ministerial acts: *Huron Co Drain Comm'r v Chandler Twp Supervisor*, 90 Mich 278, 279; 51 NW 282 (1892) (the Court refused to issue mandamus because the "proceedings [were] so defective that no legal drain could be laid out, [and] the supervisor was not in the wrong in refusing to assess the tax."); *Cheboygan Co Bd of Supervisors v Mentor Twp Supervisor*, 94 Mich 386, 387-388; 54 NW 169 (1892) (the Court refused to issue mandamus where the taxes received therefrom would be put to an illegal use). A ministerial act is one in which "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Toan v McGinn*, 271 Mich 28, 34; 260 NW 108 (1935) (quotation marks and citation omitted).

[12] *Wikman* foreshadowed this "extraordinary circumstances" exception to the tribunal's jurisdiction:

> Case law exists indicating that the constitution places some limitations on the Legislature's power to divest the court completely of equity jurisdiction and the judicial power to grant an injunction; see *Haggerty v City of Dearborn*, 332 Mich 304; 51 NW2d 290 (1952). Thus, while there may be an extraordinary case which justifies the exercise of equity jurisdiction in contravention of a statute, this is not such a case. [*Wikman*, 413 Mich at 648.]

> In cases not involving special assessments, the tribunal's membership is well-qualified to resolve the disputes concerning those matters that the Legislature has placed within its jurisdiction: assessments, valuations, rates, allocation and equalization. . . . Although the tribunal, in making its determinations, will make conclusions of law, MCL 205.751,[13] the matters within its jurisdiction under MCL 205.731 most clearly relate to the basis for a tax, and much less clearly to the proper uses which may be made of the funds once collected. Questions concerning how the funds collected may be expended do not appear to be implicated in disputes related to assessments, valuations, rates, allocation and equalization. The question presented here is whether the exclusive jurisdiction of the Tax Tribunal extends to such questions when the funds are collected pursuant to special assessment laws. [*Id.* at 737-738 (citation omitted).]

Thus, as with *Wikman*, *Romulus* was largely concerned with the particularities of special assessments.

Accordingly, it should first be noted that *Wikman* and *Romulus* are of limited application outside the context of special assessments. To the extent that those opinions address the tribunal's jurisdiction generally, *Wikman* indicates that although the tribunal cannot *itself* issue injunctions, it can issue orders that may be enforced in circuit court. Thus, *Wikman* does not suggest, as plaintiffs contend, that parties may affirma-

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As the foregoing and *Romulus*' reference to the Tax Tribunal Act not "prevent[ing]" courts from acting in equity suggest, such an exception does not actually divest the tribunal of jurisdiction but rather limits the exclusivity of such jurisdiction.

[13] MCL 205.751(1) provides:

> A decision and opinion of the tribunal shall be made within a reasonable period, shall be in writing or stated in the record, and shall include a concise statement of facts and conclusions of law, stated separately and, upon order of the tribunal, shall be officially reported and published.

tively divest the tribunal of jurisdiction by seeking equitable remedies. Indeed, *Wikman* involved a request for an equitable remedy, and this Court concluded that the tribunal possessed jurisdiction. Moreover, as *Wikman* additionally explained, when proceeding under MCL 205.731(a), the tribunal's jurisdiction is determined by the subject matter of the proceeding, *not* on the type of relief requested.[14] Thus, plaintiffs' requested relief here-- mandamus-- does not divest the tribunal of jurisdiction.[15]

Moreover, *Romulus* suggests that in "extraordinary circumstances"-- those so extraordinary that a court may deny mandamus compelling ministerial acts-- the circuit court retains equitable jurisdiction to decide a case that arguably falls within the scope of MCL 205.731(b) (proceedings for refunds). Although this case involves a request for mandamus, it does not

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[14] *Wikman* explained:

> The tribunal's jurisdiction is based either on the subject matter of the proceeding (*e.g.*, a direct review of a final decision of an agency relating to special assessments under property tax laws) or the type of relief requested (*i.e.*, a refund or redetermination of a tax under the property tax laws). In the instant case, the jurisdiction of the Tax Tribunal is governed by the first subsection since plaintiffs are seeking to enjoin permanently the collection of a special assessment rather than to obtain a refund of a tax. [*Wikman*, 413 Mich at 631.]

[15] Plaintiffs alternatively argue that defendant's defenses raise constitutional claims that the tribunal is unfit to consider, citing *Wikman*'s statement that "[g]enerally speaking, an agency exercising quasi-judicial power does not undertake the determination of constitutional questions or possess the power to hold statutes unconstitutional." *Wikman*, 413 Mich at 646-647. However, plaintiffs omit the sentences that follow: "However, the constitutional claims in this case do not involve the validity of a statute. Rather, plaintiffs' claim is merely an assertion, in constitutional terms, that the assessment was arbitrary and without foundation." *Id*. at 647. As in *Wikman*, defendant does not seek to invalidate a statute. Defendant's constitutional defenses do not provide an alternative basis for divesting the tribunal of jurisdiction.

present "extraordinary circumstances" such as those present in *Romulus*, *Huron*, and *Cheboygan*. Further, this case does not involve a proceeding for a refund under MCL 205.731(b); rather, it involves a proceeding under MCL 205.731(a). Once again, therefore, the subject matter, not the type of relief requested, determines the tribunal's jurisdiction. Thus, neither *Wikman* nor *Romulus* provides a basis for divesting the tribunal of jurisdiction.

The Court of Appeals' decision in *Jackson* is in accord. In 1977, Jackson County voters approved a 20-year levy of one mill to establish a public library system, thereby creating the petitioner, Jackson District Library.[16] In 1982, the respondent, Jackson County Board of Commissioners, rolled back the millage to 0.9651 mill pursuant to MCL 211.24e.[17] The petitioner filed a complaint in circuit court, alleging that the board lacked authorization to roll back the mill. The complaint was subsequently amended to add a second count seeking declaratory judgment as to whether the levy

[16] The proposition asked the following question:

> Shall the limitation on the total amount of taxes which may be imposed upon all property in the County of Jackson be increased by 1.00 mill on each dollar ($1.00 per $1,000.00) of the assessed valuation, as equalized, for a period of twenty (20) years, 1977 to 1996, inclusive, said millage increase to be used exclusively for the purpose of establishing and operating a single public library system in Jackson County? [*Jackson II*, 428 Mich at 375 n 5.]

[17] MCL 211.24e(2) provides in relevant part:

> [U]nless the taxing unit complies with section 16 of the uniform budgeting and accounting act, 1968 PA 2, MCL 141.436, the governing body of a taxing unit shall not levy ad valorem property taxes for operating purposes for an ensuing fiscal year of the taxing unit that yield an amount more than the sum of the taxes levied at the base tax rate on additions within the taxing unit for the ensuing fiscal year plus an amount equal to the taxes levied for operating purposes for the concluding fiscal year on existing property.

was subject to the statute. These two counts were dismissed by stipulation of the parties for lack of subject-matter jurisdiction, and a petition containing two virtually identical counts was filed with the tribunal, whereupon the tribunal determined that it lacked jurisdiction. However, citing *Wikman*, the Court of Appeals reversed that determination, concluding:

> Petitioner's claim fits the act's jurisdictional requirement. Petitioner appealed from a final determination of respondent board to rollback a tax levy pursuant to MCL 211.24e. Respondent board may be viewed as an "agency" for such purpose. The appeal related to a determination of rates under property tax laws, since respondent board's action was characterized as a tax rate rollback and petitioner asserted that public hearings were held to determine if one mill should be levied. Accordingly, the tribunal had exclusive jurisdiction over petitioner's claim pursuant to MCL 205.731(a). Because jurisdiction over respondents was obtained when petitioner originally filed its action in the circuit court, the 30-day limitation period of MCL 205.735 was tolled, and thus this matter was not removed from the tribunal's jurisdiction. *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982). [*Jackson*, 146 Mich App at 417-418 (citations omitted).]

Although this Court subsequently reversed *Jackson* on other grounds, see *Jackson II*, 428 Mich at 377-378, *Jackson*'s jurisdictional ruling was never appealed to this Court.

The circumstances surrounding the jurisdictional ruling in *Jackson* are analogous to those in this case. As the Court of Appeals explained in *Hillsdale*, unpub op at 5:

> In *Jackson*[], the plaintiffs sought direct review of a "final decision, finding, ruling, determination or order of an agency." In the present case, plaintiffs sought an order of mandamus to compel the county to levy the full amount of the millage approved by voters. However, the gist of

> plaintiff's action concerns whether the county has authority to levy less than the millage limitation approved by voters. A jurisdictional claim "should be determined not by how the plaintiff phrases its complaint, but by the relief sought and the underlying basis of the action."[18] *Colonial Village Townhouse Cooperative v Riverview*, 142 Mich App 474, 477-478; 370 NW2d 25 (1985). As in *Jackson*[], the question presented by plaintiffs' action relates to direct review of a determination of rates under the property tax laws. Accordingly, the Tax Tribunal has subject-matter jurisdiction and the circuit court lacked jurisdiction to enter a judgment of mandamus.

We agree. As explained in Section III(A) of this opinion, this case falls within the tribunal's jurisdiction, and, as further explained in this section, such a determination is entirely consistent with *Wikman* and *Romulus*. Thus, this case belongs to the tribunal "[n]o matter how skillfully plaintiff camouflages" its claims. *Colonial Village*, 142 Mich App at 478.

IV. CONCLUSION

This case concerns whether the Michigan Tax Tribunal possesses jurisdiction over plaintiffs' claim for mandamus to enforce the terms of a property-tax ballot proposition that provided for the levy of an additional 0.5 mill property tax in Hillsdale County to fund plaintiff HCSS. Because that claim falls within the scope of MCL 205.731(a) as a "proceeding for direct review of a final decision . . . of an agency relating to . . . rates . . . under the property tax laws of this state," we conclude that the tribunal possesses exclusive and original jurisdiction. Accordingly, we affirm the judgment of the

[18] As explained earlier, because this case proceeds under MCL 205.731(a), the tribunal's jurisdiction is based on the subject matter of the proceeding, not the type of relief requested.

Court of Appeals, which vacated and reversed the circuit court's judgment for mandamus for lack of subject-matter jurisdiction.

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

CAVANAGH, J., concurred in the result only.

MACOMB COUNTY v AFSCME COUNCIL 25 LOCALS 411 AND 893

Docket No. 144303. Argued March 5, 2013 (Calendar No. 2). Decided June 12, 2013.

AFSCME Council 25 Locals 411 and 893, the International Union UAW Locals 412 and 889, and the Michigan Nurses Association filed unfair labor practice complaints with the Michigan Employment Relations Commission (MERC) against Macomb County, the Macomb County Road Commission, and the 16th Judicial Circuit Court, asserting that by changing the method for calculating pension benefits, respondents had lowered their pension benefits without bargaining on the issue as required by the public employment relations act (PERA), MCL 423.201 *et seq*. The parties' collective-bargaining agreements (CBAs) provided employees with various pension-plan options, including one in which payments terminated at the death of the employee (straight-life pension) and another in which pension benefits continued until the death of both the employee and his or her beneficiary (joint-and-survivor pension). A Macomb County Retirement Ordinance mandated that the optional joint-and-survivor benefit be the actuarial equivalent of the standard straight-life benefit. In 1982, respondents switched from using gender-based actuarial tables to calculate the joint-and-survivor benefit to using a female actuarial table for all retirees. In 2006, respondents adopted a different mortality table for calculating those benefits after determining that use of the female mortality table resulted in higher pension benefits for those employees who chose the joint-and-survivor option. The hearing referee recommended that the MERC dismiss the unfair labor practice charge. She determined that a retirement plan's actuarial assumptions were mandatory subjects of bargaining under the PERA, but concluded that the duty to bargain had been satisfied because the CBAs covered the issue of retirement benefit calculations and the parties had agreed to have those benefits calculated as provided in the retirement ordinance. The referee determined that although the term "actuarially equivalent" in the ordinance was a matter of contract interpretation, the issue should be resolved through the grievance arbitration procedures, and did not constitute an unfair labor practice. The charging parties filed exceptions to the hearing referee's proposed decision and the

MERC rejected the recommendation, concluding that the actuarial assumptions at issue were never memorialized in the retirement ordinance or any of the CBAs referring to the ordinance. The MERC reasoned that although the ordinance did not define the phrase "actuarial equivalent," the parties had tacitly agreed to continue the use of the female actuarial table and that respondent's change in the table used violated the duty to bargain. In a split opinion, the Court of Appeals, FITZGERALD and SHAPIRO, JJ., (MARKEY, P.J., dissenting), affirmed the MERC's decision, 294 Mich App 149 (2011), concluding that actuarial assumptions were mandatory subjects of bargaining, that the term actuarial equivalence did not unambiguously mean equal in value and that the parties' past practice of using the female actuarial table constituted a tacit agreement to continue using it absent modification by collective bargaining. The Supreme Court granted respondents' application for leave to appeal. 491 Mich 915 (2012).

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

Disputes over the terms or conditions of employment that are covered by a CBA are subject to arbitration through the grievance process. When the CBA grants the retirement commission discretion to use actuarial tables to establish pension benefits, the commission's decision to alter a long-standing method used to calculate those benefits, by itself, does not constitute the clear and unmistakable evidence necessary to overcome the CBA's coverage and the change in calculation method does not create a new term or condition of employment that would trigger the need to bargain. Instead, the remedy for this dispute lies in the grievance and arbitration system that the parties chose to adopt.

1. MCL 423.215(1) requires a public employer to engage in collective bargaining with its employees with respect to wages, hours, and other terms and conditions of employment; the calculation of retirement benefits is a mandatory subject of collective bargaining. While the parties do not need to reach an agreement on a subject of mandatory collective bargaining, neither party may take unilateral action on the subject absent an impasse in the negotiation. When the parties reach a negotiated agreement for a provision in the CBA that fixes the parties' rights, further mandatory bargaining is foreclosed because the matter is covered by the agreement and because the parties must be able to rely on their agreements. In determining whether the MERC may resolve an unfair labor practice claim involving a breach of contract, it initially must determine whether the subject of the claim is covered by the contract. If a CBA covers the term or condition in

dispute, then the details and enforceability of the provision are left to arbitration through the grievance process that the parties agreed to and memorialized in the CBA. As a result, when the parties have agreed to a separate grievance or arbitration process, the MERC's review of a CBA in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim. In this case, UAW 412, Units 39, 46, 49, 55, and 75, UAW Local 889, AFSCME Local 411, and the Michigan Nursing Association's CBAs incorporate the terms of the retirement ordinance in the definition of retirement benefits. As a result, those charging parties' claims challenging the change in the long-standing method used to calculate pension benefits are covered by the CBAs and the grievance procedure is the appropriate avenue to determine the charging parties' rights under their respective CBAs. In addition, the Macomb County Road Commission and AFSCME Local 893 CBA implicitly incorporated the retirement ordinance to the extent that the ordinance governs optional joint-and-survivor benefits and the grievance procedure is the appropriate forum in which to challenge the calculation of those pension benefits as well.

2. A charging party may pursue an unfair labor practice complaint regarding the changing of a term or condition of employment even when a CBA controls, but only when the new term or condition amounts to an amendment of the CBA. Where a party claims that an employer unilaterally changed a term or condition of employment that is covered by unambiguous language in the CBA, that party must present clear and unmistakable evidence establishing the parties' affirmative intent to revise the CBA and establish new terms or conditions of employment; doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute, not the MERC. The charging party must show that the parties had a meeting of the minds with regard to the new terms or conditions such that there was an agreement to modify the contract. An affirmative intent to revise the terms of the CBA must be shown; a past practice must be so widely acknowledged that it creates an amendment to the contract. In this case, the retirement ordinance expressly provides the retirement commission with discretion to adopt actuarial calculations that apply to the retirement system. The commission's decision to alter a long-standing method used to calculate pension benefits, by itself, does not constitute the clear and unmistakable evidence necessary to overcome the CBA's coverage and the change in calculation method does not create a new term or condition of employment that would trigger the need to bargain. There was no evidence of a mutual commitment that

the retirement commission would continue using the female actuarial table. In addition, the description in the CBA of the current actuarial table does not indicate an intent to limit the retirement commission's discretion to adopt a different table in the future and does not create an ambiguity in their discretion to make such changes.

3. Doubt about whether a subject matter is covered by the CBA is resolved in favor of having the parties arbitrate the dispute. The arbitrator, not the MERC, is best equipped to decide whether a past practice has matured into a new term or condition of employment for purposes of a CBA. In this case, the Court of Appeals erred by affirming the MERC decision that the respondents violated the terms of the CBAs when they changed the actuarial table used to calculate pension benefits. The retirement ordinance grants the retirement commission discretion to adopt actuarial calculations that apply to the retirement system. When calculating pension benefits, actuarial equivalence is a term of art that unambiguously means a benefit of equal value. Because the ordinance requires that the pension benefits be actuarially equivalent, the commission properly altered the long-standing method used to calculate the optional joint-and-survivor benefit to ensure that they were equal in value to those received for straight-life benefits.

Reversed and remanded to the MERC for dismissal of the charging parties' unfair labor practice claims.

Justice MCCORMACK, joined by Justice CAVANAGH, dissenting, would have affirmed the Court of Appeals' decision and concluded that the parties' 24-year intentional practice of using a very specific formula for achieving actuarial equivalence amended the contract and required bargaining anew before a unilateral change could be made. Although actuarial equivalence is an unambiguous term of art, the retirement commission knew that the 100% female/0% male mortality table would not achieve actuarial equivalence. On the suggestion of the actuarial firm, the retirement commission amended the retirement ordinance to indicate a specific interest rate and data set that referred to the 100% female/0% male mortality table. This deliberate choice and long-standing past practice thereby modified the unambiguous CBA language.

Justice VIVIANO took no part in the decision of this case because he was the Chief Judge of the 16th Judicial Circuit Court before his appointment to this Court.

1. LABOR RELATIONS — COLLECTIVE BARGAINING — NEW TERMS OR CONDITIONS OF EMPLOYMENT.

In determining whether the Michigan Employment Relations Commission (MERC) may resolve an unfair labor practice ULP claim involving a breach of contract, it initially must determine whether the subject of the claim is covered by the contract; where a party claims that an employer unilaterally changed a term or condition of employment that is covered by unambiguous language in the collective bargaining agreement (CBA), that party must present clear and unmistakable evidence establishing the parties' affirmative intent to revise the CBA and establish new terms or conditions of employment; doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute, not the MERC.

2. LABOR RELATIONS — COLLECTIVE BARGAINING — PAST PRACTICES — AMENDMENTS OF CONTRACTS.

When a collective-bargaining agreement (CBA) covers the subject matter of an unfair labor practice dispute and grants the retirement commission discretion to alter what would otherwise be a mandatory subject of collective bargaining, the fact that the commission decided to alter a long-standing practice, by itself, does not constitute the clear and unmistakable evidence necessary to overcome the CBA's coverage of the matter and to create a new term or condition of employment that would trigger the need to bargain.

3. LABOR RELATIONS — COLLECTIVE BARGAINING AGREEMENTS — PENSION PLAN OPTIONS — ACTUARIALLY EQUIVALENT — WORDS AND PHRASES.

When calculating pension benefits under different plan options, a requirement that the plans be "actuarially equivalent" unambiguously means that the benefit plans must be of equal value.

McConaghy & Nyovich, LLC (by *Timothy K. McConaghy*), for Macomb County, Macomb County Road Commission, and the 16th Judicial Circuit Court.

Miller Cohen PLC (by *Bruce A. Miller*, *Richard G. Mack*, and *Ada Verloren*) and *Ava Barbour*, for AFSCME Council 25 Locals 411 and 893 and International Union UAW Locals 412 and 889.

Anita Szczepanski for Michigan Nurses Association.

Amici Curiae:

Plunkett Cooney (by *Mary Massaron Ross*) for the Michigan Municipal League, Michigan Township Association, Michigan Association of Counties and the State Bar Public Corporation Law Section.

YOUNG, C.J. The public employment relations act (PERA)[1] requires public employers to bargain with their employees' designated representatives concerning the "terms and conditions of employment," including the calculation of retirement benefits. Failure to do so constitutes an unfair labor practice. The unfair labor practice complaints at issue in this case arise out of the Macomb County Retirement Commission's decision to change the actuarial table used to calculate joint and survivor retirement benefits for employees retiring after July 1, 2007. We hold that the respondents did not commit an unfair labor practice when they refused to bargain with the charging parties over this decision and that the remedy for this dispute lies in the grievance and arbitration system these parties have created.

If a collective bargaining agreement covers the term or condition of employment in dispute, "the details and enforceability of the provision are left to arbitration."[2] The unfair labor practice complaints in this case concern subject matters covered by the collective bargaining agreements. Thus, the grievance process contemplated in the collective bargaining agreements is the appropriate avenue to challenge respondents' actions. The collective bargaining agreements grant the retirement commission discretion to establish actuarial

[1] MCL 423.201 *et seq*.

[2] *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 321; 550 NW2d 228 (1996).

tables to calculate joint and survivor benefits. The retirement commission's 24-year practice of using the same actuarial table to calculate those benefits does not, on its own, constitute the clear and unmistakable evidence necessary to overcome the collective bargaining agreements' coverage of the matter and create a new term or condition of employment. As a result, none of the unfair labor practice charges can be sustained. We reverse the decision of the Court of Appeals and remand this case to the Michigan Employment Relations Commission for dismissal of the unfair labor practice complaints.

I. FACTS AND PROCEDURAL HISTORY

The Macomb County Board of Commissioners enacted the retirement ordinance and established the Macomb County Employees Retirement System to "provid[e] pension and retirement benefits for the employees of the County of Macomb . . . ."[3] The ordinance vests the seven-member Macomb County Retirement Commission with "the general administration, management and responsibility for the proper operation of the Retirement System, and for construing and making effective the provisions of [the] Ordinance."[4]

The retirement ordinance grants a retiring county employee the option of receiving a monthly retirement allowance payable only until the employee's death, or receiving a reduced allowance during the retiree's life, the payment of which continues after this death and through the life of a named beneficiary.[5] If the retiree

[3] Macomb County retirement ordinance, § 1.

[4] *Id*. at § 3.

[5] Section 22(b) of the Macomb County retirement ordinance conditions a union represented employee's benefits on those "provided in the applicable collective bargaining agreement . . . ."

chooses to allow a surviving beneficiary to receive payments in addition to his or her own "straight life benefit," the monthly "joint and survivor" payment is reduced to ensure that it is "the actuarial equivalent . . . of [the employee's] straight life retirement allowance . . . ."[6] The retirement ordinance does not define the term "actuarial equivalent."

This case focuses on the method that the retirement system uses to calculate the joint and survivor benefit as compared to the straight life benefit. Until 1982, the county used gender-based actuarial tables to calculate the joint and survivor benefit. However that year, in response to a United States Supreme Court decision[7] and a Michigan Attorney General opinion,[8] the commission concluded that it could not continue to use gender-based actuarial tables. It sought the advice of its actuary, Gabriel, Roder, Smith & Company (GRS), in selecting a single, gender-neutral actuarial table to calculate the joint and survivor payment without regard to either the employee's or the beneficiary's gender. GRS outlined several alternative approaches and noted that the only approach "designed to make sure that no participant will receive a lesser benefit than under [existing] procedures," would be to adopt the female actuarial table for all retirees. Ultimately, the retirement commission chose to adopt the female actuarial table for all retirees.

For 24 years, the retirement system applied the female actuarial table when calculating its retirees'

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[6] Macomb County retirement ordinance, § 26(a). The ordinance lists five separate options, with varying benefits that the surviving beneficiary would receive.

[7] *City of Los Angeles Dept of Water & Power v Manhart*, 435 US 702; 98 S Ct 1370; 55 L Ed 2d 657 (1978).

[8] OAG, 1981-1982, No 5846, p 29 (January 22, 1981).

monthly joint and survivor payments. However, GRS studied the retirement system over a five-year period (2001-2005) and concluded that the joint and survivor benefit was "more valuable than the single life annuity form of payment." To ensure that the optional joint and survivor payment would "have the same present value, on average, as the straight life normal form of payment," GRS proposed a different actuarial table for the commission to adopt. GRS determined that a blended table that assumed 60% male retirees and 40% female retirees would best approximate benefits that are equal in value among all the options. At its November 17, 2006 meeting, the commission voted 4-3 to adopt this 60% male actuarial table, to take effect for all employees who retire on or after July 1, 2007.[9]

The charging parties demanded collective bargaining over the change.[10] Respondents rejected this demand and claimed that the existing collective bargaining agreements gave the commission discretion to adopt new actuarial tables.[11] The charging parties then filed unfair labor practice complaints with the Michigan Employment Relations Commission (MERC).

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[9] Any employees who retired before July 1, 2007, were unaffected by the decision and continued to receive benefits as calculated from the female actuarial table.

[10] The charging parties are: AFSCME Council 25, Locals 411 and 893; International Union UAW Locals 412 and 889; and Michigan Nurses Association.

[11] The respondents are: Macomb County, Macomb County Road Commission, and 16th Judicial Circuit Court. This case involves nine separate collective bargaining agreements between the charging parties and the respondents, each admitted as exhibits in the hearing before the hearing referee. Article 26(A) of the collective bargaining agreement between UAW Local 412, Unit 75 and Macomb County states that

> [t]he Employer shall continue the benefits as provided by the presently constituted Macomb County Employees' Retirement Ordinance, and the Employer and the employee shall abide by the

After conducting a three-day hearing, the hearing referee recommended that the MERC dismiss the unfair labor practice charges. She determined that a retirement plan's actuarial assumptions are mandatory subjects of bargaining under the PERA. However, because the underlying collective bargaining agreements "contain extensive provisions 'covering' pension benefits," and because "the parties were satisfied, and agreed, to have these benefits calculated as provided in the ordinance," she concluded that the respondents had already fulfilled their statutory duty to bargain over the retirement system's actuarial assumptions. While "the meaning of the term 'actuarial equivalent' in the ordinance involved bona fide questions of contract interpretation," those questions "are properly subject to resolution through the grievance arbitration procedures set out in the parties' contracts," not in litigation over unfair labor practices.

The charging parties filed exceptions to the hearing referee's proposed decision.[12] The MERC agreed with

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terms and conditions thereof, provided, that the provisions thereof may be amended by the Employer as provided by the statutes of the State of Michigan . . . .

An identical provision appears in seven of the other collective bargaining agreements: between UAW Local 889 and Macomb County, between AFSCME Local 411 and Macomb County, between the Michigan Nurses Association and Macomb County, and between four additional bargaining units of UAW Local 412 and Macomb County. The collective bargaining agreement between AFSCME Local 893 and the Macomb County Road Commission referred to the ordinance in outlining health and life insurance benefits and to "retirement benefit option[s]" in outlining a surviving spouse's health insurance benefits.

[12] A hearing referee's proposed decision "shall be considered by the commission only if raised in exceptions or cross exceptions to the proposed decision and recommended order filed under R 423.176." Mich Admin Code, R 423.161(6). Mich Admin Code, R 423.176 provides that "[a]ny party may file written exceptions to the decision and recommended order of the administrative law judge, or to any other part of the

the charging parties and rejected the referee's decision and recommended order. It concluded that "[t]he actuarial assumptions at issue here were never memorialized in the Retirement Ordinance or any of the collective bargaining agreements referencing the Retirement Ordinance." Although the ordinance did not define the actuarially equivalent benefits promised to retirees and their beneficiaries, the term's meaning "has been subordinated to the question of whether the parties have amended their agreements by the longstanding practice of calculating optional pension benefits that are not the actuarial equivalent of straight life benefits . . . ." On this question, the MERC determined that the parties "tacitly agreed that joint and survivor benefits would continue to be calculated as they had [been] in the past." As a result, the MERC concluded that respondents' unilateral change violated the duty to bargain and that respondents must revert to the female actuarial table.[13]

The Court of Appeals affirmed the MERC's decision in a split opinion.[14] The majority agreed with the MERC that actuarial assumptions are mandatory subjects of

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record or proceedings, including rulings upon motions or objections, and a brief in support thereof." Although Teamsters Local 214 was initially a charging party against respondent 16th Judicial Circuit Court, it did not file exceptions to the hearing referee's decision pursuant to Rule 423.176. Accordingly, the MERC adopted the hearing referee's decision and recommended order as to Teamsters Local 214. MERC Case No. C07 E-111 (January 25, 2010).

[13] The MERC held that respondents could only change the actuarial table if the parties agreed to a different actuarial table or if, upon expiration of the existing collective bargaining agreements, the parties' good faith bargaining over the actuarial table reached an impasse. The MERC also ordered respondents to recalculate the joint and survivor benefits of any retiree whose benefits were reduced under the new actuarial table; to compensate them, with interest, for the reduction in benefits it had already paid; and to post a notice indicating their intent to comply with the ruling.

[14] *Macomb Co v AFSCME Council 25 Locals 411 & 893*, 294 Mich App 149; 818 NW2d 384 (2011).

bargaining, that "the term 'actuarial equivalence' as used in this case did not unambiguously mean 'equal in value,' "[15] and that the parties' past practice of using the female actuarial table "constituted a 'tacit agreement' " to continue using it absent collective bargaining.[16] The majority further concluded that the continuous use of the female actuarial table "was 'so widely acknowledged and mutually accepted that it created an amendment to the contract,' " even if the County's definition of "actuarial equivalence" unambiguously intended to establish options that were equal in value.[17]

The dissenting judge would have reversed the MERC's decision and would have adopted the hearing referee's recommended order. The dissenting judge believed that the term "actuarial equivalent" is unambiguous and required "optional retirement benefits [to] be equivalent or equal in value on the basis of actuarial assumptions."[18] Because it "results in the optional benefits being more valuable than the straight-life benefit,"[19] the dissent opined that using the female actuarial table for all employees was inconsistent with the ordinance. The dissent further reasoned that by agreeing to incorporate the ordinance into their collective bargaining agreements, the employees' "retirement benefits and the methods used to calculate them—including mortality tables and actuarial assumptions—are 'covered by' the parties' CBAs," and do not require further bargaining.[20]

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[15] *Id*. at 165.

[16] *Id*. at 166.

[17] *Id*. at 170, quoting *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 329; 550 NW2d 228 (1996) (brackets omitted).

[18] 294 Mich App at 178 (MARKEY, P.J., dissenting).

[19] *Id*.

[20] *Id*. at 184 (MARKEY, P.J., dissenting). Judge MARKEY alternatively concluded that actuarial assumptions are not subject to mandatory bargaining in the first instance because the commission "is vested with the authority to

We granted respondents' application for leave to appeal and ordered the parties to brief "whether the Court of Appeals properly applied the holding of *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309 (1996), when it concluded that the parties intended to modify the collective bargaining agreement by use of the 100% female/ 0% male mortality tables."[21]

II. STANDARD OF REVIEW

In a case on appeal from the MERC, the MERC's factual findings are conclusive if supported by "competent, material, and substantial evidence on the whole record."[22] Legal questions, which include questions of statutory interpretation[23] and questions of contract interpretation,[24] are reviewed de novo.[25] As a result, an administrative agency's legal rulings "are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law."[26]

III. ANALYSIS

The PERA governs the relationship between public

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determine mortality tables and actuarial assumptions necessary to ensure 'actuarial equivalence' of optional requirement benefits . . . ." *Id*. at 172 (MARKEY, P.J., dissenting). However, respondents do not raise this threshold issue on appeal. Moreover, this Court has held that the calculation of retirement benefits is a matter of mandatory collective bargaining. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 63; 214 NW2d 803 (1974).

[21] 491 Mich 915 (2012).

[22] Const 1963, art 6, § 28. *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 450; 473 NW2d 249 (1991).

[23] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008).

[24] *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

[25] *Little v Hirschman*, 469 Mich 553, 557; 677 NW2d 319 (2004).

[26] *Amalgamated Transit Union*, 437 Mich at 450.

employees and governmental agencies.[27] When it was enacted in 1976,[28] the PERA "drastically altered public employee labor relations in Michigan."[29] It represents the Legislature's intent to "assure[] public employees of protection against unfair labor practices, and of remedial access to a state-level administrative agency with special expertise in statutory unfair labor practice matters."[30]

Section 15(1) of the PERA requires a public employer to engage in collective bargaining with its employees' designated representatives "with respect to wages, hours, and other terms and conditions of employment . . . ."[31] This Court has held that the calculation of retirement benefits is a mandatory subject of collective bargaining.[32] Section 10(1) specifies that "[i]t shall be unlawful for a public employer . . . to refuse to bargain collectively with the representatives of its public em-

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[27] The PERA applies to any "any person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service," subject to exceptions not applicable in this case. MCL 423.201(1)(e).

[28] 1976 PA 18; MCL 423.201 *et seq*.

[29] *The Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104, 116; 252 NW2d 818 (1977). The PERA amended the Hutchinson Act, 1947 PA 336, which "had prohibited public employees from engaging in collective bargaining. The PERA not only permitted collective bargaining by employees, see [MCL 423.09], but it [also] required public employers to negotiate with public employees' bargaining units, see [MCL 423.10]." *Id*.

[30] *Detroit Fire Fighters Ass'n v Detroit*, 408 Mich 663, 684; 293 NW2d 278 (1980).

[31] MCL 423.215(1). Section 15(1) of the PERA covers similar subjects of mandatory collective bargaining as § 8(d) of the National Labor Relations Act. 29 USC 158(d) (requiring covered employers to bargain "with respect to wages, hours, and other terms and conditions of employment"). See *Detroit Police Officers Ass'n*, 391 Mich at 53 ("The decision by the Michigan Legislature to adopt the language of § 8(d) of the NLRA is significant.").

[32] *Detroit Police Officers Ass'n*, 391 Mich at 63.

ployees."[33] This duty "persists during the life of the collective bargaining agreement."[34] A violation of § 10(1) "shall be deemed to be [an] unfair labor practice[] remediable by the [MERC]."[35]

This Court's caselaw explains the PERA's requirement to engage in collective bargaining: "The primary obligation placed upon the parties in a collective bargaining setting is to meet and confer in good faith."[36] Good faith requires a party to be "actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement."[37] While the parties do not need to reach an agreement on a subject of mandatory collective bargaining, "neither party may take unilateral action on the subject absent an impasse in the negotiations."[38]

In *Port Huron Education Association v Port Huron School District*, we examined the statutory duty to bargain in the context of an existing, controlling collective bargaining agreement. An employer "can fulfill its statutory duty by bargaining about a subject and memorializing resolution of that subject in the collective bargaining agreement."[39] When the parties " 'negotiat[e] for a provision in the collective bargaining agreement that fixes the parties' rights,' " they " 'foreclose[] further mandatory bargaining' " because "the matter is 'covered by' the agreement."[40]

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[33] MCL 423.210(1)(e).

[34] *Amalgamated Transit Union*, 437 Mich at 449-450.

[35] MCL 423.216.

[36] *Detroit Police Officers Ass'n*, 391 Mich at 53.

[37] *Id*. at 53-54.

[38] *Id*. at 55.

[39] *Port Huron Ed Ass'n*, 452 Mich at 317-318.

[40] *Id*. at 318, quoting *Local Union No 47, Int'l Brotherhood of Electrical Workers v NLRB*, 288 US App DC 363, 368; 927 F2d 635 (1991).

The foundational principle of our contract jurisprudence is that parties must be able to rely on their agreements.[41] This principle applies no less strongly to collective bargaining agreements: when parties to a collective bargaining agreement " 'bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject.' "[42] A party to the collective bargaining agreement "has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement."[43]

The MERC ordinarily "does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration."[44] However, when a charging party claims that a respondent has failed to bargain over a mandatory subject of bargaining, the MERC must "determine whether the agreement 'covers' the dispute."[45] As a result, "it is often necessary for the MERC . . . to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain."[46] If the agreement covers "the term or condition in dispute," then "the details and enforceability of the provision are left to arbitration."[47] The MERC itself has recognized this

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[41] See, e.g., *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003) ("The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable.").

[42] *Port Huron Ed Ass'n*, 452 Mich at 319, quoting *Dep't of Navy v Fed Labor Relations Auth*, 295 US App DC 239, 248; 962 F2d 48 (1992).

[43] *Port Huron Ed Ass'n*, 452 Mich at 327.

[44] *Id*. at 321.

[45] *Id*.

[46] *Id*.

[47] *Id*. "[A]rbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations . . . ." *Grand Rapids v*

limitation on its scope of authority,[48] which we reaffirm today: when the parties have agreed to a separate grievance or arbitration process, the MERC's review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim.

In *Port Huron*, the charging party also claimed that, notwithstanding a collective bargaining agreement that covered the matter in dispute, the parties' course of conduct created a *new* term or condition of employment that existed independently from the collective bargaining agreement. While this Court reviewed the parties' course-of-conduct claim separately from the collective bargaining agreement, we underscore that it is incumbent on courts and the MERC not to conflate an unfair labor practice complaint with an arbitrable disagreement over the terms of the collective bargaining agreement. Unambiguous language in a collective bargaining agreement dictates the parties' rights and obligations even in the face of a conflicting past practice, "unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract."[49] The party that seeks to overcome unambiguous contract language "must show the parties had

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Grand Rapids Lodge No 97, Fraternal Order of Police, 415 Mich 628, 634; 330 NW2d 52 (1982). However, "[t]he preference for arbitration . . . is triggered only if the parties agree to arbitrate." *Id*.

[48] See *St Clair Co Rd Comm v Local 516M Serv Employees Int'l Union*, 1992 MERC Labor Op 533, 538 ("Where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented.").

[49] *Port Huron Ed Ass'n*, 452 Mich at 329. When the collective bargaining agreement is ambiguous or silent on the subject, "there need only be 'tacit agreement that the practice would continue.' " *Id*. at 325, quoting *Amalgamated Transit Union*, 437 Mich at 454-455.

a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract."[50]

We clarify the *Port Huron* analysis to explain that this is an exceedingly high burden to meet. Any lesser standard would defeat the finality in collective bargaining agreements and would blur the line between statutory unfair labor practice claims and arbitrable disagreements over the interpretation of collective bargaining agreements. As a result, the party that seeks to overcome an unambiguous collective bargaining agreement must present evidence establishing the parties' affirmative intent to revise the collective bargaining agreement and establish new terms or conditions of employment. Moreover, because "arbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations,"[51] doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute. The arbitrator, not the MERC, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment.

IV. APPLICATION

At issue in this case is whether respondents were required to bargain with the charging parties before the retirement commission changed the actuarial tables used to calculate joint and survivor monthly payments. The parties do not dispute that the calculation of retirement benefits is a matter of mandatory collective bargaining.[52] However, respondents claim that the re-

[50] *Port Huron Ed Ass'n*, 452 Mich App at 312.

[51] *Grand Rapids*, 415 Mich at 634.

[52] *Detroit Police Officers Ass'n*, 391 Mich at 63.

tirement ordinance unambiguously gave the commission the discretion to change the actuarial tables used to calculate joint and survivor benefits and, moreover, that they satisfied the duty to bargain because the collective bargaining agreements, in turn, incorporate the ordinance's provisions authorizing this discretion. The charging parties dispute that characterization of the collective bargaining agreement and instead claim that the respondents' use of the female actuarial table for 24 years created a separate and enforceable term of employment that could not be changed absent additional collective bargaining.

A. THE RETIREMENT ORDINANCE

The Macomb County Retirement Ordinance explicitly provides the retirement commission with discretion to adopt actuarial calculations that apply to the retirement system: "The Retirement Commission shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis."[53] When an employee selects the joint and survivor option to allow a beneficiary to receive monthly retirement allowance payments after the employee's death, the ordinance requires the monthly payments to be reduced so that the joint and survivor option is "the actuarial equivalent" of the straight life benefit.[54]

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[53] Macomb County Retirement Ordinance, § 15.

[54] Section 26(a) of the Macomb County Retirement Ordinance provides:

> Prior to the receipt of his/her first monthly retirement payment but not thereafter, a member may elect to receive his/her retirement allowance as a straight life retirement allowance payable throughout his/her life or he/she may elect to receive the actuarial equivalent, at that time, of his/her straight life retirement allowance in a reduced retirement allowance payable throughout his/her life and nominate a beneficiary. . . .

The ordinance does not define the term "actuarial equivalent." Because "actuarial equivalent" is a term of art, we must assume that the Macomb County Retirement Commission intended the term to have its technical meaning.[55] Black's Law Dictionary defines "actuarial equivalence" as "[t]he amount of accrued pension benefits to be paid monthly or at some other interval so that the total amount of benefits will be paid over the expected remaining lifetime of the recipient."[56] This definition makes clear that an actuarially equivalent monthly benefit must be calculated to allocate benefits over a projected period of time, that is, the life expectancy of the recipient(s). The Attorney General reached a similar conclusion in the opinion that prompted the commission's original action to adopt a female-only actuarial table. When defining the phrase "actuarially equivalent" in the statutory election of early retirement benefits, the Attorney General stated that the term meant a " 'benefit of equal value' " to its comparison plan " 'when computed upon the basis of such mortality and other tables as may be adopted by the retirement board.' "[57] We believe that the Attorney Gen-

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The beneficiary then would receive payments on his or her survival of the employee on the basis of the particular provisions of the five options listed. Moreover, § 22(b) allows a union represented member to "elect to receive his/her retirement allowance under an option provided in Section 26 in lieu of a straight life retirement allowance."

[55] See MCL 8.3a ("[T]echnical 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."); *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998) ("The rules governing the construction of statutes apply with equal force to the interpretation of municipal ordinances.").

[56] Black's Law Dictionary (8th ed), p 39.

[57] OAG, 1981-1982, No 5846, p 31, quoting *King Co Employees' Ass'n v State Employees Retirement Bd*, 54 Wash 2d 1; 336 P2d 387, 391 (1959) (emphasis omitted).

eral's construction accurately describes this technical term and thus we adopt it as our own.

Furthermore, we hold that this definition of "actuarial equivalent" is unambiguous in the context of the ordinance. The ordinance itself makes clear that the county must present the joint and survivor options to a retiring employee in a way that estimates that the employee and his or her beneficiary are projected to receive an equal amount of total benefits from a joint and survivor option as the employee would receive from the straight life option.

Moreover, it is also clear from the evidence in this case that the parties had this same understanding of the term's meaning. GRS's report states that the proposed actuarial table is "designed to have the same present value, on average, as the straight life normal form of payment" and states that the 100% female blend is not actuarially equivalent to the straight life payment. Indeed, the charging parties' own expert witness testified that "[a]ctuarially equivalent to me means equal" and "[i]dentical in value."[58] For these reasons, we conclude that the dissenting judge of the

[58] In concluding that the term "actuarial equivalent" is ambiguous, the Court of Appeals majority erroneously focused on a different statement by the charging parties' expert witness that distinguished actuarial equivalence from the valuation of benefits: " '[A]ctuarially equivalent is usually a term used in a plan document to set the optional forms to another optional form. The valuation of those optional forms is a different matter, whole different assumption set.' " *Macomb Co*, 294 Mich App at 164 (emphasis omitted). However, the extratextual evidence that the Court of Appeals majority used to define the ordinance's term did not refute the plain meaning of the term.

The expert noted that actuaries use gender-based actuarial tables when valuing future expected outlays for the purposes of valuing its pension obligations on the open market. He testified that "to value these benefits, they would value them as an open market valuation," which takes a recipient's sex into account, unlike the method used to define the recipient's benefits.

panel correctly determined that actuarial equivalence requires "optional benefits that include payments to a survivor be equal in value to the straight-life benefit on the basis of statistical data regarding mortality and other factors such as the rate of interest."[59]

B. THE COLLECTIVE BARGAINING AGREEMENTS

While the ordinance clearly gives the commission discretion to maintain actuarially equivalent joint and survivor benefits, the ordinance is only effective as to unionized employees "as provided in the applicable collective bargaining agreement . . . ."[60] As a result, we must examine the individual collective bargaining agreements to determine whether they incorporate the ordinance's terms. Eight of the nine collective bargaining agreements at issue in this case expressly incorporate the terms of the retirement ordinance in the determination of retirement benefits.[61] They state identically that "[t]he Employer shall

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Thus, it is unremarkable for an expert to say that the county's own valuation of its pension obligations uses a different set of assumptions than its calculation of the pension benefits that are due its employees. This internal calculation is a more precise projection of its future pension funding obligations because, unlike the calculation of benefits due an employee, the county's internal calculation of its obligations can factor the differences in life expectancy between men and women.

[59] *Macomb Co*, 294 Mich App at 177 (MARKEY, P.J., dissent). Judge MARKEY interpreted the term "actuarial equivalent" by looking to the separate definitions of the terms "actuary" and "equivalent." However, as stated, the phrase "actuarial equivalence" is a term of art and as such has independent significance, as evidenced by its use in many similar retirement plans. See, e.g., *Dunn v Bd of Trustees of Wayne Co Retirement Sys*, 160 Mich App 384, 394; 407 NW2d 657 (1987) ("An employee pension . . . shall be the actuarial equivalent of his accumulated contributions standing to his credit . . . .") (quotation marks and citation omitted).

[60] Macomb County Retirement Ordinance, § 22(b).

[61] The eight collective bargaining agreements containing identical language are those bargained by: UAW Local 412, Units 39, 46, 49, 55, and 75; UAW Local 889; AFSCME Local 411; and the Michigan Nurses Association.

continue the benefits as provided by the presently constituted Macomb County Employees' Retirement Ordinance, and the Employer and the employee shall abide by the terms and conditions thereof, provided, that the provisions thereof may be amended by the Employer as provided by the statutes of the State of Michigan . . . ." Because the collective bargaining agreements cover the calculation of retirement benefits, we conclude that the grievance procedure is the appropriate avenue for the charging parties' claims arising out of the parties' rights under their respective collective bargaining agreement.[62]

The ninth collective bargaining agreement—between the Macomb County Road Commission and AFSCME Local 893—implicitly incorporates the retirement ordinance. A subject "need not be explicitly mentioned in an agreement in order for the subject to be 'covered by' the agreement."[63] In the context of retiree health care benefits, the Local 893 collective bargaining agreement states that "[h]ospital-medical coverage will be extended to a retiring Employee and spouse who qualifies and received [sic] benefits under the Macomb County Retirement Ordinance" and that this coverage "shall be

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[62] Each of these collective bargaining agreements specifies a grievance procedure. Six of the collective bargaining agreements provide a grievance procedure for "all disputes that may arise between [the parties] concerning the interpretation or operation of this Agreement." The collective bargaining agreement between UAW Local 889 and Macomb County states that the grievance procedure applies to "all disputes, including but not limited to dismissals, suspensions, demotions and other disciplinary actions of any type that may arise between [the parties] concerning the interpretation or operation of this Agreement." Finally, the collective bargaining agreement between UAW Local 412, Unit 46 and Macomb County states that a grievance is "a claim, reasonably, and sensibly founded, of a violation of this Agreement."

[63] *Port Huron Ed Ass'n*, 452 Mich at 322 n 16, citing *Dep't of Navy*, 295 US App DC at 252.

discontinued upon the death of the retiree, unless the spouse continues to be entitled to and receive payment under a retirement benefit option." Additionally, it states that "[e]mployees retiring from the Road Commission of Macomb County and eligible for benefits under the Macomb County Retirement Ordinance" shall receive a $10,000 life insurance benefit. The collective bargaining agreement specifies the formula to calculate a retiree's pension benefits but, more important for the purposes of this case, it expressly refers to a "retirement benefit option" that allows a surviving beneficiary to receive benefits. As a result, we hold that this collective bargaining agreement incorporates the retirement ordinance to the extent that the ordinance governs optional joint and survivor benefits and that the grievance procedure is the appropriate forum for the remaining charging party to raise its claim regarding disputes arising out of the collective bargaining agreement.[64]

C. PAST PRACTICE

The parties have unambiguously expressed in the collective bargaining agreements their intent that the retirement ordinance governs the commission's discretion to amend the actuarial tables used to calculate joint and survivor benefits and to ensure that retirees enjoy actuarially equivalent benefits regardless of the option that they select. Nevertheless, the charging parties claim that the past practice of using the female actuarial table to calculate those benefits created a new term or condition of employment that exists independently from the collective bargaining agreement.

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[64] The collective bargaining agreement also supplies a grievance process "limited to a complaint or request of the grievant which involves the interpretation [or] application of, or compliance with, the provisions of this Agreement."

As stated, this Court's caselaw allows a charging party to raise an unfair labor practice complaint for changing a term or condition of employment even when a collective bargaining agreement controls, but only when the new term or condition amounts to an amendment of the collective bargaining agreement. However, overcoming an unambiguous provision in the collective bargaining agreement requires the charging parties to "show the parties had *a meeting of the minds* with respect to the new terms or conditions so that there was an agreement to modify the contract."[65] The past practice must be "so widely acknowledged and *mutually accepted* that it creates an amendment to the contract."[66]

The evidence here does not establish more than the charging parties' unilateral expectation that the female actuarial table would continue to be used even if it were determined by the retirement commission that a different table would better effectuate the provisions of the retirement plan. The charging parties rely only on the fact that the female actuarial table has been used for more than two decades as dispositive of this issue. In *Gogebic Community College Michigan Educational Support Personnel Ass'n v Gogebic Community College*, the Court of Appeals ruled that the parties intended that the employer would have discretion to choose a dental insurance carrier because the collective bargaining agreement only articulated the benefits due employees.[67] There, testimony that the union's chief negotiator expected the employer to continue using a particular dental insurance carrier "does not amount to a 'meeting

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[65] *Port Huron Ed Ass'n*, 452 Mich at 312 (emphasis added).

[66] *Id*. at 329 (emphasis added).

[67] *Gogebic Community College Mich Ed Support Personnel Ass'n v Gogebic Community College*, 246 Mich App 342; 632 NW2d 517 (2001).

of the minds' that the employer would only use the [existing dental carrier] and falls far short of demonstrating conduct showing an unequivocal modification with 'definite, certain, and intentional' terms."[68]

Gogebic is instructive in this case. Indeed, our conclusion here is stronger than that in *Gogebic* because the ordinance expressly stated that the retirement commission has discretion to amend the actuarial table. Moreover, the parties negotiated the instant collective bargaining agreements before they took effect in 2005—after the retirement commission had been using the female actuarial table for 23 years. If the parties had intended to remove the discretion from the retirement commission's authority, they had ample opportunity to do so. The fact that the retirement commission chose not to exercise its discretion until 2006 does not overcome the parties' reaffirmation in their collective bargaining agreements of the discretion provided to the retirement commission in the ordinance.

The dissent argues that § 15 of the retirement ordinance establishes the parties' intent to enshrine the 100% female actuarial table as a term of employment, or at least creates an ambiguity regarding whether the retirement commission retained the discretion to adopt a different actuarial table. The dissent is wrong on both counts.

First, § 15 of the ordinance initially *reinforces* that the retirement commission has discretion to formulate an appropriate actuarial table.[69] Only then does this provision note that the retirement commission "is *cur-*

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[68] *Id*. at 354, quoting *Port Huron*, 452 Mich at 329.

[69] "The Retirement Commission shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15.

rently using . . . a blending of male and female rates."[70] This description of the current actuarial table does not in any way indicate the intent to limit the retirement commission's discretion to adopt a different actuarial table in the future, nor does it create an ambiguity in the retirement commission's discretion.[71] Thus, § 15 does not negate—in fact, it reinforces—the retirement commission's discretion to establish actuarial tables.

Second, while the charging parties and dissent urge that the 100% female actuarial table was a bargained-for benefit that respondents could not unilaterally change, § 15 actually undercuts this argument. Rather than specifying with particularity that the retirement system was "currently using" the 100% female actuarial table, § 15 simply describes the then "current" actuarial table as a "blending of male and female rates." Accordingly, the dissent's reliance on § 15 is unfounded.

Finally, the UAW asserts that the retirement commission acknowledged that the actuarial table is a term or condition of employment and points to a statement in the minutes that the county's human resources director should "meet and confer (not meet and approve) with the unions regarding this change." However, assuming that the retirement commission's belief about the nature of these collective bargaining agreements was relevant, this statement actually belies the UAW's claim that the retirement commission acted with the understanding that the actuarial table was a term or condition of employment. The statement indicates that the commission was *not* looking for the unions' ap-

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[70] *Id*. (emphasis added).

[71] In contrast to this case, the charging party in *Detroit Police Officers Ass'n v Detroit* provided evidence indicating that the employer admitted that the past practice was binding. *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 347; 551 NW2d 349 (1996).

proval of the 60% male actuarial table but expected that the unions would be consulted about the change. The charging parties can point to no *mutual commitment* that the retirement commission would continue using the female actuarial table. As a result, the commission's past practice of using the female actuarial table did not create a term or condition of employment independent from the collective bargaining agreements.

V. CONCLUSION

Because the collective bargaining agreements at issue in this case cover the subject of the unfair labor practice claims, the respondents satisfied their statutory obligation to bargain over the calculation of retirement benefits and the appropriate forum for challenging implementation of the collective bargaining agreements is the grievance process that the agreements contemplate. Moreover, absent a mutual agreement, the mere lengthy use of the female actuarial table did not create a term or condition of employment independent of the collective bargaining agreements. Therefore, we reverse the Court of Appeals and remand this case to the MERC for dismissal of the charging parties' unfair labor practice claims.

MARKMAN, KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

MCCORMACK, J. (*dissenting*). This case concerns the statutory duty to bargain about the calculation of retirement benefits under the public employment relations act (PERA), MCL 423.201 *et seq*. I agree with the majority that the calculation of retirement benefits is a mandatory subject of collective bargaining, that the calculation of retirement benefits is covered by the

parties' collective bargaining agreements (CBAs), and that the term "actuarial equivalent" is unambiguous. Without evidence of a mutually agreed upon intentional practice that modified this unambiguous contract term, I would also agree with the majority about the outcome here. But I conclude that the parties' 24-year intentional practice of using a very specific formula for achieving "actuarial equivalence" amended the contract and requires bargaining anew before a unilateral change may be made to that practice. Therefore I respectfully dissent and would affirm the Court of Appeals' judgment on this basis.

When there is a statutory duty to bargain under the PERA, the analysis from *Port Huron Ed Assoc v Port Huron Sch Dist*[1] applies when an unfair labor practice (ULP) is alleged. A public employer may defend against an ULP charge by fulfilling the statutory duty to bargain and memorializing the terms of that bargain in a CBA.[2] When an issue is covered by the CBA, the parties' past practice may amend the CBA, such that a public employer is nevertheless bound to bargain under PERA before making a unilateral change to that practice. When contract language is ambiguous or silent "there need only be tacit agreement that the practice would continue."[3] When the agreement is unambiguous with respect to the term affected by a conflicting practice, more is required. The contract language will control:

> [U]nless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract.

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[1] *Port Huron Ed Assoc v Port Huron Sch Dist*, 452 Mich 309; 550 NW2d 228 (1996).

[2] *Id.* at 317-318.

[3] *Id.* at 325 (quotation marks and citation omitted).

> While, to be sure, parties to a contract may modify it by a later agreement, . . . the conduct relied upon to show such modification must be unequivocal and the terms of modification must be definite, certain, and intentional.[4]

As this Court explained in *Detroit Police Officers Ass'n v Detroit*, when applying the *Port Huron* analysis:

> The [*Port Huron*] majority approvingly cited a case that stated that the parties' agreement to modify the contract can be deduced from their course of conduct if it is unequivocal and the terms of modification are definite, certain, and intentional. Further, the majority indicated that the party seeking to supplant the contract language must prove that the other party intentionally chose to reject the negotiated contract and knowingly acted in accordance with the past practice.[5]

Thus, if the parties' *course of conduct* shows that they intentionally chose to modify a provision in the CBA because their past practice contradicted the plain meaning of that provision, a party to the CBA cannot later rely on the plain meaning of that provision and ignore the past practice.

Because I agree with the majority that the term "actuarial equivalent" is unambiguous, the charging parties in this case must meet a higher standard of proof to show that the parties' practice amended that contract term. They have done so. As the evidence of the parties' mutual agreement regarding the specific actuarial formula to be used to calculate retirement benefits is longstanding and substantial, I would hold that the charging parties have "submit[ted] proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions—

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[4] *Id.* at 329 (quotation marks and citation omitted).

[5] *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 345; 551 NW2d 349 (1996) (citation omitted).

intentionally choosing to reject the negotiated contract and knowingly act in accordance with the past practice."[6] We have guidance on whether the evidence relating to the past practice meets the higher standard given our past decisions. This case lies somewhere between the facts of *Port Huron* and *Detroit Police*. In those cases we addressed whether past practice modified unambiguous contract language, and we came to opposite conclusions.

In *Detroit Police*, this Court held that the past practice modified the unambiguous language of the contract.[7] The contract at issue there provided that the board of trustees would determine whether an incapacitation resulted from the performance of duty. However, the parties' longstanding practice was inconsistent with this language, such that the medical director would make the determination and the medical board's decision on the issue was subsequently binding on the board of trustees.[8] In 1991, the board of trustees attempted to recapture its authority to make the duty determination by unilaterally passing a resolution, resulting in the ULP charge.

In finding that the past practice modified the unambiguous contract language, this Court found the following facts to be important: (1) the board of trustees meeting minutes from prior years accepting decisions by the medical board as final and binding; (2) the city attorney's admission to the past practice; (3) the disapproval by the board's attorney of the resolution and reference to the 'current and well established practice' of the medical director making the decisions; (4) board member testimony that from 1983 to 1990 medical

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[6] *Id.*

[7] *Id.* at 341.

[8] *Id.* at 341-342.

board decisions were regarded as final and binding; and (5) evidence that the board developed forms for use by the medical board, which expressly indicated that the medical board was to make a "duty-connectedness finding."[9]

In contrast, in *Port Huron* this Court held that the past practice did not modify the unambiguous language of the contract. *Port Huron* concerned the proration of health insurance benefits for teachers hired midyear. A 1978 CBA had provided in unambiguous terms that such benefits would be prorated for midyear hires.[10] In the 1987-88 school year, the district hired 8 teachers midyear, prompting the school district to inform the new hires that their benefits would be prorated per the contract language.[11] This Court affirmed the Michigan Employment Relations Commission's determination that the school district's payments of full insurance benefits for midyear hires prior to 1987 was inadvertent, and that the teacher's association had not presented sufficient proof that "the district knowingly paid employees hired midyear insurance benefits for the entire summer in disregard of contract language to the contrary, with the intent that such payment would supplant the agreement."[12] Notably, the hearing officer found that "the district's failure to prorate benefits before 1988 was simply a mistake or oversight . . . . There was no evidence the district was aware it had not followed the express language of the agreement."[13]

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[9] *Id.* at 346-348.

[10] *Port Huron*, 452 Mich at 312.

[11] *Id.* at 313.

[12] *Id.* at 331.

[13] *Id.* at 314-315. Notably, "[t]he record is unclear whether there were any teachers hired for less than a full year before the 1983-84 school year. From 1983 to 1987, however, eleven teachers were hired midyear." *Id.* at

The facts regarding the practice at issue in this case are far closer to *Detroit Police* than to *Port Huron*. The past practice of calculating optional pension benefits using a 100% female/0% male mortality table was certainly not a mistake and it was used for over two decades.[14] At least one of the trustees of the retirement commission opposed the unilateral adoption of the new mortality table because of this longstanding practice. Additionally, an actuarial study was conducted in 1993 and no action was taken to change the practice of using 100% female/0% male mortality tables as a result, even though the purpose of the study was to review the system's actuarial assumptions for calculating employer contributions and employee optional benefits. This continued use of the 100% female/0% male tables after the previous study, given that formula's uneasy relationship with the term "actuarial equivalence," underscored the intentional commitment to that formula by the parties.

The 100% female/0% male mortality table has never achieved actuarial equivalence; in fact, the parties selected it to accomplish other goals. Thus, while actuarial equivalence may have an unambiguous meaning, the application of that table was contrary to the plain meaning of that term, and the employers cannot now rely on the term's plain meaning when it is convenient or beneficial. Specifically, the 1982 actuarial study indicated that only a 100% female/0% male blend would be

313. In other words, the practice the charging parties cited may have only been in place a few years.

[14] The relevant time span in *Port Huron* was at most 10 years, whereas the time span in *Detroit Police* was potentially as long as 49 years. Although the length of time is not a dispositive factor, it certainly bears on our analysis of whether a past practice is something that an employer merely "knew or should have known," as opposed to something that is more "definite, certain, and intentional."

able to provide female employees with the same benefits they had received in the past, under gender-based tables which the parties agreed they could no longer use, because any other blend would reduce benefits to female employees.[15] The retirement commission did not want that result. These same issues were on the table in 1993 when the parties studied the actuarial tables again. That no change was adopted following the results of this 1993 study, even though the mortality table was still derived from the 1971 data and assumptions designed not to achieve actuarial equivalence but rather to give female employees the same benefits they had received under gender-based mortality tables, is further evidence that the practice of using the 100% female/0% male mortality table was deliberate and agreed on.

There is additional evidence that the practice of using the specific actuarial 100% female/0% male tables was intentional and not inadvertent. For example, the 1982 actuarial report that originally led the retirement commission to adopt the 100% female/0% male table contained the following statement:

> COMMENT C: The Retirement System Ordinance provides that an optional benefit will be "the actuarial equivalent" of the standard benefit. The Retirement Commission could adopt a rule stating that for purposes of determining amounts of optional benefits, the actuarial equivalent will be based upon a *stipulated interest rate and unisex mortality table*. This could eliminate the need for an ordinance change.

The report proposed a solution to the problem presented by the ordinance's stated goal of "actuarial

[15] The 1982 actuarial study states: "Instead of being designed to remove all cost of option election from the plan, the factors could be designed to make sure that no participant will receive a lesser benefit than under present procedures. To accomplish this, the present female factors would be used for all future retirants."

equivalence" and the adopted practice's departure from that goal. The retirement commission took the study's recommendation and amended the retirement ordinance in 1982 to reflect the newly adopted 100% female/0% male actuarial assumptions:

> For purposes of determining actuarial [sic] equivalent Retirement Allowances, the Retirement Commission is currently using a 7½% interest rate and a blending of male and female rates based on the 1971 group annuity mortality table projected to 1984 with ages set back 2 years.[16]

This extremely specific language amended the retirement ordinance because the actuaries and the retirement commission trustees realized that the 100% female/0% male table they were committed to using posed a problem with respect to the trade definition of the term 'actuarial equivalent.' In other words, when the 1982 retirement commission decided to adopt a practice that would not achieve actuarial equivalence, it voluntarily amended the retirement ordinance to reflect this understanding. Likewise, the employers' decision to apply the 100% female/0% male table was a " 'definite, certain, and intentional' " action.[17] Deliberate action is evidence that the practice of using a 100% female/0% male table was "widely acknowledged and mutually accepted."

Although the 1982 actuarial study indicated that a 100% female/0% male mortality table was the only way for female retirees to continue to receive benefits at the rate they had been receiving them, the retirement commission could have chosen to adopt a mortality table that featured a different blend at less cost to the system, and which was more likely to achieve "actuarial

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[16] Section 15 of the Macomb County Retirement Ordinance.

[17] *Port Huron*, 452 Mich at 329 (citation omitted).

equivalence," as the actuarial report made clear. Instead, the retirement commission decided to use a system that benefited female employees at a cost to actuarial equivalence.[18] If the retirement commission had wanted to retain *full* discretion to change the actuarial assumptions unilaterally, it would not have amended the ordinance with this language. This action is an even stronger indicator of intent than any cited in *Detroit Police*: Here, the parties' course of conduct was unequivocal and the terms of modification were definite, certain, and intentional.

The majority states that the retirement commission has always retained the *discretion* to elect how to determine actuarial equivalence, and I agree with the majority that § 15 of the Ordinance says as much.[19] But

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[18] The actuarial report specifically acknowledged that adopting a 100% female/0% male blend would probably impose a higher cost to the system. See n 16.

[19] Once a court has determined that an issue is covered by a CBA, the *Port Huron* analysis directs the court to determine whether that language is ambiguous. In this case, the majority finds that "actuarial equivalent" is the relevant term for ambiguity analysis and that it is unambiguous. Unambiguous language will control unless the past practice is widely acknowledged and mutually accepted such that it amends the CBA itself. However, the majority opinion also finds that the retirement ordinance gives the retirement commission the unilateral discretion to change the actuarial assumptions: thus, *no* past practice can overcome the language of § 15. The majority conflates the issues: If the majority believes that the discretionary language of § 15 affects the past practice analysis, this language should also be scrutinized for ambiguity. Because the retirement ordinance specifically sets the actuarial assumptions at a definite interest rate and mortality table in § 15, I would find that the § 15 is ambiguous as to whether the retirement commission retains unilateral discretion in selecting actuarial assumptions. When there is ambiguous contract language, the parties' practice is evaluated under a "knew or should have known" standard. Under that standard, I would find that the respondents-appellants knew or should have known that the language of § 15 sacrificed the retirement commission's unilateral discretion in favor of setting "actuarial equivalent" to a benchmark that would not conflict

this is the same provision of the retirement ordinance that specifically provides that the actuarial equivalence is to be determined "using a 7½% interest rate and a blending of male and female rates based on the 1971 group annuity mortality table projected to 1984 with ages set back 2 years," which reflects the 1982 amendment to the ordinance and the adoption of the 100% female/0% male mortality table.[20] It cannot be disputed that the amended § 15 language refers specifically to "the 1971 Group Annuity Mortality Table projected to 1984, for females, set back two years."[21] This 1971 data set formed the basis for the 100% female/0% male blend the parties began using after this amendment, underscoring that the amended language refers to the 100% female mortality table, as it is the only mortality table that is derived from the 1971 data set.

The retirement commission's practice of using an agreed upon formula sacrificed both actuarial equivalence and its *full* discretion. If the commission had

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with its trade definition. Contrary to the majority's position, when read *in full* instead of piecemeal, § 15 of the retirement ordinance is ambiguous as to whether the retirement commission has retained unilateral discretion to modify actuarial assumptions. Indeed, when read in full, § 15 is instead evidence that the retirement commission intentionally abandoned actuarial equivalence.

[20] Section 15 of the retirement ordinance. The majority's view that the adverb "currently" modifying the verb "using" indicates that the retirement commission retained unilateral discretion ignores a full reading of § 15. As previously explained, the entire second sentence of § 15 ("currently" included) is unnecessary if the majority is correct. Because the retirement ordinance sets actuarial equivalence to a set benchmark, I still find that the § 15 does not *unambiguously* grant the retirement commission unilateral discretion.

[21] The majority also fails to note that § 15 refers explicitly to "the 1971 group annuity mortality table projected to 1984 with ages set back 2 years." The newly proposed 60% female/40% male table would be based on "the 2000 RP Mortality Table projected for 15 years, with no set back on ages." The newly proposed table represents a change to the plain language of § 15.

intended to retain the discretion to unilaterally change the actuarial assumptions for the sake of implementing the plain meaning of the actuarial equivalency requirement, it could have done so without explicitly memorializing this roundabout way "actuarial equivalence" was to be achieved. Moreover, even if the retirement commission retained some degree of discretion under the amended portion of the ordinance's reference to a "blended" table, the *employer's* unequivocal application of the 100% female/0% male table for 24 years meant that the employers sacrificed adherence to the plain meaning of "actuarial equivalence," and that all parties to the CBAs were bound to the specific 100% female/0% male blend.

The retirement commission's amendment to the retirement ordinance makes the comparison to *Gogebic College Mich Ed Support Personnel Ass'n v Gogebic Community College*[22] unhelpful. In *Gogebic*, the Court of Appeals held that the employer had discretion to select the dental insurance carrier, because the contract only indicated what benefits were due employees, not what carrier would provide the benefits. The retirement ordinance in this case did not merely state that employees would be able to elect optional pension benefits, but actually set the means by which those benefits would be calculated and explicitly incorporated the actuarial assumptions to be used in calculating optional pension benefits.

The amendment to § 15 of the retirement ordinance reflects the retirement commission's adoption of the 100% female/0% male mortality table, and the parties' application of that table represents a "definite, certain, and intentional" action. Because the parties' commit-

[22] *Gogebic College Mich Ed Support Personnel Ass'n v Gogebic Community College*, 246 Mich App 342; 632 NW2d 517 (2001).

ment to this intentional formula lasted 24 years and survived a previous actuarial study without change, I would find that the charging parties have shown that the past practice was so widely acknowledged and mutually accepted as to create an amendment to the contract, and that the PERA mandates the parties return to the bargaining table.

CAVANAGH, J., concurred with MCCORMACK, J.

VIVIANO, J., took no part in the decision of this case because he was the Chief Judge of the 16th Judicial Circuit Court before his appointment to this Court.

PEOPLE v BURNS

Docket No. 145604. Argued April 10, 2013 (Calendar No. 4). Decided June 18, 2013.

David Barry Burns was convicted by a jury in the Bay Circuit Court of first-degree criminal sexual conduct, MCL 750.520b, following statements of sexual abuse made by CB, his four-year-old daughter, to a bible school teacher, a forensic interviewer and a sexual-assault nurse examiner. The bible school teacher conditionally testified at trial about CB's out-of-court statements before CB was called to testify. The prosecutor then attempted to elicit CB's testimony four times, but was unsuccessful. The court, Kenneth W. Schmidt, J., admitted the bible school teacher's testimony, concluding that because defendant had told CB "not to tell" during the alleged abuse, defendant had rendered CB unavailable to testify and that the testimony was therefore admissible under the forfeiture-by-wrongdoing rule, MRE 804(b)(6). The Court of Appeals, JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ., reversed in an unpublished opinion per curiam issued June 14, 2012 (Docket No. 304403), concluding that the prosecution had failed to establish by a preponderance of the evidence that defendant had both the specific intent to cause CB's unavailability and that the wrongdoing did in fact cause CB's unavailability. The Supreme Court granted the prosecution's application for leave to appeal. 493 Mich 879 (2012).

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

MRE 804(b)(6), which contains a specific intent requirement, allows for the admission of hearsay if the declarant is unavailable and the statement is offered against a party that has engaged in or encouraged wrongdoing that was specifically intended to, and did, procure the unavailability of the witness.

1. Under MRE 804(b)(6), a defendant can forfeit his right to exclude hearsay by his own wrongdoing. To admit hearsay evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing, (2) the wrongdoing was intended to procure the declarant's unavailability, and (3) the wrongdoing did

procure the unavailability. The plain language of the court rule incorporates a specific intent requirement; the prosecution must show that the defendant acted, at least in part, with the particular purpose to cause the declarant's unavailability, rather than the mere knowledge that the wrongdoing may cause the witness's unavailability. The timing of the wrongdoing is not determinative by itself, but wrongdoing after the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability. In this case, the trial court abused its discretion by admitting the hearsay testimony because the prosecution failed to establish by a preponderance of the evidence that defendant's conduct both was intended to, and did, cause CB's unavailability. Even if the trial court correctly found that defendant engaged in wrongdoing, the trial court failed to make an express finding that defendant intended to procure the unavailability of CB as a witness. Without such a finding, defendant's contemporaneous statements to CB at the time of the alleged abuse do not compel a finding on appellate review that defendant specifically intended those statements to make CB unavailable to testify. The statements occurred before the suspected abuse was reported; defendant left the family home and had no further contact with CB after the suspected abuse was reported, and nobody else attempted to influence CB on his behalf. In addition, the trial court indicated that CB was unavailable to testify because of her infirmity, her youth, and her inability to testify in open court. Because these findings did not include defendant's wrongdoing as a reason for CB's unavailability and are not clearly erroneous, the prosecution also failed to satisfy the causation element of MRE 804(b)(6).

2. The admission of testimony regarding CB's statement was outcome determinative. Other than the improperly admitted hearsay testimony, the prosecution failed to present sufficient evidence of defendant's alleged criminal sexual conduct. Given the lack of additional evidence, it was more probable than not that the erroneous admission of the hearsay testimony affected the outcome of the trial and reversal was warranted.

Affirmed.

EVIDENCE — HEARSAY — UNAVAILABLE DECLARANTS — FORFEITURE BY WRONGDOING — SPECIFIC INTENT TO MAKE DECLARANT UNAVAILABLE.

To admit hearsay evidence under MRE 804(b)(6), the forfeiture-by-wrongdoing rule, the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing, (2) the wrongdoing was intended to procure the

declarant's unavailability, and (3) the wrongdoing did procure the unavailability; the plain language of the court rule incorporates a specific intent requirement; the prosecution must show that the defendant acted, at least in part, with the particular purpose to cause the declarant's unavailability, rather than the mere knowledge that the wrongdoing may cause the witness's unavailability; the timing of the wrongdoing is not determinative by itself, but wrongdoing after the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Sylvia L. Linton* and *Jordan Emerson Case*, Assistant Prosecuting Attorneys, for the people.

State Appellate Defender (by *Valerie R. Newman*) for defendant.

Amicus Curiae:

David Leyton and *Jerrold Schrotenboer* for the Prosecuting Attorneys Association of Michigan.

MCCORMACK, J. In this case, we consider whether the Court of Appeals correctly reversed defendant's conviction and remanded for a new trial. It did so on the grounds that the circuit court erred by admitting hearsay testimony on the theory that defendant's conduct amounted to forfeiture by wrongdoing under the Michigan Rules of Evidence.[1] We agree that the circuit court erred by admitting the challenged statements, because the prosecution failed to demonstrate that defendant had the specific intent to, and in fact did, cause the unavailability of the declarant as a witness.[2] Accordingly, we affirm the Court of Appeals judgment.

[1] MRE 804(b)(6).

[2] *Id*.

I. FACTS AND PROCEDURAL HISTORY

On August 18, 2010, a bible school teacher (Gonzales) filed a police report concerning disclosures made to her the day before by a four-year-old girl (CB). The disclosures suggested that CB had been sexually abused by defendant, her father. Defendant promptly moved out of the home he shared with CB and her mother. Defendant was arrested on September 2, 2010, and he had no further contact with CB.

After the initial disclosure to Gonzales, CB was interviewed twice, first by a forensic interviewer on September 1, 2010, and later by a sexual-assault nurse examiner. In both interviews CB indicated that defendant had engaged in sexual conduct with her. A medical examination did not find evidence of sexual intercourse.

CB did not testify at the preliminary examination. Nevertheless, defendant was bound over to circuit court.[3] At trial, the court permitted Gonzales to testify to CB's out-of-court statements concerning the suspected abuse *before* CB testified.[4] Gonzales testified that CB had told her that "Dave Junior" hurt her by licking and digitally penetrating her "butt." After

[3] The district court based its decision in support of the bindover on the testimony of the sexual-assault nurse examiner. Her testimony was accepted over defendant's objection, under the medical-treatment exception to hearsay. MRE 803(4).

[4] MRE 803A permits the admission of a declarant's out-of-court statement "describing an incident that included a sexual act performed with or on the declarant by the defendant . . . to the extent that [the statement] corroborates testimony given by the declarant during the same proceeding," providing (among other limitations) that the statement is introduced through the testimony of someone other than the declarant. The rule does not expressly require that the declarant testify to the sexual act before the corroborating witness testifies to the out-of-court statement, but it does require that the declarant testify at some point in the proceedings.

Gonzales testified, the prosecutor attempted to elicit testimony from CB four times.[5] All four attempts were unsuccessful. CB left the witness chair, hid under the podium, refused to answer questions asked by the prosecutor, indicated that she would *not* tell the truth, stated that she was fearful of the jury, and expressed a desire to leave the courtroom.

The trial court then held a hearing to determine whether there was a separate basis for admitting Gonzales's conditionally admitted testimony, because MRE 803A required CB to testify.[6] The prosecutor argued, and the court agreed, that defendant had rendered CB unavailable to testify through his own wrongdoing, and the court admitted Gonzales's testimony under MRE 804(b)(6). The trial court based its ruling on a video recording of CB's interview with the forensic interviewer: When asked if defendant had said anything during the alleged abuse, CB stated that defendant told her "not to tell," and that "[defendant] didn't want me to tell nobody" or else she would "get in trouble." The trial court determined that defendant's instructions, as recounted by CB, were sufficient to find forfeiture by wrongdoing.

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[5] Multiple accommodations were made to attempt to get CB to testify, including switching the prosecution and defense tables so that CB was closer to the prosecutor; allowing a victim's advocate to accompany CB while testifying; clearing the court of visitors; moving the jury to a different room to watch CB's appearance on closed-circuit television; and allowing a private deposition at the prosecutor's office without defendant or the jury present.

[6] The trial court rejected the prosecutor's argument that CB's statement to Gonzales was an excited utterance. See MRE 803(2). The Court of Appeals rejected the prosecutor's argument that the testimony of the sexual-assault nurse examiner was admissible under the medical-treatment exception. See MRE 803(4). The prosecutor does not advance the excited-utterance argument here, and we agree with the Court of Appeals' ruling regarding the medical-treatment exception.

The trial court also determined that CB was unavailable to testify, a condition for admissibility under MRE 804(b)(6), "because, among other things, of her infirmity, her youth, to be able to testify here in court and the fear, frankly, that she has of testifying here in court."[7]

Having found Gonzales's testimony admissible under MRE 804(b)(6), the trial court also concluded that defendant had forfeited his confrontation right.[8] The court admitted the testimony of the sexual-assault nurse examiner and the transcript and video recording of CB's forensic interview with the forensic interviewer. CB never testified. There was no other evidence of the abuse apart from the hearsay testimony. Defendant testified that he did not abuse CB.

The jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b. The Court of Appeals reversed in an unpublished opinion per curiam,[9] concluding that the circuit court erred in its application of the forfeiture-by-wrongdoing analysis. The Court of Appeals concluded that the prosecutor had failed to establish by a preponderance of the evidence that defendant had both the specific intent to cause CB's unavailability, and that the wrongdoing did, in fact, cause CB's unavailability. We granted leave to appeal.[10]

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[7] The trial court did not specify on which specific subsection of MRE 804(a) its unavailability finding was based. However, defendant does not challenge this ruling, and we decline to consider it.

[8] US Const, Am VI; see *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *Giles v California*, 554 US 353; 128 S Ct 2678; 171 L Ed 2d 488 (2008).

[9] *People v Burns*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2012 (Docket No. 304403).

[10] *People v Burns*, 493 Mich 879 (2012). Our grant order directed the parties to address:

II. STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[11] Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo.[12] Likewise, interpretation of a court rule is a question of law that we review de novo.[13] A preserved error in the admission of evidence does not warrant reversal unless " 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative."[14]

III. LEGAL BACKGROUND

A defendant can forfeit his right to exclude hearsay by his own wrongdoing.[15] MRE 804(b)(6) provides that a statement is *not* excluded by the general rule against hearsay if the declarant is unavailable, and the "statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[16] This rule, commonly known as the forfeiture-

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> [W]hether 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 [] 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.

[11] *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

[12] *Id*.

[13] *Marketos v Am Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

[14] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (citation omitted).

[15] MRE 804(b)(6).

[16] *Id*.

by-wrongdoing rule, was adopted in 2001 and is substantially similar to its federal counterpart, FRE 804(b)(6).[17]

As the United States Supreme Court explained in *Giles*, forfeiture by wrongdoing has its roots in the common law, and is based on the maxim that "no one should be permitted to take advantage of his wrong."[18] The forfeiture doctrine not only provides a basis for an exception to the rule against hearsay; it is also an exception to a defendant's constitutional confrontation right. Insofar as it applies to the Sixth Amendment, however, the forfeiture doctrine requires that the defendant must have specifically intended that his wrongdoing would render the witness unavailable to testify.[19]

In *Giles*, the defendant was convicted of murder in the death of his ex-girlfriend. He testified that he had killed her in self-defense. The prosecution introduced statements the victim had made to police officers several weeks before the homicide, in which she described a death threat the defendant made to her. The California Supreme Court determined that the statements were testimonial, but that defendant had forfeited his right to confront the victim because he had committed the murder for which he was on trial, and because his intentional criminal act had caused the victim to be unavailable to testify.[20] The United States Supreme

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[17] FRE 804(b)(6) provides for admission of "[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result."

[18] *Giles*, 554 US at 359, 366, citing *Reynolds v United States*, 98 US 145 (1879); for an influential, pre-*Crawford* discussion of the doctrine see Friedman, *Confrontation and the Definition of Chutzpa*, 31 Israel L Rev 506, 532-535 (1997).

[19] *Giles*, 554 US at 359-360, 367.

[20] *Id.*; *People v Giles*, 40 Cal 4th 833, 850; 152 P3d 433, 444 (2007).

Court reversed, holding that for a defendant to forfeit his confrontation right by his or her wrongdoing, the defendant must have had "in mind the particular purpose of making the witness unavailable."[21]

Since its adoption in 2001, only two published Michigan appellate cases have discussed the application of Michigan's forfeiture rule, MRE 804(b)(6). Both preceded *Giles*. In *People v Bauder*, the Court of Appeals discussed MRE 804(b)(6) but did not address its proper application.[22] There, the defendant argued that his confrontation right had been violated when the trial court admitted hearsay testimony.[23] The Court of Appeals ultimately determined that the challenged statements were nontestimonial and properly admitted as statements of a then-existing mental condition under MRE 803(3).[24] Yet in discussing the forfeiture issue, the *Bauder* Court rejected the defendant's argument that forfeiture by wrongdoing for purposes of the Confrontation Clause required a showing of intent.[25] That approach was rejected by the United States Supreme Court in *Giles*.[26]

The Court of Appeals has specifically addressed forfeiture by wrongdoing more recently in *People v Jones*.[27]

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[21] *Giles*, 554 US at 367.

[22] *People v Bauder*, 269 Mich App 174, 186; 712 NW2d 506 (2005).

[23] *Id*.

[24] *Id*. at 188.

[25] *Id*. at 186-187, quoting *United States v Garcia-Meza*, 403 F3d 364, 370-371 (CA 6, 2005) ("The Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on the principles of equity, does not permit.").

[26] *Giles*, 554 US at 367-368.

[27] *People v Jones*, 270 Mich App 208; 714 NW2d 362 (2006).

There, the Court of Appeals held that to admit hearsay under the forfeiture doctrine, the prosecution was required to prove: "(1) that the defendant engaged in or encouraged wrongdoing; (2) that the wrongdoing was intended to procure the declarant's unavailability; and (3) that the wrongdoing did procure the unavailability."[28] The *Jones* Court further held that the preponderance of the evidence standard applied, consistent with a majority of the federal circuit courts.[29] While *Jones* preceded *Giles*, its application of forfeiture by wrongdoing as incorporating a specific intent element is consistent with *Giles*.[30] We agree with the *Jones* Court that MRE 804(b)(6) incorporates a specific intent requirement. For the rule to apply, a defendant must have "engaged in or encouraged wrongdoing that was *intended to, and did, procure* the unavailability of the declarant as a witness."[31]

We note that the Court of Appeals explicitly avoided defendant's Confrontation Clause claim in this case in recognition of our constitutional avoidance doctrine.[32] It is nonetheless readily apparent that evidence offered under the forfeiture exception will very regularly be testimonial and subject to Sixth Amendment scrutiny. As forfeiture by wrongdoing is the only recognized

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[28] *Jones*, 270 Mich App at 217, quoting *United States v Scott*, 284 F3d 758, 762 (CA 7, 2002) (quotation marks and brackets omitted).

[29] *Id.* at 215.

[30] In finding forfeiture, the *Jones* Court relied in part on testimony that the defendant had, post-arrest, sent a letter to his friends instructing them to fight the declarant to stop him from testifying. 270 Mich App at 219.

[31] MRE 804(b)(6) (emphasis added).

[32] *Burns*, unpub op at 5, citing *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001), for the proposition that a constitutional issue should not be addressed where the case may be decided on non-constitutional grounds.

exception to the Sixth Amendment's guarantee of the right to cross-examine adverse witnesses,[33] the constitutional question will often go hand-in-hand with the evidentiary question, as it did in the trial court here.

Because the forfeiture doctrine can provide both an exception to the general rule against hearsay and an exception to the confrontation right, the United States Constitution does not prevent the states from crafting a forfeiture-by-wrongdoing exception for *nontestimonial* hearsay that does not require any proof of a defendant's specific intent.[34] But the plain language of our court rule in fact incorporates the specific intent requirement at issue in *Giles*.[35]

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[33] Unlike forfeiture by wrongdoing, the United States Supreme Court has not expressly recognized that dying declarations are an exception to the Sixth Amendment's confrontation right. See *Michigan v Bryant*, 562 US ___; 131 S Ct 1143, 1151 n 1; 131 L Ed 2d 93 (2011) ("We noted in *Crawford* that we 'need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.' Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here.") (citation omitted).

[34] The Supreme Court of California's error in *Giles* was not in adopting an "equitable" forfeiture standard: it was applying that standard to instances of *testimonial* hearsay. See *Giles*, 554 US at 376 ("[O]nly *testimonial* statements are excluded by the Confrontation Clause. [Nontestimonial statements] would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing."). See, *e.g.*, *State v Jensen*, 331 Wis 2d 440, 457; 794 NW2d 482 (2010) ("The nontestimonial statements are not excluded by the Confrontation Clause and, for purposes of a hearsay objection, may be analyzed under a broader version of the forfeiture by wrongdoing doctrine, such as that proffered by the dissent in *Giles* and by our supreme court."); *Roberts v State*, 894 NE2d 1018, 1024 (Ind Ct App, 2008) ("[W]e accept the Supreme Court's invitation to take a slightly broader view of the doctrine of forfeiture by wrongdoing as advocated by Justice Breyer in his dissent in *Giles* as it applies to non-testimonial statements under Indiana law.").

[35] *Giles*, 554 US at 367-368. As a result, evidence properly admitted under MRE 804(b)(6) will likely also not be barred by the constitutional

IV. ANALYSIS

To admit evidence under MRE 804(b)(6), the prosecution must show by a preponderance of the evidence that: (1) the defendant engaged in or encouraged wrongdoing; (2) the wrongdoing was intended to procure the declarant's unavailability; and (3) the wrongdoing did procure the unavailability.[36] For purposes of our inquiry, we assume that the trial court correctly found that defendant did, in fact, engage in wrongdoing.

Turning to the second element, it is also alleged that during the alleged abuse defendant instructed CB "not to tell" anyone and warned her that if she told, she would "get in trouble." The question is whether these threats, made contemporaneously with the abuse but before any report or investigation, require a finding that defendant "intended to . . . procure the unavailability of [CB] as a witness."[37] The prosecution concedes that the trial court did not make a specific finding with regard to defendant's intent. Rather, it asks this Court to hold that the necessary finding was implicit in the trial court's evidentiary ruling, and is compelled by the record. We are not persuaded.

Even if the record were to support an express finding that the trial court never made, the record does not *compel* that finding. Defendant immediately left the family home after Gonzales reported the suspected abuse. He had no contact with CB whatsoever once the conduct was reported, and nobody else attempted on his

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requirement imposed by the Sixth Amendment. Whether our rule should be amended to recognize the distinction between testimonial and nontestimonial hearsay is not an issue before us in this case. At oral argument, the prosecution explicitly stated that it was not arguing for a different standard depending on whether the hearsay was testimonial.

[36] *Jones*, 270 Mich App at 217.

[37] MRE 804(b)(6).

behalf to influence CB not to testify. There is no evidence or allegation that defendant attempted to influence CB directly or indirectly apart from the contemporaneous statements at issue.

The timing of defendant's alleged wrongdoing is also relevant to our conclusion that the record does not compel a finding that defendant had the specific intent to procure CB's unavailability. Defendant's instruction to CB not to report the abuse was made before there was any indication that the abuse had been reported or discovered. While the timing of the wrongdoing is by itself not determinative, it can inform the inquiry: a defendant's wrongdoing *after* the underlying criminal activity has been reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability.[38]

Without the guidance of an explicit trial court finding to shed light on the record, defendant's contemporaneous statements to CB are as consistent with the inference that defendant's intention was that the alleged abuse go undiscovered as they are with an inference that defendant specifically intended to prevent CB from

[38] When a defendant acts to discourage a witness's testimony about *existing* charges, the analysis is easier. Unsurprisingly, there are many forfeiture cases discussing intent relating to already-charged conduct. See, *e.g.*, *United States v Stewart*, 485 F3d 666, 671-672 (CA 2, 2007) (holding that circumstantial evidence can establish that while the defendant faced drug charges, he procured the murder of a witness who was scheduled to testify against him to prevent that testimony); *People v Banos*, 178 Cal App 4th 483, 502; 100 Cal Rptr 3d 476 (2009) (finding *Giles* was satisfied by the testimonial statements of the defendant's ex-girlfriend, for whose murder he was being tried, because the evidence showed that the defendant had killed her both out of jealousy *and* to prevent her from testifying in pending cases and from cooperating with authorities). We note that there are important differences between these cases and the case before us. In addition to the timing of the misconduct, homicide cases present different inferences than the instant case.

testifying.[39] Further, assuming defendant knew that CB would not disclose the abuse because of his directive, that knowledge is not necessarily the equivalent of the specific intent to cause CB's unavailability to testify as required by MRE 804(b)(6). Attempting to equate the two in every circumstance improperly assumes that a defendant's knowledge is always the same as a defendant's purpose. In other words, whether a person in defendant's position would reasonably foresee that the wrongdoing might cause CB's unavailability is separate and distinct from whether defendant intended to procure the declarant's unavailability to testify at trial. We interpret the specific intent requirement of MRE 804(b)(6)—to procure the unavailability of the declarant as a witness—as requiring the prosecution to show that defendant acted with, at least in part, the particular purpose to cause CB's unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability. Without the aid of a specific factual finding from the trial court in this case, we are unable to determine from the record whether defendant had the requisite specific intent.[40]

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[39] In general, questions of intent are factual determinations for the trier of fact to make. See *People v Kieronski*, 214 Mich App 222, 232; 542 NW2d 339 (1995) ("Intent is a question of fact to be inferred from the circumstances by the trier of fact."). The trial court acts as the fact finder in determining questions of fact preliminary to the admissibility of evidence. MRE 104(a).

[40] A comparison to *Giles* is illustrative. There, the wrongdoing was an intentional homicide. Thus, the declarant's unavailability was not just reasonably foreseeable, it was certain. But, as the *Giles* Court recognized, forfeiture by wrongdoing requires a purposed-based inquiry: "the dissent's claim that knowledge is sufficient to show intent is emphatically *not* the modern view." *Giles*, 554 US at 368, citing 1 LaFave, Substantive Criminal Law, § 5.2, p 340 (2d ed 2003). While the alleged wrongdoing in the instant case is fundamentally different than the murder in *Giles*, the requisite specific intent required—to cause a declarant's unavailability to testify—remains the same.

We are mindful that prosecuting child sexual abuse cases with young victims presents acute complications. But we are not persuaded by the prosecution's argument that public policy and the nature of the alleged crime demand that we infer intent under the facts of this case. The *Giles* Court expressly rejected a similar argument in the context of domestic violence, and refused to create a presumption of intent.[41] At the same time, we recognize that the intent analysis must ultimately be made on a case-by-case basis.[42] For these reasons, we are not persuaded that the facts of this case require us to conclude that the MRE 804(b)(6)-required specific intent can necessarily be inferred from the trial court's findings.[43]

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[41] *Giles*, 554 US at 376-377.

[42] The Court of Appeals stated that "[a]lthough it appears that the purpose of any such statements 'not to tell' may have been to prevent the victim from disclosing the criminal acts, *it is doubtful that they can be construed as threats intended to prevent the victim from testifying at trial*." *Burns*, unpub op at 2 (emphasis added). Although the record in this case does not support such a construction because it is devoid of both an explicit trial court finding of specific intent or evidence to compel such a conclusion, we emphasize that such statements *must* be evaluated in light of the circumstances in which they were made, on a case-by-case basis. Although not required by our court rules, we strongly encourage trial courts to make findings of fact on the record for each of the three elements required by MRE 804(b)(6).

[43] We recognize that the *Giles* holding has been criticized for its policy implications, especially in cases of domestic violence culminating in murder. See, *e.g.*, Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 Tex L Rev 857 (2009); Davies, *Selective Originalism: Sorting Out Which Aspect of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 Lewis & Clark L Rev 605 (2009). Commentators have also advocated for different standards to be applied in cases of child witnesses in a variety of forfeiture and Confrontation clause contexts. See, *e.g.*, Lyon and Dente, *Child Witnesses and the Confrontation Clause*, 102 J Crim L & Criminology 1181 (2012) (proposing a "forfeiture by exploitation" approach in cases of child abuse); Dripps, *Controlling the Damage Done by Crawford v Washington: Three Constructive Proposals*,

We also conclude that the trial court's application of the third element required to satisfy MRE 804(b)(6)—that defendant's conduct in fact *caused* CB's unavailability—*undermines* its conclusion that the hearsay testimony was admissible pursuant to MRE 804(b)(6). As the trial court recognized in declaring CB unavailable, her inability to testify was based on her "infirmity, her youth," and her fear of testifying in open court. The trial court did not include defendant's wrongdoing among the reasons for CB's inability to testify. In fact, the objective evidence about defendant's alleged wrongdoing would tend to support the conclusion that defendant's wrongdoing *did not* cause CB's inability to testify. Defendant allegedly directed CB to "not tell," yet she did not follow that direction. Instead, she told the bible school teacher, the forensic interviewer, and the sexual-assault nurse examiner. Moreover, at one point during an interview, CB stated that defendant had told her "not to tell" anybody because she would "get in trouble," but then immediately acknowledged that she "won't get in trouble" for telling. Because the trial court's findings about the reasons for CB's unavailability did not include defendant's wrongdoing and are not clearly erroneous, we conclude that the prosecutor has not satisfied the causation element of MRE 804(b)(6).

Finally, we agree with the Court of Appeals that the admission of testimony regarding CB's statements was

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7 Ohio St J Crim L 521 (2010) (suggesting a rebuttable presumption that an otherwise unexplained unavailability of a witness previously injured or threatened by the accused is the result of improper pressure brought by the defendant). Yet, the courts' respect for the Sixth Amendment and the rules of evidence may be all that separates an accusation from a wrongful conviction. In any event, our role is not to enter such policy debates but rather to apply the United States Supreme Court's precedent and our own rules faithfully.

outcome determinative. Aside from the improperly admitted hearsay testimony, the prosecution failed to present sufficient evidence of defendant's alleged criminal sexual conduct. Given the lack of any physical evidence, third-party eyewitnesses, or testimony from CB, we conclude that it is more probable than not that the erroneous admission of the hearsay testimony was outcome determinative.

VI. CONCLUSION

We hold that the prosecutor failed to establish by a preponderance of the evidence that defendant's conduct both was intended to, and did, cause CB's unavailability. Thus, admission of CB's hearsay statements pursuant to MRE 804(b)(6) was an abuse of discretion, and the error was outcome determinative. Accordingly, we affirm the judgment of the Court of Appeals and remand this case for a new trial.

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

SMITTER v THORNAPPLE TOWNSHIP

Docket No. 144354. Argued January 9, 2013 (Calendar No. 3). Decided June 19, 2013.

Robert Smitter sought workers' compensation benefits after he was injured while working as a firefighter for Thornapple Township. At the time of his injury, Smitter was also employed by General Motors Corporation, earning approximately 11 percent of his total wages with the township and 89 percent of his wages with General Motors. The township paid Smitter wage-loss benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Smitter also received benefits pursuant to a disability insurance policy fully funded by the township. The township did not reduce its workers' compensation obligation by coordinating Smitter's workers' compensation benefits with his disability benefits under MCL 418.354(1)(b). The township initially sought reimbursement from the Second Injury Fund under the dual-employment provisions, MCL 418.372, for the entirety of Smitter's wage-loss benefits. The fund agreed to pay the amount it would have owed if the township had coordinated Smitter's benefits. The township filed an application for a hearing with the Worker's Compensation Board of Magistrates, seeking reimbursement from the fund for the uncoordinated amount of wage-loss benefits. Relying on *Rahman v Detroit Bd of Ed*, 245 Mich App 103 (2001), the magistrate ordered the fund to reimburse the township for 89 percent of Smitter's uncoordinated wage-loss benefits. The Workers' Compensation Appellate Commission (WCAC)[1] affirmed the magistrate's decision. The Court of Appeals denied the fund's application for leave to appeal. *Smitter v Thornapple Twp*, unpublished order of the Court of Appeals, entered April 5, 2010 (Docket No. 294768). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 488 Mich 917 (2010). On remand, the Court of Appeals, TALBOT, P.J., and FITZGERALD and MARKEY, JJ., affirmed the decision of the WCAC in an unpublished opinion per curiam,

[1] Now the Michigan Compensation Appellate Commission. Executive Order No. 2011-6; MCL 445.2032.

issued November 22, 2011 (Docket No. 294768). The Supreme Court granted leave to appeal. 491 Mich 917 (2012).

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

If an injured worker was engaged in more than one employment at the time of injury, the WDCA apportions liability between the employment that caused the injury and the Second Injury Fund. When the injury employment provided less than 80 percent of the employee's wages, the fund is required to reimburse its portion of the benefits due the employee. Because the fund's liability is dependent on the employer's liability and coordination of the employer's benefits is compulsory, the fund is required to reimburse its portion of the benefits due on the basis of the coordinated amount of benefits. *Rahman v Detroit Bd of Ed*, 245 Mich App 103 is overruled.

1. Under MCL 418.351(1), while the incapacity for work resulting from a personal injury is total, the employer shall pay the injured employee weekly benefits of 80 percent of the employee's after-tax average weekly wage. MCL 418.354 provides for the coordination of benefits, reducing an employer's obligation to pay weekly wage benefits under the WDCA when the injured employee simultaneously receives payments in accordance with specified benefit programs, including a disability policy. Specifically, the statute, using the mandatory word "shall," requires that the employer's worker's compensation obligation be reduced by the after-tax amount of the payments received under a disability policy provided by the employer. Contrary to *Rahman*, coordination under MCL 418.354(1) is compulsory rather than permissive. *Rahman* failed to address the significance of MCL 418.354(15), which identifies the narrow group of employers that the Legislature has permitted to waive the coordination of benefits, including those employing volunteer firefighters. By specifically defining the circumstances under which an employer may waive coordination of benefits, the Legislature by implication prohibited all other employers from waiving coordination of benefits. Because the holding in *Rahman* contravened the plain language of the statute, it was overruled. Except with regard to those employments identified in MCL 418.354(15), the coordination of benefits is mandatory and reduces the employer's obligation to pay weekly wage-loss benefits as a matter of law. Any additional sum of weekly wage-loss benefits volitionally provided by the employer has no effect on the employer's obligation to pay weekly benefits under the law.

2. The dual-employment provisions of the WDCA, MCL 418.372, apportion liability for an injured employee's workers'

compensation benefits when the employee was engaged in more than one employment at the time of injury. The statute provides that if the injury employment provided 80 percent or less of the employee's average weekly wage at the time of the injury, the employer is liable for the same percentage of the injured employee's weekly benefits as his or her average weekly wage from the injury employment bore to his or her total weekly wages. The Second Injury Fund is separately but dependently liable for the remainder of the weekly benefits. The fund is liable only for its portion of the benefits due the employee. The benefits due the employee are those that are owed to the employee. The amount due the employee by the fund is the fund's portion of the employer's remaining obligation under the act, which is the balance due after the application of the coordination provisions. The fund is not required to reimburse the employer for any additional amount that the employer voluntarily elects to provide to an injured employee.

3. Under the statutory scheme, the township was obligated to pay Smitter weekly wage-loss benefits in the amount of 80 percent of his after-tax average weekly wage. Because Smitter also received benefits pursuant to a disability policy that the township fully funded, under MCL 418.354 the township's worker's compensation obligation had to be reduced by the after-tax amount of benefits that Smitter received under the disability policy. The township's remaining worker's compensation obligation was reduced to the balance due after coordination. Under the dual-employment provisions, Smitter's weekly wage-loss benefits had to be apportioned between the township and the Second Injury Fund because the township provided less than 80 percent of his wages. The township was liable for 11 percent of Smitter's coordinated weekly benefits, and the fund was separately but dependently liable for the remaining 89 percent of Smitter's coordinated weekly benefits.

Judgment of the Court of Appeals reversed; case remanded to the magistrate for further proceedings.

Justice CAVANAGH, dissenting, asserted that Smitter was a volunteer firefighter for purposes of applying MCL 418.354(15), and, thus, that the township was permitted to provide Smitter with uncoordinated benefits. Because the majority recognized that MCL 418.354(15) permits the employer of a volunteer firefighter to provide its employees with uncoordinated benefits, the majority's conclusion that benefits coordination is mandatory except in the employment circumstances listed in MCL 418.354(15) was dictum, as was its decision to overrule *Rahman*. Although the

parties had conceded that Smitter was not a volunteer firefighter for purposes of applying MCL 418.354(15), the Court is not bound by the parties' concessions regarding the law. MCL 418.354(15) applies to volunteer firefighters who are considered employees pursuant to MCL 418.161(1)(a), which, in turn, refers to those in the service of a township under a contract of hire. Applying the statutory language, Smitter satisfied the contract-of-hire requirement as interpreted by the majority in *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561 (1999). Because Smitter was a volunteer firefighter who was considered an employee under MCL 418.161(1)(a), the township could forgo the coordination provision in MCL 418.354(1)(b). At the time of Smitter's injury, MCL 418.372(3) stated that the allocation provisions of MCL 418.372 did not apply to volunteer public employees entitled to benefits under MCL 418.161(1)(a), which would have included Smitter. Thus, the apportionment provisions were inapplicable. Because MCL 418.372 did not apply, under MCL 418.351(1), the township was liable for all of Smitter's workers' compensation benefits and the fund had no liability.

Justice MCCORMACK, dissenting, would have affirmed the decision of the Court of Appeals. Although the word "shall" generally implies a mandatory directive, context can undercut the application of that general principle. In this case, the majority's conclusion that the township was required to coordinate benefits was undercut by the text of the WDCA. Under MCL 418.354(1), it is the employer's obligation to pay benefits that may be reduced by coordination, not the Second Injury Fund's obligation. Thus, the decision to coordinate rests with the employer, and the fund's liability is not implicated. Further, there is no language in MCL 418.372(1)(b), under which the Second Injury's Fund's liability is determined, that refers to the possibility of benefit coordination. Nor is there any language in MCL 418.354 referring to the Second Injury Fund. In other words, the Legislature chose not to connect the two sections. Under the majority's analysis, both MCL 418.354(1) and (15) are implicated only in the dual-employment context, and then only when the injury employer provides 80 percent or less of the injured employee's average weekly wage; the supposedly mandatory language of MCL 418.354(1) imposes no requirements in situations in which there is only one employer, or when the injury employer provides more than 80 percent of the injured employee's average weekly wage. To read MCL 418.354(1) as imposing a requirement on a subset of injury employers in dual-employment cases renders that supposedly mandatory language meaningless in a majority of situations. Justice MCCORMACK

was reluctant to interpret the statutory terms in a manner that would lead to that anomalous result.

Justice VIVIANO took no part in the decision of this case.

WORKER'S COMPENSATION — DUAL EMPLOYMENT — SECOND INJURY FUND — COORDINATION OF BENEFITS.

If an injured worker was engaged in more than one employment at the time of injury, the Worker's Disability Compensation Act apportions liability between the injury employer and the Second Injury Fund; when the injury employment provided less than 80 percent of the employee's wages, the fund is required to reimburse its portion of the benefits due the employee; the employer is required to coordinate benefits, reducing its worker's compensation obligation when the injured employee simultaneously receives payments in accordance with specified benefit programs; because the fund's liability is dependent on the employer's liability, the fund is only required to reimburse its portion of the benefits due on the basis of the coordinated amount of benefits (MCL 418.101 *et seq*.).

Charfoos Reiter Hébert, P.C. (by *James A. Reiter* and *James J. Ranta*), for Thornapple Township and the Michigan Municipal League Workers' Compensation Fund.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Susan Przekop-Shaw*, *Dennis J. Raterink*, and *William F. Denner*, Assistant Attorneys General, for the Second Injury Fund.

YOUNG, C.J. Plaintiff was injured in the course of his employment as a part-time firefighter for defendant Thornapple Township. At the time of his injury, plaintiff was also employed by another employer. Thornapple Township paid plaintiff the maximum weekly wage loss benefits under the Worker's Disability Compensation Act (WDCA),[1] and plaintiff additionally received ben-

[1] MCL 418.101 *et seq*.

efits pursuant to a disability insurance policy provided by the township. Thornapple Township did not reduce its workers' compensation liability by coordinating plaintiff's workers' compensation benefits with his disability benefits under MCL 418.354(1)(b). Subsequently, Thornapple Township sought reimbursement from the Second Injury Fund[2] under the dual employment provisions, MCL 418.372, based on the uncoordinated amount of wage loss benefits.

The issue to be determined in this case is the amount that the fund is required to reimburse an employer for its portion of an injured employee's weekly benefits when the employer fails to coordinate benefits. We hold that the coordination of benefits is mandatory, except in very narrow employment circumstances that are inapplicable in this case. Coordination of benefits serves to reduce the amount of weekly benefits an employer is legally obligated to pay an employee under the WDCA. Any additional sum of weekly benefits volitionally provided by the employer does not alter the employer's *statutory obligation* to the injured employee.

If an injured worker was engaged in more than one employment at the time of injury, the WDCA apportions liability between the employment that caused the injury and the Second Injury Fund. When the employment that caused the injury provided less than 80 percent of the employee's wages, the fund is required to reimburse its "portion of the benefits due the employee . . . ."[3] Because the fund's liability is "dependent" upon the employer's liability, and coordination of the employer's benefits is compulsory, the fund is required to reimburse its portion of the benefits due on the basis of the coordinated amount of benefits. We reverse the judg-

[2] See MCL 418.501(1).

[3] MCL 418.372(1)(b).

ment of the Court of Appeals and remand this case to the magistrate for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The parties submitted this case under stipulated facts. Plaintiff, Robert Smitter, was employed both as a part-time firefighter for Thornapple Township and as an employee of General Motors Corporation. Smitter earned approximately 11 percent of his total wages with Thornapple Township and 89 percent of his wages with General Motors. On May 3, 2005, Smitter sustained a work-related injury while fighting a fire. He was disabled from both employments for approximately 26 weeks. Given his average weekly wage, Smitter was entitled to workers' compensation wage loss benefits at the maximum rate of $689 a week. Smitter also received $800 a week in "Sickness & Accident" benefits pursuant to a disability insurance policy fully funded by Thornapple Township. The township did not coordinate the benefits paid from the disability insurance policy against its workers' compensation obligation. Rather, the township voluntarily paid the state maximum rate of wage loss benefits to plaintiff, in addition to the benefits plaintiff received pursuant to the insurance policy.

Initially, Thornapple Township sought reimbursement from the Second Injury Fund in the amount of $17,897.87 for the entirety of plaintiff's wage loss benefits. The fund agreed to pay $2,077.99—the amount of its liability if the township had coordinated plaintiff's benefits. On February 2, 2007, Thornapple Township filed an application for a hearing, seeking reimbursement from the Second Injury Fund for "wage loss benefits attributable to earnings from General

Motors Corporation" for plaintiff's period of disability. Relying on *Rahman v Detroit Board of Education*,[4] the magistrate ordered that the fund reimburse Thornapple Township in the amount of $15,966.75, representing 89 percent of the uncoordinated wage loss benefits paid to Smitter.

The Workers' Compensation Appellate Commission (WCAC)[5] affirmed the decision of the magistrate. The majority commiserated with the fund's being required to "support the Township's public policy of treating its firefighters to benefits beyond the statutory requirements," agreeing with the fund that it was "unfair to allow an employer to forfeit coordination and force another party to fund that choice."[6] However, because *Rahman* controlled the facts of the case, the fund could "not take advantage of the injury employer's[7] entitlement to coordination unless the employer coordinates benefits."[8]

The Court of Appeals initially denied the fund's application for leave to appeal,[9] but this Court remanded the case to the Court of Appeals for consideration as on leave granted.[10] On remand, the Court of Appeals affirmed the decision of the WCAC.[11] The panel noted that it was bound to follow *Rahman* pursuant to

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[4] *Rahman v Detroit Bd of Ed*, 245 Mich App 103; 627 NW2d 41 (2001).

[5] Now the Michigan Compensation Appellate Commission. Executive Order No. 2011-6; MCL 445.2032.

[6] *Smitter v Thornapple Twp*, 2009 Mich ACO 175, p 3.

[7] The "injury employer" is the employer the injured party was working for at the time of the injury.

[8] *Id*.

[9] *Smitter v Thornapple Twp*, unpublished order of the Court of Appeals, entered April 5, 2010 (Docket No. 294768).

[10] *Smitter v Thornapple Twp*, 488 Mich 917 (2010).

[11] *Smitter v Thornapple Twp*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2011 (Docket No. 294768).

MCR 7.215(J)(1), that the holding in *Rahman* was consistent with the statutory language, and that there was no principled reason for distinguishing *Rahman* from the present case. This Court granted the Second Injury Fund's application for leave to appeal.[12]

II. STANDARD OF REVIEW

While this Court's review of a decision by the WCAC is limited, we review de novo questions of law in a workers' compensation case.[13] Likewise, questions of statutory interpretation are questions of law reviewed de novo.[14]

In interpreting a statute, our obligation is to discern the legislative intent that may reasonably be inferred from the words actually used in the statute.[15] "A fundamental principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.' "[16] When the statutory language is unambiguous, the proper role of the judiciary is simply to apply the terms of the statute to the facts of the particular case.[17] In addition, words used by the Legislature must be construed and understood in accordance with their common, ordinary meaning.[18]

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[12] *Smitter v Thornapple Twp*, 491 Mich 917 (2012).

[13] *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003); MCL 418.861; MCL 418.861a(14).

[14] *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

[15] *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979).

[16] *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Indus)*, 468 Mich 109, 113; 659 NW2d 597 (2003), quoting *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).

[17] *Rakestraw*, 469 Mich at 224.

[18] MCL 8.3a; *Massey v Mandell*, 462 Mich 375, 380; 614 NW2d 70 (2000).

III. ANALYSIS

A. RELEVANT STATUTORY PROVISIONS

In order to analyze properly the issues presented in this case, we must examine the interplay between several provisions of the WDCA.

There is no question that plaintiff received an injury arising out of and in the course of his employment with Thornapple Township.[19] Because plaintiff was completely disabled for approximately 26 weeks, MCL 418.351(1) describes the township's liability for weekly wage loss benefits. It provides in relevant part:

> While the incapacity for work resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under [MCL 418.355]. Compensation shall be paid for the duration of the disability.

MCL 418.354 provides for the coordination of benefits, reducing an employer's obligation to pay weekly wage benefits under the WDCA when an employee simultaneously receives payments in accordance with specified benefit programs. At the time of plaintiff's injury,[20] MCL 418.354 provided in relevant part as follows:

> (1) This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to [MCL 418.351, MCL 418.361, or MCL 418.835] with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a

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[19] See MCL 418.301.

[20] Although the statute was subsequently amended by 2011 PA 266, the provisions relevant to this case have remained substantively unaltered.

wage continuation plan, *or a disability insurance policy provided by the employer*; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, *the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under* [*MCL 418.361(2)*] *and (3) shall be reduced by these amounts:*

* * *

(b) *The after-tax amount of the payments received or being received* under a self-insurance plan, a wage continuation plan, or *under a disability insurance policy provided by the same employer from whom benefits under* [*MCL 418.351, MCL 418.361, or MCL 418.835*] *are received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. . . .*

* * *

(2) To satisfy any *remaining obligations* under [MCL 418.351, MCL 418.361, or MCL 418.835], the employer shall pay or cause to be paid to the employee *the balance due in either weekly or lump sum payments after the application of subsection (1).*

* * *

(15) With respect to volunteer fire fighters, volunteer safety patrol officers, volunteer civil defense workers, and volunteer ambulance drivers and attendants who are considered employees for purposes of this act pursuant to [MCL 418.161(1)(a)], *the reduction of weekly benefits provided for disability insurance payments under subsection (1)(b) and (c) and subsection (11) may be waived by the employer.* An employer that is not a self-insurer may make the waiver provided for under this subsection only at the time a worker's compensation insurance policy is entered into or renewed.[21]

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[21] MCL 418.354. as amended by 1987 PA 21 (emphasis added).

MCL 418.372, known as the dual employment provision, apportions liability for an injured employee's workers' compensation benefits when the employee was engaged in more than one employment at the time of injury. At the time of plaintiff's injury, the statute provided in relevant part as follows:

> (1) If an employee was engaged in more than 1 employment at the time of a personal injury or a personal injury resulting in death, the employer in whose employment the injury or injury resulting in death occurred is liable for all the injured employee's medical, rehabilitation, and burial benefits. Weekly benefits shall be apportioned as follows:
>
> (a) If the employment which caused the personal injury or death provided more than 80% of the injured employee's average weekly wages at the time of the personal injury or death, the insurer or self-insurer is liable for all of the weekly benefits.
>
> (b) If the employment which caused the personal injury or death provided 80% or less of the employee's average weekly wage at the time of the personal injury or death, the insurer or self-insurer is liable for that portion of the employee's weekly benefits as bears the same ratio to his or her total weekly benefits as the average weekly wage from the employment which caused the personal injury or death bears to his or her total weekly wages. *The second injury fund is separately but dependently liable for the remainder of the weekly benefits. The insurer or self-insurer has the obligation to pay the employee or the employee's dependents at the full rate of compensation. The second injury fund shall reimburse the insurer or self-insurer quarterly for the second injury fund's portion of the benefits due the employee or the employee's dependents*.
>
> * * *
>
> (3) This section does not apply to volunteer public employees entitled to benefits under [MCL

418.161(1)(a)].[22]

Reading these statutory provisions together, it is clear that, as a starting point, Thornapple Township is obligated by MCL 418.351 to pay Smitter weekly wage loss benefits in the amount of 80 percent of his after-tax average weekly wage, subject to the maximum weekly cap imposed by MCL 418.355, for the duration of his disability.

Because Smitter received benefits pursuant to a disability insurance policy provided by Thornapple Township "with respect to the same time period"[23] as the township's obligation to pay weekly wage loss benefits pursuant to MCL 418.351, the coordination of benefits provisions are implicated. As Thornapple Township fully funded the disability policy, its "obligation to pay" weekly wage loss benefits "*shall be reduced*" by the after-tax amount of benefits Smitter received under the policy.[24] The township's "remaining obligations" regarding Smitter's wage loss benefits under MCL 418.351 are thus reduced to "the balance due" after coordination.[25]

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[22] MCL 418.372, as added by 1980 PA 357 (emphasis added). MCL 418.372 was amended by 2012 PA 83, which amended subsection (3) to read "This section does not apply to individuals entitled to benefits under [MCL 418.161(1)(d), (e), (f), (g), (h), (i), (j), and (o)]."

[23] MCL 418.354.

[24] MCL 418.354(1)(b) (emphasis added).

[25] MCL 418.354(2). At oral argument, the parties agreed that plaintiff is not a volunteer firefighter, one of the very few employments to which "the reduction of weekly benefits provided for disability insurance payments . . . may be waived by the employer." MCL 418.354(15). Indeed, the parties submitted this case under stipulated facts, including the stipulation that Smitter was employed as a "paid part-time firefighter . . . ." This Court has distinguished between stipulations of *fact*, which are binding on the judiciary, *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 277 (1963), and stipulations of *law*, which are not binding, *In re Finlay Estate*, 430 Mich 590, 595; 424 NW2d

Lastly, because Smitter was engaged in more than one employment at the time of his injury, the dual employment provisions of MCL 418.372 are applicable. While Thornapple Township remains liable for all of Smitter's medical and rehabilitation benefits, Smitter's weekly wage loss benefits are apportioned between the township and the Second Injury Fund because "the employment which caused the personal injury" provided less than 80 percent of Smitter's wages at the time of his injury.[26] The township is liable for the same percentage of Smitter's weekly benefits as his average weekly wage from the township bore to his total wages. In other words, because Smitter earned 11 percent of his weekly wages with the township, it is liable for 11 percent of Smitter's weekly benefits. The fund is "separately but dependently liable" for the remaining 89 percent of Smitter's weekly benefits, representing the percentage of weekly benefits attributable to Smitter's employment with General Motors.[27] While the township must provide weekly benefits to Smitter "at the full rate of compensation," the fund is required to reimburse the township for its "portion of the benefits due the employee . . . ."[28]

B. COORDINATION OF BENEFITS

Relying on *Rahman v Detroit Board of Education*, Thornapple Township argues that the fund is liable for reimbursement of its portion of the uncoordinated amount of benefits and cannot reduce its liability by

272 (1988). Thus, Justice CAVANAGH's reliance on *Union Guardian Trust Co v Zack*, 274 Mich 108, 113; 264 NW 309 (1936), which involved an admission of law, is inapposite.

[26] MCL 418.372(1)(b).

[27] *Id*.

[28] *Id*.

claiming entitlement to the coordinated amount, particularly given that the township has "exercised its right" not to coordinate benefits.

In *Rahman*, the plaintiff suffered a back injury during the course of his employment with the Detroit Board of Education. At the time of injury, Rahman was also employed with the city of Detroit, earning 46 percent of his wages from the board of education and the remaining 54 percent of his wages from the city of Detroit. The magistrate ordered an open award of benefits and further held that the fund had reimbursement liability under the dual employment provisions because the board provided less than 80 percent of Rahman's average weekly wage.

Rahman also received a pension from the board of education, although the facts do not indicate whether the Board coordinated Rahman's weekly wage loss benefits. The fund argued that the amount it was required to reimburse the board should be based on the coordinated amount of benefits. The Court of Appeals rejected the fund's claim, providing the following analysis:

> [T]he coordination of benefits provision . . . applies if an employee receives worker's compensation benefits at the same time he receives pension or retirement payments pursuant to a plan or program maintained or established by an employer. [MCL 418.354(1)] provides that "the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits . . . shall be reduced by [specified] amounts . . . ." A plain reading of the subsection indicates that the employer's obligation to pay the employee benefits *may be reduced* by the amount of pension the employer pays to the employee.
>
> We reject the [Second Injury Fund's] argument that the total amount of worker's compensation benefits *payable to plaintiff* should be reduced by the amount of the pension

> benefits plaintiff receives from the board. Again, we consider the clear and unambiguous language of the statute. [MCL 418.354] provides for a reduction in an employer's obligation to pay benefits if that employer provides the employee a pension. This reduction is clearly premised on the fact that the employer is providing another wage benefit to the employee; the statute *allows the employer* to coordinate that benefit with its obligation to pay worker's compensation wage-loss benefits to the employee. It is apparent from the language of the statute that the Legislature intended that the employer whose employment caused an injury alone may *take advantage* of the coordination provisions. There is no suggestion that the [Second Injury Fund], in a dual employment situation, may take advantage of the injury-employer's *entitlement* to coordination. Therefore, the [Second Injury Fund's] argument is rejected.[29]

While *Rahman* claimed to follow the unambiguous language of the statute, it failed to do so. Contrary to *Rahman*'s holding that an employer's obligation to pay weekly benefits "*may* be reduced," MCL 418.354(1) provides that the employer's obligation "*shall* be reduced" by the requisite amounts listed in the statute. The Legislature's use of the word "shall" generally indicates a mandatory directive, not a discretionary act.[30]

Furthermore, *Rahman* failed to recognize or address the significance of MCL 418.354(15).[31] This provision

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[29] *Rahman*, 245 Mich App at 120-121 (third alteration in original) (emphasis altered) (citation omitted).

[30] *Costa v Community Emergency Med Servs*, 475 Mich 403, 409; 716 NW2d 236 (2006); *Burton v Reed City Hosp Corp*, 471 Mich 745, 752-754; 691 NW2d 424 (2005); *Tobin v Civil Serv Comm*, 416 Mich 661, 667; 331 NW2d 184 (1982); *Smith v Amber Twp Sch Dist*, 241 Mich 366, 368-369; 217 NW 15 (1928).

[31] Through 1983 PA 159 the Legislature enacted MCL 418.354(15) and redesignated former subsections (15) to (17). MCL 418.354(15) has remained unaltered since that time.

explicitly delineates the narrow group of employers that the Legislature has permitted to waive the "reduction of weekly benefits" that is otherwise compelled by the coordination provisions: those employing "volunteer fire fighters, volunteer safety patrol officers, volunteer civil defense workers, and volunteer ambulance drivers and attendants who are considered employees for purposes of this act pursuant to [MCL 418.161(1)(a)] . . . ."[32] Moreover, the scope of allowable waiver encompasses only "disability insurance payments under subsection (1)(b) and (c) and subsection (11) . . . ."[33] By specifically outlining the parameters under which an employer may permissibly waive coordination of benefits, the Legislature by implication prohibited *all other employers* who do not meet the specifications from waiving coordination of benefits.[34] Such a conclusion is incompatible with *Rahman*'s holding that the coordination of benefits is a discretionary "entitlement" that may be claimed or relinquished at the pleasure of *any* employer.[35] While *Rahman* decried the notion that "the total amount of worker's compensation benefits payable to plaintiff should be reduced by the amount of the pension benefits plaintiff receives," that is *precisely* what MCL 418.354(1) requires. Because the holding in *Rahman* contravenes the plain language of the statute, it is overruled.

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[32] MCL 418.354(15).

[33] *Id*.

[34] Under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the specification in a statute of one particular class excludes all other classes. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003); *Dave's Place, Inc v Liquor Control Comm*, 277 Mich 551; 269 NW 594 (1936); *Detroit v Redford Twp*, 253 Mich 453, 455-456; 235 NW 217 (1931).

[35] *Rahman*, 245 Mich App at 121.

Thus, with the exception of those employments falling within the limits described in MCL 418.354(15), an employer's obligation to pay weekly benefits under the WDCA "shall be reduced" by the corresponding amounts listed in MCL 418.354(1). The coordination of benefits is mandatory, not discretionary, and reduces an employer's obligation to pay weekly wage loss benefits as a matter of law. As a practical consideration, an injured worker is unlikely to protest if an employer consciously chooses to pay the employee in excess of what the law requires. However, any additional sum of weekly wage loss benefits volitionally provided by the employer "[f]or its own policy reasons" has no effect on the employer's obligation to pay weekly benefits under the law.[36]

C. THE SECOND INJURY FUND'S LIABILITY

MCL 418.372(1)(b) apportions liability between the fund and the injury employer when the employee was engaged in more than one employment at the time of his injury *and* the injury employer provided 80 percent or less of the employee's average weekly wage.[37] The statute

[36] Despite the unambiguous meaning of the word "shall," Justice MCCORMACK opines that an injury employer may avoid coordinating its compensation obligation under the WDCA because to hold otherwise would prohibit "employers and employees from freely entering into employment contracts under terms as they see fit." Nothing in this opinion affects the right of an employer to agree to provide any contractual benefit to its employees that it wishes to offer. We have announced no limiting legal principle that would prohibit an injury employer, either by gratuitous impulse or a negotiated contract provision, from providing benefits in excess of its obligation under the WDCA. However, we do conclude, applying the language of the WDCA, that the injury employer in a dual employment situation must bear the cost of its munificence and cannot require the fund to subsidize its choices.

[37] When the injury employer provided *more* than 80 percent of the employee's average weekly wage, there is no apportionment of liability. The injury employer is "liable for all of the weekly benefits." MCL 418.372(1)(a).

does not require reimbursement of any additional amount that the employer voluntarily elects to provide to an injured employee—it only provides that the fund is liable for its "portion of the benefits *due* the employee . . . ." Consistent with the common understanding of the word "due," the benefits due the employee are those that are *owed* to the employee.[38]

In determining the amount "due" the employee, we note that under the explicit language of the statute, the fund has dependent or contingent liability[39] for the remainder of the weekly benefits for which the injury employer would ordinarily be liable[40] but for the apportionment of liability provided in MCL 418.372.[41] Thus, the fund's reimbursement liability is expressly conditioned on the injury employer's statutory liability. As discussed above, the application of MCL 418.354 to reduce an employer's liability under the WDCA is compulsory and may not be avoided except in very narrow circumstances.[42] Therefore, the amount "due the employee"[43] is the fund's portion of the employer's

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[38] *Random House Webster's College Dictionary* (1996), p 413 (defining "due" as "owing or owed[.]").

[39] *Random House Webster's College Dictionary* (1996), p 363 (defining "dependent" as "conditioned or determined by something else; contingent[.]").

[40] See MCL 418.351; MCL 418.361.

[41] MCL 418.372(1)(b) imposes liability on the fund for that portion of weekly benefits attributable to the injured employee's concurrent employment. See *Lawrence v Toys R Us*, 453 Mich 112, 128; 551 NW2d 155 (1996) ("[T]he fund is only subject to liability for benefits in respect to the wage-earning capacity lost at the concurrent employment.").

[42] We note that the *very same* employments permitted to waive the coordination of benefits under MCL 418.354(15) are specifically *excluded* from the apportionment of liability under the dual employment provisions pursuant to MCL 418.372(3). Thus, when the coordination of benefits is properly waived, the fund has absolutely no reimbursement liability in a dual employment situation.

[43] MCL 418.372(1)(b).

"remaining obligation[]" under the act, which is described as "the balance due in either weekly or lump sum payments *after the application of*" the coordination provisions.[44] Thus, the fund is obligated to reimburse the employer for its "portion of the benefits due the employee"[45] after the application of MCL 418.354.[46] The fund is not required to reimburse the employer for any additional amounts of benefits that do not reflect the employer's liability under the act.

Thornapple Township argues that "strong public policy" considerations support its position and that providing an injured firefighter with full workers' compensation benefits as well as disability benefits provides an "incentive" for its employees to engage in firefighting services. However, the public policy of Michigan is not to be determined by what a majority of this Court deems desirable or appropriate at a given time. Rather, the public policy of Michigan must be "clearly rooted in the law" as "reflected in our state and federal constitutions, our statutes, and the common law."[47] Moreover, this Court may not substitute its policy preferences for those policy decisions that have been clearly provided by statute.[48] In this instant case, it is clear from the

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[44] MCL 418.354(2) (emphasis added).

[45] MCL 418.372(1)(b).

[46] This conclusion is further supported by the fact that MCL 418.354(1) refers to "the employer's obligation." The only time "obligation" appears in MCL 418.372(1)(b) is in the third sentence, which addresses the "obligation" to "pay the employee . . . at the full rate of compensation." When MCL 418.372(1)(b) mentions the employer alone and the fund alone, the provision refers to their "liab[ilities]." Therefore, it is reasonable to conclude that the reference in MCL 418.354(1) to "the employer's obligation" refers to "the full rate of compensation," not just the amount for which the employer alone is "liable." If the full rate must be coordinated, then the fund's liability to reimburse an employer necessarily occurs after coordination.

[47] *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002).

[48] See generally *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 588-593; 702 NW2d 539 (2005).

mandate contained in MCL 418.354(1) that the public policy of Michigan, as articulated *by the Legislature*, is to prevent duplicative wage loss payments while maintaining "suitable wage-loss benefits."[49] Additionally, the Legislature has unequivocally indicated that the public policy of Michigan prohibits the employees of fire departments and police departments from receiving "like benefits" from both a municipality and the WDCA.[50] MCL 418.161(c) provides:

> Police officers, fire fighters, or employees of the police or fire departments, or their dependents, in municipalities or villages of this state providing like benefits, may waive the provisions of this act and accept like benefits that are provided by the municipality or village but are not entitled to like benefits from both the municipality or village and this act. However, this waiver does not prohibit those employees or their dependents from being reimbursed under [MCL 418.315] for the medical expenses or portion of medical expenses that are not otherwise provided for by the municipality or village. This act shall not be construed as limiting, changing, or repealing any of the provisions of a charter of a municipality or village of this state relating to benefits, compensation, pensions, or retirement independent of this act, provided for employees.

Because the policy arguments advanced by Thornapple Township stand in stark contradiction to the public policy pronouncements of the Legislature, they must fail.

IV. CONCLUSION

We conclude that the Second Injury Fund is required to reimburse an employer for the fund's portion of the

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[49] See *Drouillard v Stroh Brewery Co*, 449 Mich 293, 299-300; 536 NW2d 530 (1995).

[50] See *Crowe v Detroit*, 465 Mich 1, 8-10; 631 NW2d 293 (2001) (providing that "like benefits" are those that are similar in their salient features).

benefits due the employee on the basis of the coordinated amount of weekly benefits. We reverse the judgment of the Court of Appeals and remand this case to the magistrate for further proceedings consistent with this opinion.

MARKMAN, KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority opinion because I believe that Robert Smitter was a "volunteer fire fighter[]" for purposes of applying MCL 418.354(15) of the Michigan Worker's Disability Compensation Act (WDCA),[1] and, thus, Thornapple Township was permitted to provide Smitter with uncoordinated benefits. While I do not necessarily disagree with Justice MCCORMACK's conclusion that the WDCA may allow *all* employers to decide whether to coordinate workers' compensation benefits and disability insurance benefits, I do not believe that it is necessary to decide that issue in this case. Rather, because the majority recognizes that MCL 418.354(15) permits the employer of a volunteer firefighter to provide its employees with uncoordinated benefits, I believe that the majority's conclusion that benefits coordination is mandatory except in the employment circumstances listed in MCL 418.354(15) is unnecessary dictum. Likewise, I believe that the majority's decision to overrule *Rahman v Detroit Bd of Ed*, 245 Mich App 103; 627 NW2d 41 (2001), is also dictum.

Although both parties stated at oral argument that Smitter was not a volunteer firefighter for purposes of applying MCL 418.354(15) because he was paid, this Court is not bound by the parties' concessions regard-

[1] MCL 418.101 *et seq*.

ing the law. See, e.g., *Union Guardian Trust Co v Zack*, 274 Mich 108, 113; 264 NW 309 (1936).[2] Accordingly, I believe that the majority errs by relying solely on the parties' concessions without considering more closely whether those concessions comport with the applicable statutory provisions.

In order to determine whether Smitter was a volunteer firefighter for purposes of MCL 418.354(15), we must look more closely at the language of that subsection:

> With respect to volunteer fire fighters, volunteer safety patrol officers, volunteer civil defense workers, and volunteer ambulance drivers and attendants who are considered employees for purposes of [the WDCA] pursuant to section 161(1)(a),[3] the reduction of weekly benefits provided for disability insurance payments under subsection (1)(b) and (c) and subsection (11) may be waived by the employer. An employer that is not a self-insurer may make the waiver provided for under this subsection only at the time a worker's compensation insurance policy is entered into or renewed.

Importantly, MCL 418.354(15) provides that it applies to "volunteer fire fighters . . . who *are considered employees for purposes of* [*the WDCA*] *pursuant to section*

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[2] I recognize that the parties submitted this case under stipulated facts, including the fact that Smitter was a "paid part-time firefighter . . . ." However, as my subsequent analysis explains, a paid employee may nevertheless be a "volunteer" *as that word is used in MCL 418.354(15)*. Thus, my analysis engages in statutory interpretation to determine the meaning of "volunteer" as used in MCL 418.354(15). It is well established and universally accepted that statutory interpretation presents a *question of law*. See, e.g., *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). Accordingly, contrary to the majority's claim, this Court's common refusal to be bound by parties' concessions regarding the law clearly applies to this Court's interpretation of the meaning of "volunteer" as used in MCL 418.354(15).

[3] MCL 418.161(1)(a).

161(1)(a) . . . ." (Emphasis added.) MCL 418.161(1)(a), in turn, defines "employee" as "[a] person in the service of the state, a county, city, township, village, or school district, under any appointment, *or contract of hire*, express or implied, oral or written." (Emphasis added.) Thus, although MCL 418.354(15) refers to "volunteer fire fighters," in my view, subsection (15) applies to volunteer firefighters who are "under any . . . contract of hire," which may include *paid* firefighters.[4]

This Court addressed the "contract of hire" language in MCL 418.161(1) at length in *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561; 592 NW2d 360 (1999).[5] The *Hoste* majority first stated that the phrase "contract of hire" "connote[s] payment of some kind." *Id.* at 574-575. The majority supported that conclusion by noting that the Legislature "designed worker's compensation to be a safety net to provide '*income maintenance* for persons who have met misfortune or whose *regular income source* has been cut off.' " *Id.* at 575, quoting *Franks v White Pine Copper Div*, 422 Mich 636, 654; 375 NW2d 715 (1985). *Hoste* explained that the "of hire" portion of the phrase distinguishes between gratuity or accommodation and a payment. Specifically, the major-

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[4] The idea that a "volunteer" firefighter may receive compensation is not a foreign concept in the realm of employment benefits. For example, the Employment Security Act, MCL 421.1 *et seq*., recognizes that "volunteer" firefighters may be paid and expressly excludes a "volunteer" fire fighter's wages, up to a defined amount, from consideration in determining his or her unemployment benefit rate. MCL 421.27(c)(2) ("The weekly benefit rate shall not be reduced under this subdivision for *remuneration received* for on-call or training services *as a volunteer firefighter*, if the volunteer firefighter receives less than $10,000.00 in a calendar year for services as a volunteer firefighter.") (emphasis added).

[5] I remain committed to the dissent in *Hoste*. See *Hoste*, 459 Mich at 579-586 (MARILYN KELLY, J., dissenting). However, because I conclude that the result in this case is the same under either the majority or dissenting opinions in *Hoste*, I will apply the majority opinion for purposes of this dissent.

ity stated that gratuity does not satisfy the "of hire" requirement because "worker's compensation provides benefits to those who have lost a source of income; it does not provide benefits to those who can no longer take advantage of a gratuity or privilege that serves merely as an accommodation." *Hoste*, 459 Mich at 575. Finally, *Hoste* summarized by stating that in order to satisfy the "of hire" requirement in MCL 418.161(1), "compensation must be payment intended as wages," which the majority defined as "real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer." *Id*. at 576.[6]

Applying the statutory language as written, in my view, Smitter satisfied the "contract of hire" requirement under the definition of "employee" as interpreted by the *Hoste* majority. Both parties agree that Smitter received wages as compensation for the time he spent working as a firefighter. Thus, I think that Smitter was a "volunteer fire fighter[] . . . who [is] considered [an] employee[] . . . pursuant to section 161(1)(a) . . . ." MCL 418.354(15). Accordingly, I think that the next provision of MCL 418.354(15) applies: "the reduction of weekly benefits provided for disability insurance payments under [MCL 418.354(1)(b)] . . . may be waived by the employer." Therefore, I think that Thornapple may

[6] I recognize that the version of MCL 418.161(1) in place at the time *Hoste* was decided expressly included volunteer firefighters in the definition of "employee," see *Hoste*, 459 Mich at 578, whereas the version of MCL 418.161(1) applicable in this case does not. However, because MCL 418.354(15) continues to refer to MCL 418.161(1)(a), I believe that *Hoste*'s analysis remains relevant. The change in statutory language and its impact on this case will be discussed in greater detail later in this dissent.

forgo the coordination provision in MCL 418.354(1)(b) in this case and instead provide Smitter with uncoordinated workers' compensation and disability insurance benefits.

Accepting that MCL 418.354(15) applies in this case and allows Thornapple to provide Smitter with uncoordinated benefits, the next question is how that conclusion affects the Second Injury Fund's (SIF) liability for workers' compensation benefits. That question is answered by reviewing the apportionment statute, MCL 418.372. Specifically, at the time of Smitter's injury, MCL 418.372(3) expressly stated that the allocation provisions in MCL 418.372 do "not apply to volunteer public employees entitled to benefits under section 161(1)(a)."[7] In my view, because Smitter was a "volunteer fire fighter" who was "considered [an] employee[] for purposes of [the WDCA] pursuant to section 161(1)(a)" under MCL 418.354(15), he was a "volunteer public employee[] entitled to benefits under section 161(1)(a)" for purposes of MCL 418.372(3). Thus, I think that MCL 418.372(3) applies and the apportionment provisions are inapplicable in this case. Indeed, the majority opinion acknowledges that this is the proper interpretation of the relevant statutory provisions. See *ante* at 139 n 42 ("[T]he *very same* employments permitted to waive the coordination of benefits under MCL 418.354(15) are specifically *excluded* from the apportionment of liability under the dual employment provisions pursuant to MCL 418.372(3).").

Because MCL 418.372 does not apply, this case returns to a simple application of MCL 418.351(1), which provides that "the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-

[7] MCL 418.372 was later amended by 2012 PA 83.

tax average weekly wage . . . .” In short, Thornapple is liable for *all* of Smitter’s workers’ compensation benefits, and the SIF has no liability.[8] Again, the majority agrees with this result. See *ante* at 139 n 42 (stating that when MCL 418.354(15) and MCL 418.372(3) apply, the SIF has “no reimbursement liability in a dual employment situation”). Thus, because the majority, in my view, erroneously relies exclusively on the parties’ concessions that Smitter was not a “volunteer fire fighter” for purposes of MCL 418.354(15) while otherwise agreeing that the employer of a “volunteer fire fighter” may elect to forgo coordination of benefits, I believe that the majority opinion reaches issues that need not be addressed in this case. Specifically, I do not think that it is necessary to decide whether benefits coordination is mandatory in employment circumstances not listed in MCL 418.354(15). Moreover, because *Rahman*, 245 Mich App 103, did not address an employment listed in MCL 418.354(15), I think that opinion is distinguishable and, thus, I believe the majority’s decision to overrule *Rahman* is dictum.

Finally, as mentioned previously in footnote 6 of this opinion, I recognize that the current version of MCL 418.161(1) differs from the version of MCL 418.161(1) in place at the time the plaintiff in *Hoste* was injured in 1990. Specifically, former MCL 418.161(1)(a), as amended by 1985 PA 103, explicitly addressed volunteer public employees, including “[m]embers of a volunteer fire department:”

> As used in this act, “employee” means:

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[8] Thornapple would be liable for Smitter’s “average weekly wage” based on his income from both jobs (General Motors and Thornapple). See MCL 418.371(2) (defining “average weekly wage” as “the weekly wage earned by the employee at the time of the employee’s injury *in all employment* . . . .”) (emphasis added).

> (a) A person in the service of the state, a county, city, township, village, or school district, under any appointment, or contract of hire, express or implied, oral or written. A person employed by a contractor who has contracted with a county, city, township, village, school district, or the state, through its representatives, shall not be considered an employee of the state, county, city, township, village, or school district which made the contract, when the contractor is subject to this act. . . . *Members of a volunteer fire department* of a city, village, or township *shall be considered to be employees* of the city, village, or township, and entitled to all the benefits of this act when personally injured in the performance of duties as members of the volunteer fire department. [Emphasis added.]

The current version of MCL 418.161(1)(a) no longer includes a specific reference to "volunteer" public employees; rather, the statute's discussion of those employments, including the reference to "[m]embers of a volunteer fire department," was removed from MCL 418.161(1)(a). However, several new subdivisions were added to the statute that seem to address "volunteer" public employees including "[o]n-call members of a fire department:"

> As used in this act, "employee" means:
>
> (a) A person in the service of the state, a county, city, township, village, or school district, under any appointment, or contract of hire, express or implied, oral or written. A person employed by a contractor who has contracted with a county, city, township, village, school district, or the state, through its representatives, shall not be considered an employee of the state, county, city, township, village, or school district that made the contract, if the contractor is subject to [the WDCA].
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> * * *
>
> (d) *On-call members of a fire department* of a county, city, village, or township *shall be considered to be employees* of

> the county, city, village, or township, and entitled to all the benefits of this act if personally injured in the performance of duties as on-call members of the fire department *whether the on-call member of the fire department is paid or unpaid*. . . .
>
> (e) *On-call members of a fire department* or an on-call member of a volunteer underwater diving team that contracts with or receives reimbursement from 1 or more counties, cities, villages, or townships *is entitled to all the benefits of this act* if personally injured in the performance of their duties as on-call members of a fire department or as an on-call member of a volunteer underwater diving team *whether the on-call member of the fire department or the on-call member of the volunteer underwater diving team is paid or unpaid*. [MCL 418.161(1) (emphasis added).][9]

Thus, the reference in MCL 418.354(15) to "volunteer fire fighters . . . who are considered employees for purposes of [the WDCA] pursuant to section 161(1)(a)," might be a relic reference to the former version of MCL 418.161(1)(a) that the Legislature failed to revise when it altered the language in MCL 418.161.[10]

Possibly bolstering this conclusion is the fact that MCL 418.372(3) was recently amended by 2012 PA 83. Before the 2012 amendment, MCL 418.372(3) used language similar to MCL 418.354(15). Former MCL 418.372(3) stated, "This section does not apply to *volunteer public employees* entitled to benefits *under section 161(1)(a)*." (Emphasis added.) However, as amended by 2012 PA 83, MCL 418.372(3) refers to the new subdivisions of MCL 418.161(1) that expressly address the various employments of "volunteer" public

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[9] The switch from references to "[m]embers of a volunteer fire department" to "[o]n-call members of a fire department" first occurred in 1994 PA 271.

[10] MCL 418.354(15) has not been amended since it was enacted by 1983 PA 159.

employees, including on-call members of a fire department. Specifically, MCL 418.372(3), as amended by 2012 PA 83, states, "This section does not apply to individuals entitled to benefits *under section 161(1)(d), (e), (f), (g), (h), (i), (j), and (o)*." (Emphasis added.) Thus, it appears that MCL 418.354(15) should be similarly revised to refer to "individuals entitled to benefits under MCL 418.161(1)(d), (e), (f), (g), (h), (i), (j), and (o)" rather than the current reference to "volunteer fire fighters . . . who are considered employees for purposes of this act pursuant to section 161(1)(a) . . . ."

Although evidence exists to support the conclusion that the reference in MCL 418.354(15) to MCL 418.161(1)(a) appears to be a legislative oversight in light of subsequent amendments to MCL 418.161(1), this Court must nevertheless attempt to apply the statutes as currently written. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."). See, also, *Flint & Fentonville Plank-Rd Co v Woodhull*, 25 Mich 99, 108 (1872) ("It is not consistent with legislative independence and dignity, that the courts should assert a right to sit in judgment upon legislative action, or to attribute to the legislature erroneous or oppressive conduct in the exercise of any of its proper and legitimate functions.").[11] Accordingly, while resorting to *Hoste*'s inter-

[11] I maintain the belief that, depending on the circumstances, it may be appropriate for this Court to conclude that a "clerical error in legislative drafting" occurred if a literal interpretation of the statute at issue would create an "absurd result." See, e.g., *Krajewski v Krajewski*, 420 Mich 729, 739 n 6; 362 NW2d 230 (1984). (CAVANAGH, J., dissenting). Applying the reference in MCL 418.354(15) to MCL 418.161(1)(a) does not, however, create an absurd result in this case.

pretation of "contract of hire" in order to determine how best to classify Smitter's employment with Thornapple for purposes of applying MCL 418.354(15) is the quintessential attempt to fit a square peg into a round hole, it is nevertheless my best effort at determining the most reasonable analysis of the current statutory language. And, because I believe that *Hoste* leads to the conclusion that Smitter was a "volunteer fire fighter" for purposes of MCL 418.354(15), I dissent from the majority's contrary conclusion and from its decision to overrule *Rahman*, 245 Mich App 103.

MCCORMACK, J. (*dissenting*). The majority holds that, in a dual-employment context, the Worker's Disability Compensation Act (WDCA)[1] mandates an employer's coordination of benefits, such that the Second Injury Fund[2] is required to reimburse an employer only for a pro rata share of the coordinated amount of weekly benefits. As a consequence, the majority prohibits employers and employees from freely entering into employment contracts under terms as they see fit. While I agree with the majority that this Court's role is to apply the terms of an unambiguous statute to the facts of a particular case, here the applicable sections of the WDCA defy an unambiguous reading. In fact, the relevant statutory provisions at issue do not even refer to one another, much less unambiguously require the majority's interpretation. Because I am generally reluctant to interpret ambiguous statutory terms to impede freedom of contract, and moreover because the majority's reading anomalously applies only to the minority of employers who hire part-time workers, while still

[1] MCL 418.101 *et seq*.

[2] See MCL 418.501(1).

allowing the great majority of employers to enter into the employment contracts they deem appropriate, I respectfully dissent.

I. BACKGROUND

When an employee working two jobs is eligible for WDCA wage-loss benefits, the employer in whose service the employee worked at the time of the injury (the injury employer) is responsible for paying the full amount of those benefits.[3] When the injury employer provided 80 percent or less of the injured employee's average weekly wage, however, the injury employer is ultimately responsible only for that portion of the wage-loss benefits that corresponds to the portion of the employee's average weekly wage that the injury employer provided.[4]

In this case, because Thornapple Township provided only 10.87 percent of Robert Smitter's average weekly wage, Thornapple was ultimately responsible for 10.87 percent of his wage-loss benefits: after paying the full amount of the workers' compensation wage-loss benefits up front, Thornapple claimed entitlement to reimbursement from the Second Injury Fund for 89.13 percent of the amount paid. Had Thornapple paid no other benefits to Smitter, there is no question, and there would have been no dispute, that Thornapple was entitled to recover from the Second Injury Fund 89.13 percent of the wage-loss benefits it paid Smitter. Case closed.

As it happens, however, Thornapple offered Smitter both workers' compensation wage-loss benefits and

[3] MCL 418.351(1).

[4] MCL 418.372(1)(b).

sickness and accident benefits, which he accepted.[5] Wage-loss benefits, of course, compensate an employee for wages lost as a result of an injury. Sickness and accident benefits, in contrast, cover out-of-pocket expenses associated with lifestyle changes necessitated by an injury.[6] The WDCA allows an injury employer to "coordinate" benefits when that employer also provides alternative benefits, such that an injury employer's initial obligation to pay workers' compensation wage-loss benefits can be reduced by the amount of other benefits the injury employer provides.[7] The statute explicitly states that disability benefits, such as those provided by Thornapple to its part-time firefighters, are among the benefits that can be coordinated.[8] The crucial question is whether they must be.

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[5] Smitter received $800 a week in sickness and accident benefits pursuant to the policy purchased by Thornapple. The benefit policy covered part-time firefighters. Thornapple Township hoped to incentivize this job to better recruit qualified candidates and therefore offered its employees disability benefits *along with* workers' compensation wage-loss benefits.

[6] Sickness and accident benefits are essentially disability benefits, and the parties do not dispute that these benefits are provided under a disability insurance policy as described in MCL 418.354(1)(b). MCL 500.3400(1) defines "policy of disability insurance" to "include[] any policy or contract of insurance against loss resulting from sickness or from bodily injury or death by accident, or both, including also the granting of specific hospital benefits and medical, surgical and sick-care benefits to any person, family or group . . . ." Depending on how the relevant insurance policy defines them, disability benefits may be used for in-home assistance, special transportation needs, uncompensated medical needs, or other consequences of an injury apart from lost income. Disability benefits are especially relevant in dangerous occupations like firefighting, in which employment risks are not limited to the lost *wages*, and the injured are likely to require compensation greater than that provided by wage replacement. More generally, there is a robust market for disability insurance.

[7] MCL 418.354(1).

[8] MCL 418.354(1)(b).

II. PLAIN LANGUAGE OF THE WDCA

The majority holds that MCL 418.354(1) *mandates* that employers coordinate benefits. I am not convinced. In relevant part, § 354(1) states that "the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under [MCL 418.361(2) and (3)] shall be reduced by these amounts[.]"[9] I agree with the majority that the sickness and accident policy Thornapple provided to Smitter is covered by § 354(1). The question is whether Thornapple was required to coordinate that coverage with the wage-loss benefits it also paid, or whether it could elect to do so. The majority believes that the Legislature's use of the word "shall" is dispositive.

I agree with the majority that "shall" generally implies a mandatory directive. But context can occasionally undercut the general principle that the ordinary usage applies.[10] In this case, the majority's conclusion is undercut by the text of the WDCA for three reasons.

First, MCL 418.354(1) specifically states that an *employer's* obligation may be reduced by coordination, not the Second Injury Fund's obligation or the employee's bottom-line benefits. This plain language must mean that the decision to coordinate rests with the employer and that the Second Injury Fund's liability is not implicated. If the Legislature intended mandatory benefit coordination it could have more clearly

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[9] MCL 418.354(1).

[10] "'Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' See D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402-403 (1992) ('shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ('[C]ourts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa.')" *Gutierrez de Martinez v Lamagno*, 515 US 417, 432-433 n 9; 115 S Ct 2227; 132 L Ed 2d 375 (1995).

accomplished that in any number of ways. Most simply, it could have omitted the phrase "the employer's obligation to pay or cause to be paid" from the final sentence of MCL 418.354(1). The sentence would then read: "Except as otherwise provided in this section, . . . weekly benefits other than specific loss benefits under [MCL 418.361(2) and (3)] shall be reduced by these amounts[.]"[11] This language would better support the majority's reading because it would be obvious that the Legislature's intent was to ensure that the employee's wage-loss benefits were reduced when the employee also received additional benefits.

Second, MCL 418.372(1)(b) unambiguously sets forth the formula by which the Second Injury Fund's liability is determined. In that subsection, which provides that the Second Injury Fund "is separately but dependently liable for the remainder of the weekly benefits," and "shall reimburse the insurer or self-insurer quarterly for the second injury fund's portion of the benefits due the employee or the employee's dependents," no reference is made to the possibility of benefit coordination or to MCL 418.354 more specifically.[12] There is no language whatsoever to suggest that the phrase "due the employee" in MCL 418.372(1)(b) should be read to incorporate the ability or obligation to coordinate in MCL 418.354. The converse is also true; while the Legislature refers explicitly to the "second injury fund" and its liabilities in the text of MCL 418.372(1)(b), the absence of any reference to the Second Injury Fund in MCL 418.354 is meaningful. The Legislature could have connected the two sections, but chose not to do so.[13]

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[11] See MCL 418.354(1).

[12] MCL 418.372(1)(b).

[13] The majority argues that the Legislature's use of the word "obligation," as opposed to "liability," in MCL 418.354(1) is a meaningful

Third, the majority argues that MCL 418.354(15), the subsection governing volunteer firefighters, supports its position that benefits coordination is mandatory. The statute states that for volunteer firefighters:

> [T]he reduction of weekly benefits provided for disability insurance payments under subsection (1)(b) . . . may be waived by the employer. An employer that is not a self-insurer may make the waiver provided for under this subsection only at the time a worker's compensation insurance policy is entered into or renewed.[14]

As does MCL 418.354(1), this provision refers explicitly to the employer and decisions made by the employer, not the liability of the Second Injury Fund or the employee's bottom-line benefits. The majority believes that MCL 418.354(15) delineates the only exception to mandatory coordination. But this reading neglects the great majority of cases in which there is no second employer, as well as those in which the injury employer provides more than 80 percent of the injured employee's average weekly wage. Nothing will prevent those employers from choosing to provide uncoordinated benefits to their injured employees, even if the injured employees are not volunteer firefighters or other first responders. Instead, those employers are free to contract as they see fit with respect to benefits in accordance with their employment needs.

This point warrants emphasis: under the majority's analysis MCL 418.354(15) is implicated only in a dual-employment context in which the injury employer pro-

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reference to the third sentence of MCL 418.372(1)(b), which states that "[t]he insurer . . . has the obligation to pay the employee . . . at the full rate of compensation." Again, I believe that if the Legislature had intended for the two sections to be read together, it would have indicated that explicitly instead of using such cryptic means.

[14] MCL 418.354(15).

vides 80 percent or less of the injured employee's average weekly wage and can, therefore, request reimbursement from the Second Injury Fund. But MCL 418.354 on its face plainly applies to *all* cases, not just those in which the Second Injury Fund is dependently liable. If an employer may *only* waive benefit coordination under the volunteer firefighter provision of MCL 418.354(15), what import would MCL 418.354 have if Thornapple had been Smitter's only employer, or if General Motors had been the injury employer? In either case, the injury employer surely could have chosen to pay its employees whatever benefits it deemed appropriate *without* regard to MCL 418.354(1) or (15).

To read MCL 418.354(1) as imposing a *requirement* on a subset of injury employers in dual-employment cases renders that supposedly mandatory language meaningless in a majority of situations.[15] The majority's analysis requires us to assume away the textual clues that undercut application of the common understanding of the verb "shall" and to overlook the fact that, under the majority's interpretation, the language of MCL 418.354(1) is inapplicable to most cases. The plain language of the WDCA does not make that analysis easy. If the touchstone of our analysis remains the plain language of the statute, I would refrain from reading such particular intent into MCL 418.354(1) and (15) because there is no clear indication that this is what the Legislature intended.[16]

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[15] "It is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). It seems irrational that the Legislature would announce a mandatory directive that would apply only in a minority of situations, and I presume that the Legislature acts thoughtfully and rationally.

[16] "[A] court should refrain from speculating about the Legislature's intent beyond the words employed in the statute." *In re MCI*, 460 Mich at 414-415.

III. THE PUBLIC POLICY ARTICULATED BY THE LEGISLATURE

The majority's view that the statute requires coordination of benefits by injury employers who provide less than 80 percent of an employee's wage in dual-employment contexts (the minority injury employer) is undermined by the many contexts in which that rule is not enforceable. As previously noted, single employers and injury employers who are responsible for more than 80 percent of an employee's weekly wage will never seek reimbursement from the Second Injury Fund and are thus free to contract with their employees to provide insurance as they deem appropriate. In addition, the non-injury employer in a dual-employment situation may provide the injured employee with an insurance benefit without triggering any obligation to coordinate before seeking reimbursement from the Second Injury Fund because the statute only addresses the coordination of benefits provided by the "same employer."[17] It is hard to imagine that the Legislature intended to prevent benefits beyond wage-loss benefits in those cases where there is a minority injury employer in a dual-employment situation. It makes far more sense that the Legislature intended to give an employer providing both wage-loss and accident benefits the possibility of reducing its wage-loss obligation, if that employer deemed it appropriate.

To reiterate, MCL 418.354(1)(b) only directs the "same employer" to coordinate benefits. The fact that coordination is not required when an injured employee receives an additional benefit from a different employer is evidence that that the Legislature did not intend this

[17] MCL 418.354(1)(b). The injury employer would still seek reimbursement if they provided 80 percent or less of the employee's wage, but the non-injury employer's disability benefit would never be coordinated with that amount.

section to limit the amount of benefits an employee *received*.[18] If Smitter had received accident insurance from General Motors, there would have been no dispute that Thornapple would have been responsible for paying full wage-loss benefits and also been entitled to a full reimbursement by the Second Injury Fund. This limitation of the coordination provision to the benefits provided by the injury employer is yet further evidence that coordination is not mandated before reimbursement is sought. The Legislature's decision *not* to require coordination of benefits among employers implies that the Legislature *did* anticipate that some employees would recover benefits apart from the weekly wage-loss benefits and did not see any need to address that issue.

Furthermore, permitting a minority injury employer to coordinate instead of mandating coordination does not result in greater costs being passed on to the Second Injury Fund. Any minority injury employer in a dual-employment situation that might request reimbursement from the Second Injury Fund has these choices: (1) the employer could choose not to offer additional insurance benefits at all, (2) the employer could choose to offer additional benefits, and then coordinate those benefits so that it would have a lower wage-loss liability, or (3) the employer could choose to offer additional benefits and elect not to coordinate those benefits, paying the full wage-loss benefit in addition to the additional benefit. Notably, the minority injury employer's and the Second Injury Fund's liabilities are the same in the first and last scenarios, and both are lower in the second. The minority injury employer does not stand to gain financially from the Second Injury Fund under any option.

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[18] See MCL 418.354(1)(b).

According to the majority, a minority injury employer loses the right to full reimbursement by providing an additional insurance benefit. If the majority is correct, the Legislature must have intended to discourage employers who are hiring part-time employees from providing incentives for those employees. Surely that narrow policy goal could have been accomplished without requiring the tenuous reading of the statutory language the majority proposes. But more fundamentally, there is no reason to suppose the Legislature sought to interfere with the prerogative of this subset of employers to enter into employment contracts and offer their employees whatever insurance benefits the employer and employee jointly elected. Respecting employment contracts seems especially important for employers trying to attract first responders in tough economic times. In the absence of any reason to worry that either the injury employer or the employee would be taken advantage of in their free market transaction, or that both would collude to take advantage of the Second Injury Fund—and such worries seem hard to imagine here—we should presume, barring legislative indication to the contrary, that the Legislature did not seek to regulate employment contract terms.

IV. CONCLUSION

In my view, the more natural reading of the statutory provisions at issue is one that holds that the decision to coordinate benefits rests solely with the injury employer and does not affect the reimbursement an injury employer may request from the Second Injury Fund in dual-employment cases. This understanding gives meaning to the statutory language limiting coordination to benefits paid by a single employer, avoids reading out the phrase "the employer's obligation" in MCL

418.354(1), avoids rendering the supposed mandate of the verb "shall" nugatory in a majority of employment situations, and would not punish or impede an employer seeking to recruit employees with employment terms that employers and employees deem desirable, especially for dangerous but important jobs like fighting fires.

Accordingly, I would affirm the decision of the Court of Appeals.

VIVIANO, J., took no part in the decision of this case.

In re ADAMS

Docket No. 144985. Argued April 11, 2013 (Calendar No. 7). Decided June 19, 2013.

The Judicial Tenure Commission (JTC) issued a formal complaint against Judge Deborah Ross Adams of the 3rd Circuit Court, alleging three counts of misconduct, including misrepresentations under oath, forgery and the filing of forged and unauthorized pleadings, and misrepresentations to the commission. The Supreme Court appointed the Honorable Donald G. Miller to act as master in the matter. After the hearing, Judge Miller found that 2 out of the 3 counts alleged in the JTC complaint were established by a preponderance of the evidence. With regard to count 3, Judge Miller found that 3 out of the 7 allegations of misrepresentations to the commission had been established by a preponderance of the evidence. After hearing oral arguments, the JTC adopted the master's findings with certain exceptions and concluded that respondent had committed judicial misconduct with regard to all three counts of the complaint in violation of MRPC 3.3(a)(1), MCR 9.104(A), MCR 9.208(B), and Canons 1 and 2 of the Code of Judicial Conduct. The JTC recommended that respondent be suspended without pay for 180 days and ordered to pay costs in the amount of $8,498.40.

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices KELLY, ZAHRA, and VIVIANO, the Supreme Court *held*:

The Supreme Court affirmed the JTC's factual findings and conclusions of law. However, the JTC's recommendation of a 180-day suspension was rejected because the cumulative effect of respondent's misconduct warranted her removal from office.

1. Respondent made false statements under oath in Judge Brennan's courtroom when she repeatedly denied that she had called Judge Brennan's chambers while represented by counsel.

2. Respondent signed her former attorney's name on legal documents without her permission and filed those documents with the court, also without her permission. Respondent's assertion that she thought she had her former attorney's permission to sign the documents and file them with the court was not credible.

3. As found by the JTC, respondent misrepresented to the JTC that she had contacted Judge Brennan's chambers on only four occasions; that Judge Brennan's staff had never told her that it was improper for her to make calls to them while she was represented by counsel; and that her former attorney had given respondent permission to sign her former attorney's name on legal documents and file them with the court and that she had given her former attorney copies of those documents.

4. Applying the judicial-discipline recommendations set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (2000), the Supreme Court concluded that respondent engaged in a pattern or practice of calling Judge Brennan's chambers while represented after having been warned not to do so, signing her former attorneys' names to documents without their permission, testifying falsely under oath, and lying to both the JTC and the Supreme Court; that respondent's misconduct was prejudicial to the actual administration of justice; that respondent's lies to the JTC and the Supreme Court, as well as her signing of her former attorney's name on documents and filing them with the court without her former attorney's permission, were deliberate; and that respondent's false testimony under oath undermined the ability of the justice system to discover the truth of what occurred in this legal controversy. At least five out of the seven *Brown* factors weighed in favor of a more severe sanction.

5. Our judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As the focal point of the administration of justice, a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. Testifying falsely under oath, as respondent has been adjudged to have done, is conduct that is the antithesis of judicial integrity. The effectiveness of our judicial system is dependent upon the public's trust and confidence and when a judge testifies falsely under oath, the public's trust and confidence in that system can only be seriously eroded. Testifying falsely under oath is antithetical to the role of a judge who is sworn to uphold the law and seek the truth. When a judge testifies falsely under oath, he or she has failed to demonstrate in his or her personal affairs standards of conduct indispensable to a judge of this state and becomes unfit to sit in judgment of others.

6. Because at least five out of the seven *Brown* factors weighed in favor of a more severe sanction and because respondent testified falsely under oath—conduct which is entirely antithetical to the role of a judge who is sworn to uphold the law and to seek the

truth—and because respondent continues to deny any responsibility for her wrongdoing or show any indication of remorse for such wrongdoing, removal from office is warranted.

Removal from office ordered and, pursuant to MCR 9.205(B), respondent ordered to pay costs of $8,498.40.

Justice MCCORMACK, joined by Justice CAVANAGH, concurring in part and dissenting in part, agreed with the majority's adoption of the JTC's factual findings and conclusions of law. However, considering the entire factual context of the case, including the fact that none of respondent's misconduct carried over to the performance of her duties as a judicial officer, and according the JTC's recommendation considerable deference, Justice MCCORMACK would have adopted the JTC's recommended sanction of a 180-day suspension.

Paul J. Fischer and *Margaret N. S. Rynier* for the Judicial Tenure Commission.

Dettmer & Dezsi PLLC (by *Michael R. Dezsi*), and *Cyril C. Hall*, for Deborah Ross Adams.

Amicus Curiae:

Dickinson Wright PLLC (by *Dennis C. Kolenda*), for the Michigan District Judges Association.

MARKMAN, J. The Judicial Tenure Commission (JTC) has recommended that respondent, 3rd Circuit Court Judge Deborah Ross Adams, be suspended without pay for 180 days and be ordered to pay costs in the amount of $8,498.40. Respondent has filed a petition asking this Court to reject that recommendation. We affirm the JTC's factual findings and conclusions of law, but conclude at the same time that it is necessary and appropriate to remove respondent from office for the remainder of her term. The evidence establishes that respondent: (a) committed perjury; (b) signed her former attorney's name on legal documents without the latter's permission and filed these documents also without such permission; and (c) made numerous misrepre-

sentations of fact under oath during the JTC proceedings. The cumulative effect of respondent's misconduct convinces this Court that respondent should not remain in judicial office, and we therefore remove her from such office. In addition, because respondent engaged in conduct involving "deceit or intentional misrepresentation," pursuant to MCR 9.205(B), we order respondent to pay costs of $8,498.40 to the JTC.

I. FACTS AND HISTORY

On April 17, 2012, the JTC filed Formal Complaint No. 89 against respondent, alleging three counts of misconduct. It asserted that respondent had engaged in: (a) "misrepresentations under oath;" (b) "forgery and filing of forged and unauthorized pleadings;" and (c) "misrepresentations to the commission." With regard to count one, the complaint asserted that while respondent was the defendant in a divorce case before Oakland Circuit Court Judge Mary Ellen Brennan, respondent repeatedly called Judge Brennan's chambers despite being advised each time by Judge Brennan's staff that such contact was improper while respondent was represented by counsel. At a subsequent hearing and while under oath, when Judge Brennan told respondent that she must stop calling her chambers, respondent denied ever doing so while she was represented by counsel. Respondent stated that she had her clerk call Judge Brennan's chambers on one occasion to determine if the time of the hearing could be changed. Judge Brennan's secretary, Kirsten Turner, testified that on March 15, 2011, she spoke to a woman who identified herself as Judge Adams. In response, respondent stated, "that's not correct." When Judge Brennan noted that respondent had previously stated

that she had her clerk call Judge Brennan's chambers, respondent denied ever having said that.

With regard to count two, the complaint alleged that after attorney Andra Dudley was released from representing respondent, respondent prepared a motion to set aside or modify the judgment of divorce, a supporting brief, and a notice of hearing, to all of which she signed Ms. Dudley's name without the latter's knowledge or permission and filed them with the court, also without such knowledge or permission.

With regard to count three, the complaint alleged that respondent falsely told the JTC that: (a) she had been walking away from counsel's table, on her way out of the courtroom, when Judge Brennan asked respondent about calling her chambers the day before; (b) she had only contacted Judge Brennan's chambers on four occasions; (c) nobody in Judge Brennan's chambers had told her that it was improper for her to call Judge Brennan's chambers while she was represented by counsel; (d) she had Ms. Dudley's permission to file pleadings on Ms. Dudley's behalf; (e) she also had permission to sign Ms. Dudley's name to the motion that was filed on May 5, 2011; (f) she had provided a copy of the motion to Ms. Dudley; and (g) she had provided Ms. Dudley with notice of the hearing date for the motion.

Also on April 17, 2012, the JTC filed a request for the appointment of a master. Nine days later on April 26, 2012, this Court appointed the Honorable Donald G. Miller as the master, and a hearing began on September 11, 2012, and concluded on September 17, 2012. On October 9, 2012, the master filed his findings of fact and conclusions of law with the JTC. With regard to count one, the master concluded that "the Examiner has, by a

preponderance of the evidence,[1] shown that Respondent did in fact violate MCL 750.423 by making false statements under oath."[2] With regard to count two, the master concluded that there was insufficient evidence to find that respondent violated the forgery statute, MCL 750.248,[3] or the uttering and publishing statute, MCL 750.249,[4] because there was no evidence presented to indicate that respondent had acted with an "intent to

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[1] See MCR 9.211 ("The examiner shall present the evidence in support of the charges set forth in the complaint, and at all times shall have the burden of proving the allegations by a preponderance of the evidence.").

[2] MCL 750.423(1) provides:

> Any person authorized by a statute of this state to take an oath, or any person of whom an oath is required by law, who willfully swears falsely in regard to any matter or thing respecting which the oath is authorized or required is guilty of perjury, a felony punishable by imprisonment for not more than 15 years.

[3] MCL 750.248(1) provides:

> A person who falsely makes, alters, forges, or counterfeits a public record, or a certificate, return, or attestation of a clerk of a court, register of deeds, notary public, township clerk, or any other public officer, in relation to a matter in which the certificate, return, or attestation may be received as legal proof, or a charter, will, testament, bond, writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or an order, acquittance of discharge for money or other property, or a waiver, release, claim or demand, or an acceptance of a bill of exchange, or indorsement, or assignment of a bill of exchange or promissory note for the payment of money, or an accountable receipt for money, goods, or other property with intent to injure or defraud another person is guilty of a felony punishable by imprisonment for not more than 14 years.

[4] MCL 750.249(1) provides:

> A person who utters and publishes as true a false, forged, altered, or counterfeit record, instrument, or other writing listed in [MCL 750.248] knowing it to be false, altered, forged, or counterfeit with intent to injure or defraud is guilty of a felony punishable by imprisonment for not more than 14 years.

injure or defraud" when she signed Ms. Dudley's name on the legal documents and filed them with the court.

Finally, with regard to count three, the master concluded that there was sufficient evidence to support three out of the seven allegations of misrepresentations to the JTC. Specifically, the master concluded that there was sufficient evidence that respondent had lied to the JTC about: (a) having contacted Judge Brennan's chambers on only four occasions; (b) having never been told by Judge Brennan's staff that it was improper for her to call them while she was represented by counsel; and (c) having Ms. Dudley's permission to affix her signature to the motion filed on May 5, 2011. But the master found that there was insufficient evidence to find that respondent had lied about: (a) having been walking out of Judge Brennan's courtroom when Judge Brennan asked her about calling her chambers the day before; (b) having Ms. Dudley's permission to file pleadings on her behalf; (c) having supplied a copy of the motion to Ms. Dudley; and (d) having supplied a copy of the notice of the hearing to Ms. Dudley.

The JTC then held a hearing on December 3, 2012, and issued its decision and recommendation for discipline on December 28, 2012. The JTC adopted the master's findings except, unlike the master, the JTC determined that: (a) "Respondent could not possibly believe that she had Ms. Dudley's permission to sign and file pleadings under Ms. Dudley's signature;" and (b) "Respondent failed to provide Ms. Dudley with a copy of the May 5, 2011 Motion and accompanying documents." The JTC concluded that the examiner had proven by a preponderance of the evidence all the allegations in counts one and two[5] of the complaint and,

[5] The JTC determined that the master had erred by analyzing the allegations in count two of the complainant under the standards set forth

with a single exception, all the allegations in count three of the complaint.[6] It concluded that respondent violated MRPC 3.3(a)(1), MCR 9.104(A), MCR 9.208(B), and Canons 1 and 2 of the Code of Judicial Conduct. In determining an appropriate sanction, the JTC considered the seven factors that this Court set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (2000). Finding that respondent's misconduct implicated at least five of the seven *Brown* factors and recognizing that this Court has held that "[l]ying under oath is the antithesis of judicial integrity," *In re James*, 492 Mich 553, 582; 821 NW2d 144 (2012) (MARKMAN, J.,

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in the criminal statutes for forgery and uttering and publishing. That is, the master could have found that respondent signed Ms. Dudley's name on the motion and filed it without Ms. Dudley's permission without having to also find that respondent did this with an "intent to injure or defraud." We agree. We do not have to find that respondent violated a criminal statute to conclude that respondent engaged in judicial misconduct worthy of a sanction. See *In re Halloran*, 466 Mich 1219, 1220; 647 NW2d 505 (2002) ("[T]he Supreme Court has found a judge's conduct to violate the Code of Judicial Conduct without regard to whether criminal charges were filed, or even in cases in which a judge has been acquitted in criminal proceedings."). Similarly, respondent's contention that the JTC violated Michigan's 'separation of powers' doctrine, Const 1963, art 3, § 2, by charging respondent with felony violations is meritless. Although the JTC clearly does not possess the authority to bring criminal charges against a judge, it just as clearly *does* possess the authority to investigate and adjudicate the conduct of judges, including conduct that may also involve violations of criminal laws. See Canon 2(B) of the Michigan Code of Judicial Conduct ("A judge should respect and observe the law."); *In re Mikesell*, 396 Mich 517, 528; 243 NW2d 86 (1976) ("The proceedings of the [JTC] are investigatory and advisory and are not binding upon the Supreme Court. No determination of criminal guilt is made, but merely a determination of the [JTC's] view of the conformity of the subject of investigation to the state constitutional standards for judicial office. Similarly, the resulting Order of the Supreme Court does not operate as a sanction for criminal guilt but as a judgment on judicial fitness.") (quotation marks and citation omitted).

[6] The JTC did not address the allegation that respondent lied to the JTC about having been walking away from counsel's table on her way out of the courtroom when Judge Brennan asked respondent about calling her chambers the day before.

concurring in part and dissenting in part), the JTC recommended that respondent be suspended without pay for 180 days and be ordered to pay costs in the amount of $8,498.40.[7]

II. STANDARD OF REVIEW

Const 1963, art 6, § 4 provides that "[t]he supreme court shall have general superintending control over all courts." Const 1963, art 6, § 30(2) provides that

> [o]n recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice.

MCR 9.225 provides that "[t]he Supreme Court shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission, or modify the recommendations by imposing a greater, lesser, or entirely different sanction." This Court reviews de novo the JTC's factual findings, conclusions of law, and disciplinary recommendations. *In re James*, 492 Mich at 560; *In re Halloran*, 466 Mich 1219, 1219; 647 NW2d 505 (2002).[8]

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[7] MCR 9.205(B) provides:

> In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

[8] "[I]t is the JTC's, not the master's conclusions and recommendations that are ultimately subject to review by this Court." *In re Chrzanowski*, 465 Mich 468, 481; 636 NW2d 758 (2001).

III. ANALYSIS

A. FACTUAL FINDINGS

After reviewing the record and hearing oral arguments, we agree with and adopt the factual findings of the JTC.

1. COUNT ONE: PERJURY

The master and the JTC both found that respondent made false statements under oath in Judge Brennan's courtroom. We agree. While respondent was under oath in Judge Brennan's courtroom, Judge Brennan asked respondent whether she had called Judge Brennan's chambers on the preceding day, March 15, 2011, and respondent said that she had not.[9] Indeed, respondent repeatedly denied ever having called Judge Brennan's chambers while she was represented by counsel.[10] How-

[9] Respondent argues that she was not under oath when she was asked about the telephone call. We agree with the master and the JTC that she was. It is undisputed that respondent was placed under oath near the beginning of the proceedings on March 16, 2011, while she was at counsel's table. Respondent remained at counsel's table during the entire proceeding, she did not leave the courtroom, and she was not at any point told that she was no longer under oath. Indeed, when respondent indicated that she had not spoken to anyone in Judge Brennan's chambers the day before, Judge Brennan had her secretary, Kirsten Turner, brought into the courtroom and made it a point to place Ms. Turner under oath before asking Ms. Turner whether someone had called Judge Brennan's chambers the day before and identified herself as Judge Adams. On the basis of this evidence, we agree with the master and the JTC that respondent was-- and should have known that she was-- still under oath when she repeatedly denied having called Judge Brennan's chambers.

[10] Specifically, respondent stated at one point or another in this regard, "I didn't call your chambers directly;" I did not call your staff directly;" "I did not call anyone direct -- your chambers directly;" "Again, I did not call your staff -- your chambers directly;" "I did not call anyone -- your chambers;" "I did not have any conversation;" "I did not call your

ever, both Judge Brennan's secretary, Kirsten Turner, and her clerk, Ryan Mathews, testified that respondent had called Judge Brennan's chambers on several occasions while represented by counsel. Respondent herself now admits that she did call Judge Brennan's chambers on March 15, 2011.

Respondent argues, however, that she did not intentionally or willfully make any false statements because when she denied calling Judge Brennan's chambers, she was under the impression that she was simply denying that she had tried to speak directly with Judge Brennan. This is belied by the fact that respondent did not just say, "I didn't call your chambers directly," but also repeatedly said, "I did not call your staff directly," and then, after Judge Brennan asked her, "Are you telling me that you did not have a conversation with anybody from my staff, from my office yesterday," respondent said, "I did not call anyone," "I did not have any conversation," and, finally, when Judge Brennan told respondent, "do not call my chambers[;] [d]on't call members of the staff, don't speak with clerks, don't speak with legal secretaries, don't speak with research attorneys, anybody who's a member of the staff; it's not appropriate," respondent replied, "the only time I've called your chambers was when I was unrepresented." At this point in the colloquy it was perfectly clear that Judge Brennan was asking respondent if she had called and talked to any of her staff and respondent clearly denied that she had ever done so while represented by counsel.

After this occurred, Judge Brennan had her secretary, Kirsten Turner, brought into the courtroom and

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chambers directly;" "The only time I've called your chambers was when I was unrepresented;" "I haven't admitted to speaking with anyone;" "maybe someone from my court called but I did not call;" "I did not call here;" and "I've never called your chambers directly."

placed under oath, and when Ms. Turner testified that respondent had called the day before, respondent replied, "That is not correct." Again, at this point, respondent had to have known that she was being asked whether she had called and spoken to Judge Brennan's secretary, not just whether she had tried to call Judge Brennan herself, and yet respondent still refused to admit that she had called and spoken to Judge Brennan's secretary. Respondent also testified falsely about whether her clerk had called Judge Brennan's chambers. Respondent first said that her clerk had called Judge Brennan's chambers to see if the hearing could be rescheduled, but then about one minute later denied ever having said that. On the basis of this evidence, we agree with and adopt the JTC's finding that respondent made false statements under oath in Judge Brennan's courtroom.[11]

2. COUNT TWO: FORGERY

The JTC found that respondent signed her former attorney's (Ms. Dudley's) name on legal documents (motion, brief, praecipe, and notice of hearing) without her permission and filed these documents with the court, also without her permission. We agree. While respondent admits that she signed Ms. Dudley's name on the documents and filed them with the court, she asserts that she believed that she did have Ms. Dudley's permission to do so. Ms. Dudley testified that she did not sign the documents and she did not give respondent permission to sign or file the documents on her behalf. Indeed, she testified that she had never given respon-

[11] In addition to testifying falsely under oath in Judge Brennan's courtroom, we observe that respondent also treated Judge Brennan in a highly disrespectful manner. Respondent repeatedly interrupted Judge Brennan, spoke over her, and clearly sought to evade her questions.

dent permission to sign her name on any documents. She also testified that respondent did not send her a copy of the legal documents. Finally, Ms. Dudley testified that when she became aware that the documents had been signed and filed without her permission by way of a telephone call from respondent's now ex-husband's attorney, she emailed respondent, stating:

> I did not receive any contact from you this week and hopefully you did not file any pleadings with my name without me first reviewing them and without my permission.

We agree with the JTC that respondent's contention that she believed that she had Ms. Dudley's permission to sign Ms. Dudley's name on the legal documents and file them with the court is not credible. To begin with, Ms. Dudley was not even representing respondent when respondent signed and filed the documents under Ms. Dudley's name. The judgment of divorce expressly released Ms. Dudley from any further representation of respondent, and respondent was well-aware that Ms. Dudley was no longer representing her as evidenced by her May 5, 2011 email stating, "In the unlikely event the issue is not resolved tomorrow, I will retain an appellate person to handle the matter."

In addition, after respondent signed Ms. Dudley's name on the legal documents and filed them, respondent sent Ms. Dudley an email stating, "I tried contacting you earlier this week to obtain permission to file a quick pleading on my behalf under your name."[12] Respondent would not have tried to contact Ms. Dudley to

[12] Respondent argues that the admission of these emails violates the attorney-client privilege. We disagree. To begin with, as already discussed, when these emails were sent, Ms. Dudley was no longer respondent's attorney. Furthermore, these emails do not contain "confidential communications between . . . a client and [her] attorney," *Schaibly v*

obtain her permission to sign and file the documents under Ms. Dudley's name if she already had Ms. Dudley's permission to do so. Respondent also did not indicate in any manner, on any of the documents, that she was signing Ms. Dudley's name with her permission. Finally, as discussed above, Ms. Dudley testified that she had never given respondent permission to sign her name or file documents on her behalf.[13] On the basis of this evidence, we agree with the JTC that respondent signed Ms. Dudley's name on legal documents absent Ms. Dudley's permission and filed these documents with the court, also without Ms. Dudley's permission.

3. COUNT THREE: MISREPRESENTATIONS

Both the master and the JTC found that respondent made factual misrepresentations to the JTC. We agree. Specifically, both the master and the JTC found that respondent lied to the JTC about: (a) having contacted Judge Brennan's court on only four occasions; (b) having never been told by Judge Brennan's staff that it was improper for her to make calls to them while she was represented by counsel; and (c) having Ms. Dudley's permission to affix her signature to the motion filed on May 5, 2011. We agree.

Judge Brennan's secretary, Kirsten Turner, testified that there were between five to fifteen occasions on which respondent called Judge Brennan's chambers and she (Kirsten Turner) answered the telephone. In

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Vinton, 338 Mich 191, 196; 61 NW2d 122 (1953), made "for the purpose of obtaining [or giving] legal advice," *Alderman v People*, 4 Mich 414, 423 (1857).

[13] Respondent's former attorney, Janice Burns, testified that respondent had also signed Ms. Burns' name on a motion without her permission, filed the motion without her permission, and never provided her with a copy of the motion.

addition, Judge Brennan's clerk, Ryan Matthews, testified that there were between six to eight occasions on which respondent called Judge Brennan's chamber and he (Ryan Turner) answered the telephone. Both Ms. Turner and Mr. Matthews also testified that when respondent called while she was represented, they told her that she had to call her attorney and have her attorney call the office. On the basis of this evidence, we agree with and adopt the master's and JTC's findings that respondent lied to the JTC about having contacted Judge Brennan's court on only four occasions and having never been told by Judge Brennan's staff that it was improper for her to call them while she was represented by counsel. And, for the reasons already discussed with regard to count two, we agree with and adopt the master's and JTC's finding that respondent lied to the JTC about having Ms. Dudley's permission to affix her signature to the motion filed on May 5, 2011.

The JTC also found that respondent lied to the JTC about: (a) having Ms. Dudley's permission to file pleadings on her behalf; (b) having supplied a copy of the motion to Ms. Dudley; and (c) having supplied a copy of the notice of the hearing to Ms. Dudley. We agree. As already discussed above with regard to count two, Ms. Dudley testified that she never gave respondent permission to file pleadings on her behalf and respondent never supplied her with a copy of the motion or the notice of the hearing. Respondent's former attorney, Ms. Burns, testified that respondent had done the same thing to her-- signed her name on a motion without her permission, filed the motion without her permission, and never provided her with a copy of the motion. After respondent signed Ms. Dudley's name on the legal documents and filed them, respondent sent Ms. Dudley an email stating, "I tried contacting you earlier this week to obtain permission to file a quick pleading on my

behalf under your name." This email demonstrates that respondent was aware that she did not have Ms. Dudley's permission to file the pleading under her name at the time that she filed it. Ms. Dudley testified that she did not know that respondent had filed pleadings under her name until respondent's now ex-husband's attorney, William Brukoff, called her to discuss the pleadings. At this point, Ms. Dudley asked Mr. Brukoff to send her copies of the pleadings, and he did. According to Ms. Dudley, the only copies of the pleadings that she received were the ones sent to her by Mr. Brukoff. On the basis of this evidence, we agree with and adopt the JTC's findings that respondent lied to the JTC about: (a) having Ms. Dudley's permission to file pleadings on her behalf; (b) having supplied a copy of the motion to Ms. Dudley; and (c) having supplied a copy of the notice of the hearing to Ms. Dudley.

In addition to the factual misrepresentations identified by the JTC, we find that respondent also testified falsely about several other matters of varying significance. In one instance, respondent testified that she "didn't have control over scheduling" the March 16th hearing, and that she did not find out about this hearing until late on March 15th. However, Mr. Matthews testified that both parties were required to consent to the hearing date, and Ms. Dudley testified that she had told respondent about the March 16th hearing as early as March 11th, but no later than March 14th. Respondent also testified that she had never referred to herself as "Judge Adams" when she called Judge Brennan's chambers. Yet Mr. Matthews testified that "the majority of time[s]" that respondent called, she had referred to herself in this manner. Finally, respondent testified that she sent the May 5th email to Ms. Dudley about how she had tried to contact Ms. Dudley to obtain her permission to file a pleading under Ms. Dudley's

name because she was "trying to give [Ms. Dudley] another opportunity to file the motion" and respondent "was busy and . . . needed [Ms. Dudley] to do it." However, given that the motion had already been filed by respondent at the time this email was sent, it is clear that respondent did not send the email for this purpose.

B. CONCLUSIONS OF LAW

The JTC concluded that respondent violated MRPC 3.3(a)(1), MCR 9.104(A), MCR 9.208(B), and Canons 1 and 2 of the Code of Judicial Conduct. After reviewing the record and hearing oral arguments, we agree with and adopt the JTC's conclusions of law. Respondent violated MRPC 3.3(a)(1)[14] by testifying falsely under oath in Judge Brennan's courtroom and also by lying under oath during the JTC proceedings. She violated MCR 9.104(A)(1)-(5) by engaging in "conduct prejudicial to the proper administration of justice;" "conduct that exposes the legal profession or the court to obloquy, contempt, censure, or reproach;" "conduct that is contrary to justice, ethics, honesty, or good morals;" "conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;" and "conduct that violates a criminal law of a state or of the United States."[15] Respondent also violated MCR 9.104(A)(6) by making a "knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint," and she violated

[14] MRPC 3.3 provides, in pertinent part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]

[15] At the very least, respondent violated the perjury statute, MCL 750.423(1).

MCR 9.208 by lying to the JTC.[16] Respondent violated Canon 1 by failing to maintain "high standards of conduct so that the integrity and independence of the judiciary may be preserved."[17] Finally, respondent violated Canon 2 by failing to "avoid impropriety and appearance of impropriety" and by failing to "respect and observe the law."[18]

C. SANCTIONS

The purpose of judicial disciplinary proceedings is to "protect the people from corruption and abuse on the

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[16] MCR 9.208(B) (cooperation with investigation) provides, "A judge, clerk, court employee, member of the bar, or other officer of a court must comply with a reasonable request made by the commission in its investigation."

[17] Canon 1 provides:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

[18] Canon 2 provides, in pertinent part:

> 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.

part of those who wield judicial power." *In re Leon Jenkins*, 437 Mich 15, 28; 465 NW2d 317 (1991). "In determining appropriate sanctions, we seek to 'restore and maintain the dignity and impartiality of the judiciary and to protect the public.' " *In re James*, 492 Mich at 569, quoting *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998). We agree with the JTC's assessment of the *Brown* factors-- the considerations that this Court set forth to guide the formation of judicial-discipline recommendations.

The first *Brown* factor states that "misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct." *In re Brown*, 461 Mich at 1292. As the JTC explained, "Respondent's acts of calling Judge Brennan's chambers while represented, after Respondent had been warned not to do so, and her repeated unauthorized signing of her attorneys' names, Ms. Burns and Ms. Dudley, to various documents during the course of Respondent's divorce constituted a pattern and practice of misconduct during that period." In addition, respondent engaged in a pattern or practice of testifying falsely. To begin with, respondent repeatedly testified falsely under oath in Judge Brennan's courtroom. Respondent did not just *mistakenly* state that she had not called Judge Brennan's chambers on March 15, 2011. Instead, she repeatedly and quite vehemently denied ever calling Judge Brennan's chambers while she was represented by counsel. Further, she lied to the JTC about a variety of different matters, such as the number of times she had called Judge Brennan's chambers, whether anybody in Judge Brennan's chambers had told her that it was improper for her to call there while she was represented by counsel, whether she had Ms. Dudley's permission to sign her name and file pleadings on her behalf, whether she had provided a copy of the motion and notice of hearing to Ms. Dudley,

when she was notified about the March 16th hearing, whether she referred to herself as "Judge Adams" when she called Judge Brennan's chambers, and why she had sent the May 5th email to Ms. Dudley. And now, respondent continues to lie to this Court about the very same matters. She continues to shirk any responsibility for her wrongdoings or express any indication of remorse. Although she now admits that she did call Judge Brennan's chambers, she claims that she did not intentionally testify falsely under oath when she vehemently and repeatedly denied calling Judge Brennan's chambers because she simply misunderstood Judge Brennan's questions. We believe this is disingenuous. As both the master and the JTC, and now this Court, have each concluded, this excuse is wholly unbelievable given the reality of the exchange that took place between Judge Brennan and respondent. Respondent lied to Judge Brennan, lied to the JTC, lied to the master, and lied to this Court. Therefore, respondent did not just engage in an "isolated instance of misconduct." As Justice YOUNG offered in *In re Noecker*:

> Where a respondent judge readily acknowledges his [or her] shortcomings and is completely honest and forthcoming during the course of the Judicial Tenure Commission investigation, . . . the sanction correspondingly can be less severe. However, where a respondent is not repentant, but engages in deceitful behavior during the course of a Judicial Tenure Commission disciplinary investigation, the sanction must be measurably greater. [*In re Noecker*, 472 Mich 1, 18; 691 NW2d 440 (2005) (YOUNG, J., concurring).]

The second *Brown* factor states that "misconduct on the bench is usually more serious than the same misconduct off the bench." *Id.* Again, we agree with the JTC that although there is no evidence that respondent committed misconduct on the bench, she did "attempt[] to leverage her position as a [Wayne County Circuit

Court] judge in order to obtain special treatment not available to other non-judicial litigants." Despite being told by her attorney that Judge Brennan's staff stated that the March 16, 2011 hearing could not be rescheduled, respondent took it upon herself to personally call Judge Brennan's chambers in an attempt to reschedule the hearing. In addition, although respondent's misconduct did not occur while she herself was on the bench, she did repeatedly testify falsely under oath in a courtroom, with all the gravity that such a venue should communicate, especially to a judge, in response to questions asked of her by a judge on the bench.

The third *Brown* factor states that "misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety." *Id*. at 1293. We agree with the JTC that respondent's misconduct was prejudicial to the actual administration of justice. Indeed, there is not much, if anything, that is more prejudicial to the actual administration of justice than testifying falsely under oath. Similarly, the fourth *Brown* factor states that "misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does." *Id.* Again, we agree with the JTC that respondent's misconduct implicated the actual administration of justice.

The fifth *Brown* factor states that "misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated." *Id.* While respondent's lying under oath in Judge Brennan's courtroom may not have been premeditated, her continuingly disingenuous protestations before both the JTC and this Court of not having done this intentionally were most certainly premeditated, as were her other false statements before the JTC and this Court. That is,

although respondent's initial false testimony about never having called Judge Brennan's chambers while she was represented may have been "spontaneous," all of her lies thereafter were made after she had time to reflect upon these matters, i.e., after periods of "deliberations." Respondent deliberately lied about: (a) misunderstanding Judge Brennan's questions; (b) how many times she had called Judge Brennan's chambers; (c) whether anybody in Judge Brennan's chambers had told her that it was improper for her to call Judge Brennan's chambers while she was represented by counsel; (d) whether she had Ms. Dudley's permission to sign her name and file pleadings on her behalf; (e) whether she had provided a copy of the motion and notice of hearing to Ms. Dudley; (f) when she was notified about the March 16th hearing; (g) whether she referred to herself as "Judge Adams" when she called Judge Brennan's chambers; and (h) why she had sent the May 5th email to Ms. Dudley. Respondent's signing of Ms. Dudley's name on legal documents and filing them with the court without Ms. Dudley's permission was also premeditated.

The sixth *Brown* factor states that "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." *Id.* Testifying falsely under oath-- conduct in which respondent repeatedly engaged-- is certainly "misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy."

Finally, the seventh *Brown* factor states that "misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic

background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship." *Id*. There is no evidence that respondent did anything to "disparage the integrity of the system on the basis of a class of citizenship."

Despite finding that at least five of the *Brown* factors weigh in favor of more severe sanctions, and despite recognizing that testifying falsely under oath is the "antithesis of judicial integrity," *In re James*, 492 Mich at 582 (MARKMAN, J., concurring in part and dissenting in part), the JTC concluded that a suspension for 180 days without pay would constitute a sufficient sanction. We respectfully disagree. We do not believe that such a sanction would sufficiently address the harm done to the integrity of the judiciary.[19] Indeed, just last term this Court held that testifying falsely under oath "is

[19] Although we ultimately agree with the examiner that a 180-day suspension constitutes an insufficient sanction under the instant circumstances and that this Court possesses the authority to remove respondent from office even though the JTC only recommended the suspension, see MCR 9.225, we question the examiner's authority to argue before this Court that we should impose a sanction other than the one recommended by the JTC. MCR 9.202(G)(2)(a) expressly states that the examiner "shall not be present during the deliberations of the commission or participate in any other manner in the decision to file formal charges or to *recommend action by the Supreme Court* with regard to that judge[.]" (Emphasis added.) Although MCR 9.215 allows the examiner to file with the JTC a "statement of objections to the report of the *master*," we are unaware of any provision that allows the examiner to file with this Court a statement of objections to the *JTC*'s recommendation. (Emphasis added.) MCR 9.224(A) provides that the respondent may file with this Court "a petition to reject or modify the commission's recommendation," and MCR 9.224(B) provides that, if such a petition is filed with this Court, the commission must file with this Court "a brief supporting its finding." It says nothing about the examiner filing with this Court a brief supporting his personal objections to the commission's recommendation. Instead, it appears that after the JTC has made its findings and its recommendation and the respondent has filed a petition to reject or

entirely incompatible with judicial office and warrants removal." *In re Justin*, 490 Mich 394, 419; 809 NW2d 126 (2012). The "act of lying under oath categorically renders [a judge] unfit for office." *Id.* at 424.

> "Our judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As the "focal point of the administration of justice," a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others.
>
> Certainly, Judicial Tenure Commission proceedings are intended to be remedial, not penal. The vast majority of misconduct found by the Judicial Tenure Commission is not fatal; rather, it reflects oversight or poor judgment on the part of a fallible human being who is a judge. However, some misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.
>
> . . . Lying under oath, as the respondent has been adjudged to have done, makes him unfit for judicial office." [*Id.* at 424, quoting *In re Noecker*, 472 Mich at 17-18 (YOUNG, J., concurring).]

"Judges occupying the watchtower of our system of justice, should preserve, if not uplift, the standard of truth, not trample it underfoot or hide in its shady recesses." *In re Ferrara*, 458 Mich at 372. "The effectiveness of our judicial system is dependent upon the public's trust." *Id.* When a judge lies under oath, the public's trust and confidence in the judiciary is seriously eroded. *In re Noecker*, 472 Mich at 13; *In re Ferrara*, 458 at 364 ("When a judge's character and

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modify the commissioner's recommendation, the role of the examiner is to represent the JTC before this Court.

morals come into question not only do the people lose respect for him as a person, but worse, respect for the Court over which he presides is lost as well."). (Quotation marks and citation omitted.)

"The most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." *In re Brown*, 461 Mich at 1292. "[U]nexplained disparities in punishment cannot be countenanced by a system with hopes of maintaining the public's faith in its just and fair administration." *Id.* at 1293. This Court has consistently imposed the most severe sanction by removing judges for testifying falsely under oath. See *In re Ryman*, 394 Mich 637, 642-643; 232 NW2d 178 (1975); *In re Loyd*, 424 Mich 514, 516, 535-536; 384 NW2d 9 (1986); *In re Ferrara*, 458 Mich at 372-373; *In re Noecker*, 472 Mich at 3, 12-13; *In re Nettles-Nickerson*, 481 Mich 321, 322; 750 NW2d 560 (2008);[20] *In re Justin*, 490 Mich at 396-397; *In re James*, 492 Mich at 568-570.[21] Because we can discern no compelling reason to treat this case any differently, and because testifying falsely under oath is "antithetical to the role of a Judge who is sworn to uphold the law and seek the truth," *In re*

[20] See also *In re Servaas*, 484 Mich 634, 702; 774 NW2d 46 (2009) (MARKMAN, J., dissenting) ("Because respondent engaged in a prolonged and deliberate effort to mislead [the Supreme Court Administrative Office], the master, the JTC, and this Court . . . including and especially testifying falsely under oath, I believe the JTC has reasonably concluded that respondent should be removed from office."), an opinion joined by three justices. The majority did not express disagreement concerning the propriety of removing a judge from office for lying under oath, but rather disagreed with the minority that the respondent had been shown to be lying in this case.

[21] The only arguable exception of which we are aware is *In re Thompson*, 470 Mich 1347; 682 NW2d 477 (2004), in which the JTC and respondent reached a plea agreement for a 90-day suspension despite the complaint having included a generalized allegation that respondent had "demonstrated a lack of candor" before the JTC.

Ferrara, 458 Mich at 369 (quotation marks and citation omitted), and also because respondent has not demonstrated any apparent remorse for her misconduct and continues to deny responsibility for her actions, we believe that the only proportionate sanction is to remove respondent from office.

IV. CONCLUSION

We remove respondent from judicial office because we find removal necessary to restore and maintain the dignity and honor of the judiciary and, most importantly, to protect the public. In addition, because respondent engaged in conduct involving "deceit or intentional misrepresentation," pursuant to MCR 9.205(B), we order respondent to pay costs of $8,498.40 to the JTC. Pursuant to MCR 7.317(C)(3), the clerk is directed to issue the judgment order forthwith.

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

MCCORMACK, J. (*concurring in part, dissenting in part*). Respondent Judge Deborah Ross Adams engaged in conduct in her own tumultuous divorce proceedings that was inappropriate for any litigant, much less a judicial officer. The majority agrees with and adopts the factual findings and conclusions of law of the Judicial Tenure Commission (JTC), as well as the JTC's assessment of the controlling *Brown* factors.[1] Despite that, the majority rejects the JTC's recommended sanction of a 180-day suspension without pay, and has instead imposed the harshest sanction available, ordering that respondent be removed from office. I concur in all

[1] *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (2000).

aspects of the majority's careful opinion, with the exception of its analysis of the appropriate sanction in section III(C), from which I dissent.[2]

I agree with the majority that the JTC thoroughly and reasonably applied the *Brown* factors in this case. During the JTC proceedings, the examiner urged the JTC to recommend removal as the appropriate sanction, but the nine commissioners of the JTC unanimously determined that the sanction of a 180-day suspension without pay was adequate to address respondent's misconduct in this case. The JTC reasonably concluded that only five out of the seven *Brown* factors indicated that respondent's misconduct was more serious. I think it is also significant that the JTC concluded that respondent's actions were not part of a pattern or practice throughout her judicial career. Respondent's misconduct was not isolated to a single incident, but it was isolated in the sense that all of respondent's misconduct arose out of her personal divorce proceedings. It is clear from the record that those proceedings were contentious and emotionally difficult. Further, and not least of all, there is no allegation that respondent's misconduct carried over to the performance of her duties as a judicial officer. These facts do not justify or excuse respondent's misconduct in any way, but they do indicate that it is unlikely respondent will engage in similar misconduct in the future, or that her misconduct will infect the performance of her judicial duties, especially after enduring a 180-day suspension and the public proceedings in this case.

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[2] While I dissent from section III(C), I share the majority's concern about the propriety of the JTC examiner's conduct before this Court, as expressed in footnote 19 of the majority opinion.

For all these reasons, and considering the entire factual context of this case,[3] I am not persuaded that the JTC's unanimous recommendation that respondent be suspended for 180 days without pay is inadequate to serve the purposes of judicial discipline.[4] Thus, I would accord the JTC's recommendation considerable deference,[5] and adopt its recommended sanction.

CAVANAGH, J., concurred with MCCORMACK, J.

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[3] See *In re Kapcia*, 389 Mich 306, 311; 205 NW2d 436 (1973) (noting that Const 1963, art 6, § 30 contemplates that the JTC and this Court will make individualized determinations on the entire factual context).

[4] See *In re Chrzanowski*, 465 Mich 468, 487-488; 636 NW2d 758 (2001), citing *In re Hocking*, 451 Mich 1, 24; 546 NW2d 234 (1996); *Matter of Mikesell*, 396 Mich 517, 527; 243 NW2d 86 (1976).

[5] See *In re Brown*, 461 Mich at 1293; *Chrzanowski*, 465 Mich at 488. I agree with the majority that this Court is not bound by the JTC's recommendations but it is not clear to me in this case why we should replace the JTC's recommendation of 180 days with removal. If a lengthier suspension would be more appropriate, there is a lot of ground between 180 days and removal.

PETIPREN v JASKOWSKI

JASKOWSKI v PETIPREN

Docket Nos. 144142 and 144143. Argued November 14, 2012 (Calendar No. 6). Decided June 20, 2013.

Thomas J. Petipren brought an action in the Sanilac Circuit Court against Rodney Jaskowski, who was the police chief for the village of Port Sanilac, and the village of Port Sanilac, alleging that Jaskowski had assaulted and wrongfully arrested him for resisting and obstructing and disorderly conduct (Docket No. 144142). Jaskowski filed a separate suit against Petipren, alleging assault and negligent and intentional infliction of emotional distress. Petipren filed a counterclaim in the separate lawsuit, alleging claims of negligence, negligent infliction of emotional distress and intentional infliction of emotional distress against Jaskowski (Docket No. 144143). Petipren's band had been scheduled to perform at a fundraiser hosted by the village of Port Sanilac. Attendees complained about the style of music that was being performed before Petipren's performance. Jaskowski was called to the event, and a decision was made to stop the bands' performances. Petipren, who claimed that he was unaware of the decision to stop the performances, was warming up on his drum set when Jaskowski approached him. Jaskowski proceeded to arrest Petipren, but the parties' respective versions of the circumstances surrounding the arrest were completely different. Petipren alleged that he did not resist arrest, but that Jaskowski barged through the drum set and then pushed him off his seat and into a pole before pushing him off the stage and onto the grass where he was handcuffed. Jaskowski alleged that Petipren refused to stop playing, swore at him, struck him in the jaw, and then resisted arrest. Jaskowski filed motions for summary disposition pursuant to MCR 2.116(C)(7) in both cases on the basis that under MCL 691.1407(5), Petipren's claims were barred by governmental immunity. The court, Donald A. Teeple, J., denied Jaskowski's motions. Jaskowski appealed both orders and the Court of Appeals consolidated the appeals. The Court of Appeals, FITZGERALD and RONAYNE KRAUSE, JJ. (MURRAY, P.J., dissenting), affirmed. 294 Mich App 419 (2011). The Supreme Court granted leave to appeal. 491 Mich 913 (2012).

In an opinion by Justice KELLY, joined by Chief Justice YOUNG and Justice ZAHRA, the Supreme Court *held*:

As used in MCL 691.1407(5), the term "executive authority" encompasses all authority vested in the highest executive official of a level of government by virtue of his or her role in the executive branch, including the authority to engage in tasks that might also be performed by lower-level employees. Thus, the highest executive official of a level of government is entitled to absolute immunity under MCL 691.1407(5) even when performing acts that might otherwise be performed by a lower-level employee if those acts fall within the authority vested in the official by virtue of his or her role as an executive official.

1. Under MCL 691.1407(5), 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. To qualify for absolute immunity under the statute, the governmental employee must establish (1) the he or she is a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) that he or she acted within the scope of his or her judicial, legislative, or executive authority. In context, the words "executive authority" appear as a counterpart to the statute's reference to judicial and legislative authority, thereby referring to the division of power among the three branches of government. Thus, "executive authority" means all authority vested in the highest executive official of a level of government by virtue of his or her position in the executive branch. In arguing that the immunity provided for in the statute is limited to a specific subset of authority, the dissent departed from the statutory language, isolating the term "executive authority" from its context. The official's scope of authority is the extent or range of his or her delegated executive power. Although lower-level employees and high-ranking officials may possess some overlapping authority and engage in the same governmental conduct, the statute includes no indication that the immunity granted to high-ranking officials is not absolute when the official's authority encompasses conduct that might also be performed by a lower-level employee. An objective inquiry into the factual context is necessary to determine the scope of the actor's executive authority. Factors to consider include the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of

powers in the particular level of government. The inquiry does not include analysis of the actor's subjective state of mind.

2. In this case, Jaskowski had the statutory authority to conduct an arrest and his job duties included arresting offenders. There was no genuine issue of material fact with regard to whether Jaskowski possessed the authority to conduct an arrest. When the highest appointive executive official of a level of government acts within the authority vested in the official by virtue of his or her executive position and there are no questions of material fact, the official is entitled to absolute immunity as a matter of law. The circuit court erred when it denied Jaskowski's motions for summary disposition because it believed that Jaskowski had acted out of personal animus. The actor's intent has no bearing on the scope of his or her executive authority. The Court of Appeals erred when it construed the term "executive authority" as including only high-level tasks exclusive to an executive's position. Because the power to arrest fell within the scope of Jaskowski's executive authority, he was absolutely immune from tort liability stemming from Petipren's arrest, and the lower courts erred by denying Jaskowski's motions for summary disposition.

Reversed and remanded for entry of judgment in favor of Jaskowski in Docket No. 144142, for entry of judgment in favor of Jaskowski on Petipren's counterclaims in Docket No. 144143, and for further proceedings consistent with the Court's opinion.

Justice CAVANAGH, joined by Justice MARKMAN, dissenting, would have held that the word "executive" within the phrase "executive authority" refers to a specific subset of authority that a high-level executive must be acting within the scope of to obtain the benefit of absolute immunity from tort liability under MCL 691.1407(5). The majority's interpretation erroneously construed the phrase "executive authority" as coextensive with the phrase "executive branch." In doing so, it failed to give effect to every word in the statute and broadened the scope of absolute immunity beyond the intent of the Legislature. With regard to this case, a chief of police is not entitled to absolute immunity simply because, as a police officer, the chief has the authority to arrest. In carrying out the decision to arrest, Jaskowski was not acting within the scope of his executive authority as the highest appointive executive official of a level of government. Instead he was acting within his authority as an ordinary police officer. Accordingly, Jaskowski was only entitled to seek qualified immunity under MCL 691.1407(2) and *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984).

Justices MCCORMACK and VIVIANO took no part in the decision of this case.

GOVERNMENTAL IMMUNITY — EXECUTIVE OFFICIALS — EXECUTIVE AUTHORITY.

Under MCL 691.1407(5), a judge, a legislator, and the elective or highest appointive executive official of all levels of government is 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; to qualify for absolute immunity under the statute, the governmental employee must establish (1) the he or she is a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) that he or she acted within the scope of his or her judicial, legislative, or executive authority; as used in MCL 691.1407(5), the term "executive authority" encompasses all authority vested in the highest executive official of a level of government by virtue of his or her role in the executive branch; the highest executive official of a level of government is entitled to absolute immunity under MCL 691.1407(5) even when performing acts that might otherwise be performed by a lower-level employee if those acts fall within the authority vested in the official by virtue of his or her role as an executive official.

Cutler & Associates, P.C. (by *Michael H. Cutler*), for Thomas J. Petipren.

McGraw Morris P.C. (by *G. Gus Morris* and *D. Randall Gilmer*) for Rodney Jaskowski.

Amicus Curiae:

Flood Lanctot Connor Stablein PLLC (by *Christopher J. Forsyth* and *Janet A. Napp*) for the Michigan Association of Chiefs of Police.

MARY BETH KELLY, J. This case concerns "absolute" governmental immunity. Specifically, we consider whether a village chief of police, the highest appointive executive official of a level of government, acted within the scope of his "executive authority" when he performed the duties of an ordinary police officer and is, therefore, entitled to absolute immunity under MCL 691.1407(5) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. We hold that the term

"executive authority," as used in MCL 691.1407(5), encompasses *all* authority vested in the highest executive official by virtue of his or her role in the executive branch, including the authority to engage in tasks that might also be performed by lower-level employees. Consistent with the plain meaning of "executive authority," the highest executive official is entitled to absolute immunity under MCL 691.1407(5) even when performing acts that might otherwise be performed by a lower-level employee if those actions fall within the authority vested in the official by virtue of his or her role as an executive official. Because no factual dispute exists in this case with regard to whether the village chief of police had the authority to conduct an arrest in his official capacity as chief of police, we hold that the chief of police is absolutely immune from tort liability arising from his arrest of the citizen in this case. The Court of Appeals reached a contrary conclusion and, accordingly, we reverse the judgment of the Court of Appeals and remand this matter to the circuit court for entry of summary disposition in favor of village of Port Sanilac Chief of Police Rodney Jaskowski with regard to the claims against him and for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On July 19, 2008, the village of Port Sanilac held its annual "Bark Shanty Festival," an outdoor summer fundraising event involving a beer tent and several musical acts. The band HI8US was among the acts scheduled to perform. Before HI8US's scheduled performance, volunteers working at the beer tent received numerous complaints about the allegedly offensive music. Ron Smith, the Brown City Police Chief, reported to the park after volunteers at the beer tent relayed to him

the complaints about the offensive music. The organizer of the musical portion of the event also returned to the park after receiving a call informing her that festival patrons were displeased with the music.

When Smith arrived at the park, he heard individuals in the beer tent heckling the band then onstage. He also saw attendees, including families, leaving the festival, some of whom voiced their displeasure with the musical performances as they left. Several individuals also complained to Smith that they found the bands' music "offensive, disturbing, and not appropriate for the crowd." The Village of Port Sanilac Fire Chief, who was involved with beer tent operations, indicated he would close the beer tent if the bands' music continued to drive patrons away. He also warned Smith that he anticipated trouble arising between the bands' supporters and other festival attendees. Concerned about the festival's atmosphere, Smith contacted Jaskowski to report the potential trouble. After speaking with Smith, Jaskowski went to the park and agreed with the decision to stop the bands' performances.

Thomas Petipren, a drummer for HI8US, claims that he did not know that organizers decided to cancel the remaining musical performances and was onstage playing his normal warm-up routine when Jaskowski approached him. Petipren noticed Jaskowski appeared angry, so he stopped playing and held his drumsticks in his lap. He claimed he said nothing and simply waited to find out what Jaskowski wanted. Jaskowski then allegedly knocked over Petipren's equipment, grabbed and threw Petipren's drumsticks to the ground, and assaulted him, grabbing Petipren by the collar and pushing him off his seat and into a pole. Petipren claims he put his arms up and asked, "What did I do?" Jaskowski then allegedly pushed him off the stage and down onto

the grass, yelling at Petipren to stop resisting. Once Petipren was face down, Jaskowski handcuffed him. When a bystander asked why Petipren was being arrested, Jaskowski had him arrested as well.

In contrast to Petipren's version of events, Jaskowski insists that he told Petipren to stop playing, to which Petipren responded by swearing at him and punching him in the jaw. Jaskowski then arrested Petipren. Jaskowski maintains that Petipren continued to resist while he was placed in handcuffs. Jaskowski arrested Petipren for resisting and obstructing a police officer, assaulting a police officer, and disorderly conduct, but the prosecutor ultimately declined to press any charges.

Following the incident, Petipren filed suit against the village of Port Sanilac[1] and Jaskowski, individually and in his capacity as the chief of police.[2] Petipren alleged assault and battery and false arrest. Several months later, Jaskowski filed a separate suit against Petipren, claiming assault and battery, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress.[3] Petipren, in turn, counterclaimed against Jaskowski, alleging intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress.

Jaskowski moved for summary disposition under MCR 2.116(C)(7) in Petipren's original suit, and, at a later date, under MCR 2.116(C)(7), (8), and (10) in regard to Petipren's counterclaims. In both cases, Jas-

[1] The circuit court dismissed the claims against the village after determining that the village was immune from liability under MCL 691.1407(1), which provides immunity to governmental agencies engaged in governmental functions.

[2] Sanilac Circuit Court Docket No. 09-032990-NO.

[3] Sanilac Circuit Court Docket No. 10-033374-NO.

kowski asserted that he was absolutely immune under MCL 691.1407(5) of the GTLA because, in executing the arrest, he acted within his executive authority as the highest appointed executive official of a level of government.[4] To establish his claim, Jaskowski provided the circuit court with the job description for the village of Port Sanilac chief of police and an affidavit in which he attested to his occupational duties. The job description includes a list of "ESSENTIAL DUTIES AND RESPONSIBILITIES" and identifies the "FUNCTIONAL RESPONSIBILITIES" of the police department, the latter of which include "[m]aintenance of law and order in the Village of Port Sanilac" and "[t]he enforcement of all laws of the United States, the State of Michigan, and all ordinance of such law, and ordinances of the Village of Port Sanilac."[5] The functional responsibilities identified in the job description also included

> [p]atrol[ing] the streets of the Village of Port Sanilac, . . . and in doing so observ[ing] and investigat[ing] persons, situations or things which require attention and which affect enforcement of laws or prevention of crime. Preserv[ing] the peace and protect[ing] life and property, control[ing] public gatherings and perform[ing] miscellaneous services relative to public health and safety including property checks . . . . Receiv[ing] and process[ing] com-

[4] In regard to Petipren's negligence-based counterclaims, Jaskowski also asserted that he was entitled to the governmental immunity available to all officers and employees of governmental agencies under MCL 691.1407(2) because Petipren failed to allege gross negligence. See *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008). Relying on *Odom*, Jaskowski also maintained that Petipren's intentional-infliction-of-emotional-distress counterclaim must be dismissed because Jaskowski had acted in good faith, he acted or reasonably believed he was acting within the scope of his authority, and the arrest was discretionary in nature, thereby entitling him to the immunity available to lower-level employees under MCL 691.1407(2).

[5] Emphasis omitted.

> plaints by citizens, arrest[ing] offenders, prepar[ing] reports and testify[ing] in court.[6]

Petipren opposed the motions for summary disposition, arguing that Jaskowski was *not* the highest executive of a level of government and that Jaskowski had acted with an improper motive, arresting Petipren because Jaskowski was prejudiced against Petipren and his fans. The circuit court denied Jaskowski's motion for summary disposition in Petipren's original suit, concluding that because Jaskowski had acted with a biased motive, he had not acted within his executive authority as chief of police. On the record, the circuit court explained, "I don't think it's acting in a Governmental function, I don't think it's within the scope of authority of a Police Chief. I think it's a personal vendetta, someone who thinks there's a Music Fair apparently and therefore immunity is not available to Rodney Jaskowski. That motion is denied." The circuit court also denied Jaskowski's claim of absolute immunity in regard to Petipren's counterclaims in the second lawsuit.[7]

Jaskowski appealed each case as of right, disputing the circuit court's application of governmental immu-

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[6] The job description's essential duties and responsibilities involve employment decisions, administrative tasks, policy and procedural decisions, and the general authority to "[m]ake[] decisions and take[] necessary actions."

[7] The circuit court likewise declined to dismiss Petipren's intentional-infliction-of-emotional-distress counterclaim under MCR 2.116(C)(10), finding an issue of fact remained concerning whether Jaskowski's conduct could be characterized as "extreme and outrageous" and whether he acted in good faith as required by *Odom*. The circuit court dismissed Petipren's negligence and negligent-infliction-of-emotional-distress counterclaims under MCR 2.116(C)(8), but it allowed Petipren to amend his countercomplaint to state a claim of gross negligence, which he did. As a result, the remaining claims to be resolved include Petipren's claims of assault and battery and false arrest and his counterclaims for intentional infliction of emotional distress and gross negligence.

nity. The Court of Appeals consolidated the appeals and, in a split, published opinion, affirmed, holding that "[w]hen a police chief acts as an ordinary police officer—that is, when the nature of the act is outside the scope of his or her *executive duties*—the chief is not entitled to absolute immunity simply because he or she is also the police chief."[8] After noting that no binding Michigan case had considered whether a police chief is entitled to absolute immunity when he or she undertakes actions performed by ordinary police officers, the Court of Appeals construed the words "executive authority," as used in MCL 691.1407(5), to mean only those " 'tasks particular to [the official's] position as the "highest appointive official." ' "[9] According to the Court of Appeals, this interpretation, which it adopted from a federal district court decision, "best reflects the legislative intent expressed in the words of [the statute]."[10] The Court of Appeals explained:

> Although a police chief may occasionally perform the duties of an ordinary police officer, the police chief is not acting within the scope of his or her *executive* authority as the highest executive official in the police department when doing so. Rather, the nature of the act is that of an

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[8] *Petipren v Jaskowski*, 294 Mich App 419, 432; 812 NW2d 17 (2011) (emphasis added).

[9] *Id*. at 431, quoting *Scozzari v City of Clare*, 723 F Supp 2d 945, 967 (ED Mich, 2010). In adopting *Scozzari*'s interpretation of "executive authority," the Court of Appeals rejected the reasoning of an unpublished Court of Appeals opinion, which held that "a police chief's 'executive authority' includes his duties as a high ranking executive as well as his ordinary duties as a police officer." *Lewkowicz v Poe*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2001 (Docket No. 216307), p 2. The panel of the Court of Appeals addressing this case determined that *Lewkowicz* was unpersuasive given that, in *Lewkowicz*, the police chief was directed to attend a city council meeting "in his official capacity as police chief . . . ." *Petipren*, 294 Mich App at 431 (emphasis omitted).

[10] *Id.*

> ordinary police officer. As an ordinary police officer, he would be entitled to the immunity provided to governmental employees under MCL 691.1407(2) if all the statutory requirements were satisfied. Indeed, it would lead to an illogical result to limit a plaintiff's intentional-tort claims arising from the conduct of a police officer in those cases in which the police officer was also the police chief who was acting as an ordinary police officer at the time he or she allegedly committed the tortious act.[11]

Given its understanding of the term "executive authority," the Court of Appeals applied the factors relevant to determining the scope of the actor's executive authority, articulated by this Court in *American Transmissions, Inc v Attorney General*,[12] by considering only that evidence related to Jaskowski's high-level duties, as outlined in the essential-duties section of the police chief's job description.[13] Because those duties "generally involve policy, procedure, administration, and personnel matters," the Court of Appeals concluded that Jaskowski was not acting within his executive authority when he arrested Petipren and that Jaskowski was, therefore, not entitled to absolute immunity under MCL 691.1407(5).[14]

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[11] *Id.* at 432-433.

[12] *American Transmissions, Inc v Attorney General*, 454 Mich 135, 141; 560 NW2d 50 (1997), quoting *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988).

[13] *Petipren*, 294 Mich App at 427-429. The Court of Appeals recognized that the job description also included a section setting forth the functional responsibilities of the police department, which are equivalent to the duties of an ordinary police officer, and that Jaskowski submitted an affidavit stating that his duties included those functional responsibilities. However, the Court of Appeals dismissed the significance of this evidence because "the fact that Jaskowski performed those functions does not place the functions within the scope of the *executive* duty of the police chief; rather, they remain within the scope of the functional responsibilities of the police department generally." *Id.* at 432 n 6.

[14] *Id.* at 429, 432-433.

We granted leave to appeal, "limited to the issue whether Chief of Police Jaskowski is entitled to absolute immunity under MCL 691.1407(5)."[15]

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision regarding a motion for summary disposition.[16] When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7).[17] Under MCR 2.116(C)(7), the moving party has the option of supporting its motion with affidavits, depositions, admissions, or other documentary evidence provided that the "substance or content" of the supporting proofs is admissible as evidence.[18] In reviewing a motion under MCR 2.116(C)(7), we accept the factual contents of the complaint as true unless contradicted by the movant's documentation.[19] When the material facts are not in dispute, this Court may decide whether a plaintiff's claim is barred by immunity as a matter of law.[20]

This case requires us to interpret MCL 691.1407(5), raising an issue of statutory interpretation that this Court reviews de novo.[21] When construing a statute, this Court's obligation is to discern the Legislature's intent as expressed in the statute's plain language.[22] If

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[15] *Petipren v Jaskowski*, 491 Mich 913 (2012).

[16] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[17] *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

[18] *Maiden*, 461 Mich at 119.

[19] *Id.*

[20] See *Robinson v Detroit*, 462 Mich 439, 445; 613 NW2d 307 (2000); see also *Guider v Smith*, 431 Mich 559, 572; 431 NW2d 810 (1988) (noting a case should proceed to trial if there is a question of fact that would affect the availability of immunity).

[21] *Odom*, 482 Mich at 467.

[22] *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011).

the language is clear and unambiguous, the statute must be enforced as written without judicial construction.[23]

III. ANALYSIS

Before the Michigan Legislature's enactment of the GTLA, this Court's jurisprudence recognized the existence of governmental immunity for all levels of government, including townships, cities, school districts, villages, and counties when those subdivisions were engaged in a governmental function.[24] Our common law has also long recognized that certain individuals may enjoy immunity from tort liability, historically granting immunity to governmental "officers, employees, and agents . . . engaged in discretionary, as opposed to ministerial, acts which were within the scope of their authority."[25] Over time, however, our caselaw muddled the parameters of individual immunity by defining it with references to ultra vires acts and whether an individual was engaged in the exercise of a governmental function.[26]

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[23] *Id.* at 247.

[24] See *Pohutski v City of Allen Park*, 465 Mich 675, 682; 641 NW2d 219 (2002) (citation omitted); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 605, 695; 363 NW2d 641 (1984).

[25] *Ross*, 420 Mich at 626. Discretionary acts require "personal deliberation, decision, and judgment," whereas ministerial acts constitute "an obedience to orders or the performance of a duty in which the individual has little or no choice." *Id*. at 634. The distinction between the two is that "the former involves significant decision-making, while the latter involves the execution of a decision and might entail some minor decision-making." *Id.* at 635.

[26] As we explained in *Ross*, "*ultra vires* activities are those which are unauthorized and outside the scope of employment." *Id.* at 631. In *Ross*, we criticized the ultra vires approach because, under the state of the law at that time, the ultra vires approach granted immunity to every public employee acting within the scope of employment regardless of whether he or she was

We thus endeavored to clarify the common law of individual immunity in *Ross v Consumers Power Co (On Rehearing)*, in which we distinguished between the immunity available to lower-level employees and high-ranking officials. We modified the ultra vires approach for lower-level employees and required them to show that they were not only (1) acting during the course of their employment and acting or reasonably believed they were acting, within the scope of their authority; but also that they were (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial acts.[27] In comparison, we identified certain high-ranking officials entitled to a broader grant of immunity, holding that "judges, legislators, and the highest executive officials of all levels of government are absolutely immune from all tort liability whenever they are acting within their judicial, legislative, or executive authority."[28] We thus retained an approach similar to the ultra vires approach for high-ranking officials, providing absolute immunity whenever high-ranking officials acted within the scope of their respective authority.[29] Then, two years after *Ross*, the Legislature amended the GTLA, as it relates to the present dispute, by codifying *Ross*'s grant of absolute immunity at MCL 691.1407(5).[30]

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engaged in a ministerial or discretionary act. In *Ross*, we also expressly disavowed the "governmental function" approach, which granted individual immunity if the individual's actions were not ultra vires and were within the scope of the discharge of a governmental function. We explained that individual immunity could not be defined in reference to simply whether the tortfeasor was engaged in a governmental function. *Id.*

[27] *Id.* at 633-634.

[28] *Id.* at 633.

[29] In this regard, we disagree with the dissent's characterization of *Ross* as rejecting the ultra vires approach to individual absolute immunity.

[30] See *Odom*, 482 Mich at 469 (explaining the legislative action post-*Ross*).

With this historical context in mind, we turn to the language of MCL 691.1407(5), which provides certain high-ranking officials with absolute immunity from tort liability, to determine whether Jaskowski is entitled to absolute immunity. It states:

> 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.

To qualify for absolute immunity from tort liability an individual governmental employee must prove his or her entitlement to immunity by establishing, consistently with the statute's plain language, (1) that he or she is a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) that he or she acted within the scope of his or her judicial, legislative, or executive authority.[31] In the circuit court, Petipren argued that Jaskowski was not the highest appointive executive official of a level of government.[32] On appeal, Petipren abandoned this ar-

[31] MCL 691.1407(5); see also *Marrocco*, 431 Mich at 710-711 (recognizing that executive officials "are not immune from tort liability for acts not within their executive authority"); *Odom*, 482 Mich at 479 (recognizing that entitlement to governmental immunity must be established as an affirmative defense).

[32] Contrary to Petipren's arguments in the circuit court, caselaw recognizes that a chief of police, as head of the police department, qualifies as the highest appointive executive official of a level of government. See, e.g., *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995) ("[W]hen acting in his executive authority, the police chief of the City of Detroit is absolutely immune from tort liability."); *Washington v Starke*, 173 Mich App 230, 240-241; 433 NW2d 834 (1988) (holding that the highest executive in the city's police department was entitled to absolute immunity); *Meadows v Detroit*, 164 Mich App 418, 427; 418 NW2d 100 (1987) (holding that the chief of police was absolutely immune from tort liability).

gument, leaving the sole issue before this Court as whether Jaskowski acted within the scope of his executive authority when he arrested Petipren. To determine whether Jaskowski qualifies for absolute immunity under MCL 691.1407(5) when performing the duties of an ordinary police officer while serving as the highest appointive executive official of the village, we examine the meaning of "executive authority" as interpreted in this state's jurisprudence.

A. EXECUTIVE AUTHORITY

Petipren, like the Court of Appeals, asserts that Jaskowski engaged in activities outside the scope of his executive authority when he arrested Petipren and is therefore not entitled to absolute immunity. As the Court of Appeals acknowledged, no decision of this Court has specifically considered whether the scope of a police chief's executive authority under MCL 691.1407(5) may include those activities also performed by ordinary officers.[33] Further, the GTLA does not define what it means to "act[] within the scope of his or her . . . executive authority," nor has this Court expressly defined the parameters of the phrase. However, we have previously identified several factors as relevant to the determination whether an action is within the scope of an executive official's authority. Specifically, we recognized in *American Transmissions* that

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[33] Several decisions cited by the Court of Appeals considered whether conduct, such as supervisory decisions, employment decisions, and public comments, fell within a police chief's executive authority. See *Bennett v Detroit Police Chief*, 274 Mich App 307, 313-315; 732 NW2d 164 (2007); *Washington*, 173 Mich App at 241; *Meadows*, 164 Mich App at 427. However, as the Court of Appeals acknowledged, none of these decisions considered whether executive authority includes actions that might also be performed by lower-level officers. For this reason, these cases do not directly address the issue presented in the current case.

> "[t]he determination whether particular acts are within their [executive] authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government."[34]

This list of factors, while not exhaustive, demonstrates the type of objective inquiry into the factual context that is necessary to determine the scope of the actor's executive authority.[35] This objective inquiry does not include analysis of the actor's subjective state of mind.[36] An official's motive or intent has no bearing on the scope of his or her executive authority.[37]

While the factors outlined in *American Transmissions* remain relevant to the determination whether certain acts are within the scope of an executive's authority, they do not resolve the definitional issue regarding whether the Legislature intended "executive authority" to include activities also performed by lower-level officials or, as the Court of Appeals held, to include only duties exclusive to the elective or highest appointive executive official's position. To resolve this issue, we turn to the statute's plain language.

Again, MCL 691.1407(5) provides that, to claim absolute immunity, the highest appointive executive official must "act[] within the scope of his or her . . .

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[34] *American Transmissions*, 454 Mich at 141, quoting *Marrocco*, 431 Mich at 711.

[35] *Id.* at 143 n 10.

[36] *Id.* at 141-143 (recognizing that the Legislature did not provide a malevolent-heart exception to the grant of absolute immunity contained in MCL 691.1407(5) and rejecting a Court of Appeals decision that introduced concepts of intent and motive into the absolute-immunity context).

[37] See *id*.

executive authority." We begin our analysis of the phrase "executive authority" by examining the term's plain and ordinary meaning.[38] "Authority" is defined as "a power or right delegated or given," and "scope" is defined as the "extent or range of view, outlook, application, operation, effectiveness . . . ."[39] Taken together, the words indicate that a highest appointive executive official's scope of authority consists of the extent or range of his or her delegated executive power.

In determining what the Legislature intended by the use of the term "executive," we are mindful of the principle that statutory words are to be "given meaning by [their] context or setting."[40] In context, the words "executive authority" appear as the counterpart to the statute's reference to "judicial" and "legislative" authority. Specifically, the statute grants immunity to certain high-level officials when they act within the scope of their "*judicial, legislative, or executive* authority." Because the words are grouped together in a list, we assume those words were intended to have a related meaning.[41] By using the term "executive" in conjunction with the terms "judicial" and "legislative," the Legislature plainly referred to the axiomatic power division among the three branches of government—

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[38] See *Driver*, 490 Mich at 246-247.

[39] *Random House Webster's College Dictionary* (2001); see also *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 409; 605 NW2d 690 (1999).

[40] *Tyler v Livonia Pub Sch*, 459 Mich 382, 390-391; 590 NW2d 560 (1999) ("Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis:* '[i]t is known from its associates[.]' "); see also *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011) ("We read the statutory language in context and as a whole, considering the plain and ordinary meaning of every word.").

[41] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005), citing *Third Nat'l Bank in Nashville v Impac Ltd, Inc*, 432 US 312, 322; 97 S Ct 2307; 53 L Ed 2d 368 (1977).

legislative, executive, and judicial.[42] This reference to the three branches of government parallels the statute's earlier description of who may claim absolute immunity, namely: "[a] judge, a legislator, and the elective or highest appointive *executive* official of all levels of government . . . ." In both instances, the term "executive" appears in MCL 691.1407(5) as a reference to the executive branch of government, thereby referring to the authority exercised by individuals in that branch of government. In a similar fashion, the statute envisions a legislator's exercise of legislative authority and a judge's exercise of judicial authority. Nowhere does the statute contain any indication that the "executive authority" exercised must be exclusive to the elective or highest appointive official in order for that official to claim absolute immunity.

We therefore hold that "executive authority" as used in MCL 691.1407(5) means all authority vested in the highest executive official by virtue of his or her position in the executive branch. In so concluding, we reject other possible interpretations of the term "executive," including the notion proposed by the Court of Appeals, Petipren, and the dissent that it should be read as referring to high-level administrative or supervisory functions particular to an executive's office. That interpretation ignores the context in which the term "executive" is used. In context, the term "executive authority"

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[42] See Const 1963, art 3, § 2 ("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."); *People v Salsbury*, 134 Mich 537, 547-548; 96 NW 936 (1903) ("In government 'executive' is distinguished from 'legislative' and 'judicial;' 'legislative' being applied to the organ or organs of government which make the laws, 'judicial' to that which interprets and applies the laws, and 'executive' to that which carries them into effect.") (citations and quotation marks omitted).

does not contemplate whether the highest appointive executive official performed high-level duties exclusive to his or her position, but simply whether the official exercised authority vested in the official by virtue of his or her role in the executive branch.[43]

In reaching the contrary conclusion, the Court of Appeals failed to undertake any explication of the statute's plain language and relied instead on a federal district court decision, *Scozzari v City of Clare*.[44] In that case, a city police chief sought absolute immunity under MCL 691.1407(5) from numerous tort claims resulting from a shooting death that had occurred when the chief attempted to arrest the decedent. The federal court rejected the police chief's claim of absolute immunity, reasoning that "[t]he Chief does not address the fact that he appears to have been acting in his capacity as an officer on patrol, rather than performing any tasks particular to his position as the 'highest appointive official.' "[45] In our view, *Scozzari* is devoid of any persuasive value: the court engaged in no statutory analysis and simply dismissed the police chief's assertion of absolute immunity in light of his failure to address the implications of the fact that he had acted as an ordinary officer.[46] Further, the implicit holding of

[43] Contrary to the dissent's suggestion, in adopting this construction of the term "executive authority," we do not discard the factors discussed in *American Transmissions*, 454 Mich at 141. Our holding today merely clarifies that conduct is not excluded from the scope of an official's executive authority simply because it is not exclusive to the official's position. Indeed, it is the dissent that effectively disregards these factors by advancing an interpretation that there is some "specific and limited subset" of "truly executive" authority.

[44] See *Petipren*, 294 Mich App at 431-432, discussing *Scozzari*, 723 F Supp 2d at 967.

[45] *Scozzari*, 723 F Supp 2d at 967.

[46] *Id*. In this regard, we agree with the Court of Appeals dissent's criticism of the majority's reliance on *Scozzari*, because, in the dissent's

Scozzari, that absolute immunity is only available when an official performs acts unique to his or her position as the highest executive official, is detached from the plain language of the statute, as we have previously explained. In any case, *Scozzari* is a decision of a lower federal court, and we are not bound to follow it.[47]

The Court of Appeals also erroneously justified its holding on the basis of what it perceived as an "illogical result." According to the Court of Appeals, it would be illogical to confer absolute immunity on a police chief who was acting as an ordinary officer because an ordinary officer engaged in the same conduct would be entitled only to the qualified immunity offered by MCL 691.1407(2) or, in the case of an intentional tort, the common-law immunity described in *Ross*.[48] Yet this outcome is exactly what the Legislature intended when it distinguished between the absolute immunity avail-

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words, the "pivotal basis of the [*Scozzari*] court's holding was that the defendant [unlike Jaskowski] *failed to address* whether his authority extended to those also exercised by a patrol officer." *Petipren*, 294 Mich App at 436 n 3 (MURRAY, P.J., dissenting). In other words, *Scozzari* is readily distinguishable from the instant matter.

[47] *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[48] *Ross*, 420 Mich 567. In *Odom*, this Court summarized the availability of immunity for lower-level employees. We explained that, in cases of negligence, to qualify for immunity under MCL 691.1407(2), the governmental employee must show:

> (a) the individual was acting or reasonably believed that he was acting within the scope of his authority,
>
> (b) the governmental agency was engaged in the exercise or discharge of a governmental function, and
>
> (c) the individual's conduct [did not] amount[] to gross negligence that was the proximate cause of the injury or damage. [*Odom*, 482 Mich at 479-480.]

In comparison, we recognized that immunity is available to lower-level employees against claims of an intentional tort if the employee can satisfy the common-law immunity described in *Ross* by showing the following:

able to those actors at the highest levels of government and the lesser immunity available to those actors who are lower-level employees.[49] While it is true that lower-level actors and high-ranking officials may possess some overlapping authority and, at times, engage in the same governmental conduct, MCL 691.1407(5) includes no indication that the absolute immunity granted to high-ranking officials is not absolute when their authority encompasses conduct that might also be performed by a lower-level employee. To adopt the Court of Appeals' understanding of executive authority would eviscerate the Legislature's clear intent to completely insulate individuals at the highest levels of government from tort liability when they are acting within the scope of their official authority. While the Court of Appeals

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(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Id.* at 480, discussing *Ross*, 420 Mich at 633-634.]

[49] The dissent effectively eviscerates these distinct levels of protection by reading MCL 691.1407(2) and MCL 691.1407(5) together to mean that high-level officials are merely entitled to qualified immunity if they are not acting within their limited subset of high-level authority. The dissent's interpretation, however, is not supported by a reading of subsections (2) and (5) together, but rather hinges entirely on the premise that "executive authority" under subsection (5) includes only a subset of high-level duties. Once this premise is rejected, as it must be given the plain language of subsection (5), there is nothing in the language of either subsection (2) or subsection (5), singly or together, to indicate that a high-level official is entitled to only qualified immunity for conduct outside the supposed subset of high-level duties. Regarding this point, we disagree with the dissent's suggestion that we have not given its interpretation a "faithful reading." We have simply concluded that the dissent's interpretation does not adhere to the plain language of the statute.

viewed this result as illogical, the propriety of the Legislature's decision to treat individuals differently on the basis of their official positions is a question of policy for the Legislature, not this Court.[50]

Accordingly, the Court of Appeals erred when it interpreted "executive authority" to include only those high-level tasks exclusive to the official's position. Rather, we hold, consistent with the plain meaning of "executive authority," that the highest appointive executive official is entitled to absolute immunity under MCL 691.1407(5) even when performing the acts of a lower-level employee if those actions are within the authority vested in the official by virtue of his or her role as an executive official.

B. APPLICATION

Our analysis does not end with our determination that the term "executive authority" in MCL 691.1407(5) refers to all those powers vested in the highest executive official by virtue of his or her role as an executive official, which may also include those functions performed by lower-level employees. Because the specific acts alleged involve Jaskowski's arrest of Petipren, we consider whether Jaskowski's executive authority actually included the ability to conduct an arrest. This inquiry requires consideration of the factors articulated in *American Transmissions*, including " 'the nature of the specific acts alleged, the position

[50] See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002) ("[The] judicial role precludes imposing different policy choices than those selected by the Legislature . . . .") (quotation marks and citation omitted); *Gilliam v Hi-Temp Prod, Inc*, 260 Mich App 98, 109; 677 NW2d 856 (2003) ("The fact that a statute appears to be impolitic, unwise, or unfair is not sufficient to permit judicial construction. The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written.").

held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government.' "[51]

In this case, there is no factual dispute regarding the duties Jaskowski's position required him to perform or that, by virtue of his position as chief of police, Jaskowski was also a police officer, meaning that he possessed the power of any ordinary officer to conduct an arrest.[52] By statute, village police officers are vested "with authority necessary for the preservation of quiet and good order in the village."[53] As officers charged with the preservation of public peace, village police officers possess statutory authority to conduct an arrest.[54] As chief of police, Jaskowski was also charged with the duty to "see that all the ordinances and regulations of

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[51] *American Transmissions*, 454 Mich at 141, quoting *Marrocco*, 431 Mich at 711. Notably, on the basis of its erroneous understanding of the term "executive authority," the Court of Appeals wrongly disregarded all the evidence relevant to this inquiry except for the essential duties of Jaskowski's job description.

[52] Petipren recognizes that Jaskowski is the chief of police, and he does not challenge the accuracy of the police chief job description or the veracity of Jaskowski's affidavit describing his obligations as chief of police.

[53] MCL 70.14. They are similarly vested "within the village . . . with all the powers conferred upon sheriffs for the preservation of quiet and good order . . . ." MCL 70.16.

[54] MCL 70.14 (authorizing village police to "suppress . . . disturbances, and breaches of the peace," and to "apprehend upon view any person found violating a state law or village ordinance in a manner involving a breach of the peace"); MCL 764.15(1) (describing the circumstances in which a "peace officer" may conduct an arrest without a warrant); see also *People v Bissonette*, 327 Mich 349, 356; 42 NW2d 113 (1950) (defining the term "peace officer" as generally including "sheriffs and their deputies, constables, marshals, members of the police force of cities, and other officers whose duty is to enforce and preserve the public peace") (quotation marks and citation omitted).

the council, made for the preservation of quiet, and good order, and the protection of persons and property, are promptly enforced."[55]

In addition to this statutory authority to conduct an arrest, Jaskowski presented to the circuit court his job description, as provided to him by the Port Sanilac Village Council, detailing his duties and responsibilities. Of particular relevance are the sections of the job description describing the functional responsibilities of the police department, which include "[m]aintenance of law and order in the Village of Port Sanilac" and "[t]he enforcement of all laws of the United States, the State of Michigan, and all ordinance of such law, and ordinances of the Village of Port Sanilac." Most significantly, these responsibilities also include a duty to "[p]reserve the peace . . . , control public gatherings," "[r]eceive and process complaints by citizens," and "*arrest offenders* . . . ."[56]

Similarly, in an undisputed affidavit, Jaskowski quotes the job description and avers that his duties included patrolling the streets of the village and doing the following in the course of his patrolling:

> "[o]bserve and investigate persons, situations or things which require attention and which affect enforcement of laws or prevention of crime. Preserve the peace and protect

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[55] MCL 70.15.

[56] Emphasis added. The job description is rife with additional indications that in the village of Port Sanilac, the chief of police is expected to partake in those functions of a typical patrol officer. For example, the chief is expected to use guns, batons, handcuffs, police radios, Tasers, radar, and patrol car computers and aggressively operate a patrol car in emergencies. The job description also specifically advises that "physical intervention techniques may be necessary" and that the chief of police needs to be able to run and lift 300 pounds. The chief of police is also said to have a "[h]igh risk" of exposure to bloodborne pathogens, stemming from frequent and direct contact with individuals who might be carriers.

> life and property, control public gatherings and perform miscellaneous services relative to public health and safety including property checks. . . . Receive and process complaints by citizens, *arrest offenders*, prepare reports and testify in court."[57]

Taking this evidence as a whole, there is no genuine issue of material fact with regard to whether Jaskowski possessed the authority to conduct an arrest and act for the preservation of peace in his official capacity as chief of police. Where, as here, the highest appointive executive official acts within the authority vested in the official by virtue of his or her executive position and there are no questions of material fact, that official is entitled to absolute immunity as a matter of law.

The Court of Appeals erroneously affirmed the circuit court's denial of summary disposition when it incorrectly construed the term "executive authority" as including only high-level tasks exclusive to an executive's position. The Court of Appeals thereby disregarded all the evidence relevant to this inquiry, except for the essential duties listed in the job description for the position of chief of police. However, for reasons we have explained, there is no basis in the language of MCL 691.1407(5) for concluding that the highest executive official acts outside the scope of his or her executive authority when undertaking a task performed by lower-level employees, which is also undisputedly a task he or she is authorized to perform. That those activities might also be undertaken by lower-level employees does not alter the analysis for determining the scope of an official's executive authority.

The circuit court's reason for denying summary disposition—that Jaskowski acted with personal animus—is also erroneous. Petipren implicitly resur-

[57] Emphasis added.

rects this argument on appeal by offering extensive discussion of the circumstances surrounding his arrest, but as we have made clear, an actor's intent and motivation have no bearing on the scope of his or her executive authority under MCL 691.1407(5).[58] In sum, because the power to arrest unquestionably falls within the scope of Jaskowski's executive authority under MCL 691.1407(5), as a matter of law, Jaskowski is absolutely immune from tort liability stemming from Petipren's arrest, and the lower courts erred by denying Jaskowski's motions for summary disposition.

IV. RESPONSE TO THE DISSENT

The dissent's main concern with our holding is that it "remov[es]" the statutory language from its context and returns Michigan's approach to individual absolute immunity to an "ultra vires" test that grants immunity based on the official's high-level status. However, in formulating its preferred holding, that the absolute immunity provided for under MCL 691.1407(5) is limited to "a specific subset of authority," the dissent reads "executive authority" in a manner isolated from the context in which it is used. By focusing only on the terms that directly modify the word "authority," the dissent ignores the necessary parallel between the official's position and his or her judicial, legislative, or executive authority and thereby fails to afford meaning to every word in the statute. Further, by overlooking the term "executive" as a clear reference to the authority exercised by those in the executive branch of government and instead defining it as a specific subset of high-level duties related to "administrative or managerial responsibilit[ies]," the dissent reads additional requirements into the statute that do not exist. It is

[58] See *American Transmissions*, 454 Mich at 143-144.

therefore the dissent that has "transform[ed]" the grant of absolute immunity to something other than the official's "executive authority" as intended by the Legislature.[59]

Similarly unpersuasive is the dissent's complaint that our holding grants absolute immunity to high-level officials simply because they are "cloaked with the title of a high-level executive." This accusation plainly oversimplifies our holding; any high-level executive official acting outside his or her executive authority, as we have defined it, is not entitled to absolute immunity. The dissent also protests that we have returned Michigan's approach to individual absolute immunity to an "ultra vires" test, which according to the dissent "was rejected by *Ross* . . . and, subsequently, the Legislature . . . ." However, a closer reading of *Ross* reveals that this Court merely criticized that approach and rejected it as to lower-level employees, not high-level judicial officers, legislators, and executive officials.[60] To the extent it can be said that the Legislature codified the absolute indi-

[59] In further support of its interpretation, the dissent proposes that the Legislature's codification of absolute immunity after our decision in *Ross* evinces a legislative intent to protect only a subset of high-level authority involving broad decision-making power. However, it is a fundamental principle of statutory interpretation that the Legislature speaks through the language used, *Driver*, 490 Mich at 246-247, and, as explained, the statutory language at issue does not protect only a subset of executive authority. Indeed, it is not our role to speculate whether the Legislature adopted the reasoning of the authorities that the *Ross* Court cited in support of its holding. Given the plain language of MCL 691.1407(5), it is thus irrelevant whether the members of the *Ross* Court intended that absolute immunity extend only to a subset of high-level decision-making authority. Therefore, the dissent's reliance on *Ross* to support its interpretation of "executive authority" is misplaced.

[60] Although the dissent contends that *Ross* "rejected" the ultra vires approach, this assertion has not been supported with citation to an express statement to this effect from *Ross*. At most, *Ross* indicated that the ultra vires approach had "its drawbacks." *Ross*, 420 Mich at 631.

vidual immunity articulated in *Ross*, it did not reject the ultra vires test. Indeed, given the plain language of MCL 691.1407(5), the Legislature's codification of absolute immunity with regard to high-level officials is consistent with the ultra vires approach and is precisely necessary to protect high-level officers' unfettered decision-making.[61]

In short, there is no support in the law for the dissent's characterization of our holding as adopting a rule of individual absolute immunity that radically departs from the statutory language and that has supposedly been rejected by the Legislature. Rather, it is the dissent's view that would depart from the statutory language and it is the dissent's view that would adopt a test not recognized anywhere in Michigan law. Indeed, our review of the caselaw reveals no authority, aside from the Court of Appeals decision in this case, confining individual absolute immunity to a subset of high-level authority.

V. CONCLUSION

The term "executive authority," as used in MCL 691.1407(5), encompasses all authority vested in the highest appointive executive official of a level of govern-

[61] The dissent claims that our definition of "executive authority" as encompassing "all authority" "extends absolute immunity beyond its purpose . . . ." However, the unworkability of the dissent's approach demonstrates exactly why the dissent's interpretation would hinder " 'unfettered governmental decision-making,' " *Ross*, 420 Mich at 632 (citation omitted), and why our holding is entirely consistent with the purpose of absolute immunity. Mainly, to adopt the dissent's definition of "executive authority" as including only a "specific subset of authority," would place officials in the untenable position of continually attempting to discern which of their executive actions are somehow *more* executive than others so as to fall into the protected "subset" of executive authority. In the face of that uncertainty, high level officials would undoubtedly be constrained in their decision-making.

ment by virtue of his or her role in the executive branch, including the authority vested in the official to engage in tasks that might also be performed by lower-level employees. Under the statute's plain terms, when the highest appointive executive official of a level of government acts within the scope of his or her executive authority, the official is entitled to absolute immunity. Because there is no genuine issue of material fact that Jaskowski's executive authority encompassed the authority to preserve the peace and conduct an arrest, Jaskowski is absolutely immune under MCL 691.1407(5) from tort liability arising from Petipren's arrest. For this reason, we reverse the Court of Appeals' conclusion to the contrary and remand this matter to the circuit court for entry of judgment in favor of Jaskowski in Sanilac Circuit Court Docket No. 09-032990-NO, for entry of judgment in favor of Jaskowski on Petipren's counterclaims in Sanilac Circuit Court Docket No. 10-033374-NO, and for further proceedings not inconsistent with this opinion.

YOUNG, C.J., and ZAHRA, J., concurred with KELLY, J.

CAVANAGH, J. (*dissenting*). In this case, this Court must decide what the Legislature determined to be the appropriate balance between the public interest in ensuring that certain governmental actions are performed with independence and without fear of liability on one hand, and, on the other hand, ensuring that victims of tortious actions are compensated when certain governmental employees commit a tort. Specifically, this Court is asked to decide whether a chief of police, Rodney Jaskowski, who allegedly engaged in tortious conduct against Thomas Petipren while performing the duties of an ordinary police officer is nevertheless entitled to absolute immunity from tort

liability under MCL 691.1407(5), simply by virtue of his status as the highest appointive executive official of a level of government.

I believe that the majority errs by concluding that the phrase "executive authority" refers to *all* authority vested in the elective or highest appointive executive official by virtue of his or her position in the executive branch. In my opinion, the majority's interpretation erroneously reads the phrase "executive authority" as coextensive with the phrase "executive branch" as used in the Michigan Constitution and, in doing so, not only fails to give meaning to every word in the statute but also effectively grants absolute immunity solely on the basis of an official's status as a high-level executive, regardless of the nature of the conduct in which the official was engaged. Contrary to the majority position, I would hold that the word "executive" within the phrase "executive authority" refers to a specific subset of authority that a high-level executive must be acting within the scope of to obtain the benefit of absolute immunity from tort liability. Because I believe that the majority's approach fails to give effect to the Legislature's intent and extends the scope of the protection of absolute immunity further than the Legislature prescribed, I respectfully dissent.

I. A BRIEF HISTORY OF INDIVIDUAL IMMUNITY FOR PUBLIC EMPLOYEES

Suits for monetary damages generally serve dual purposes: to compensate victims of wrongful actions and to discourage conduct that might result in liability. *Forrester v White*, 484 US 219, 223; 108 S Ct 538; 98 L Ed 2d 555 (1988). Difficulty arises, however, when public employees are exposed to tort liability. *Id*. This is because government officials are expected to make

decisions that must be "informed by considerations other than the personal interests of the decisionmaker," yet such decisions will often have adverse effects on others. *Id.* As a result, although the threat of monetary damages might encourage public officials to lawfully perform their duties in an appropriate manner, the threat of liability might also "*inhibit* officials in the proper performance of their duties." *Id.* Recognition of these issues has led jurisdictions, including Michigan, to adopt various forms of governmental immunity from tort liability. *Id*.

Michigan's approach to individual immunity for governmental employees has its historical roots in the common law. *Robinson v City of Lansing*, 486 Mich 1, 5; 782 NW2d 171 (2010). After this Court partially abolished common-law governmental immunity in 1961, the Legislature responded by enacting the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., to "restor[e] immunity for municipalities and preserv[e] . . . protection for the state and its agencies." *Id*. See, also, *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 605; 363 NW2d 641 (1984). The GTLA, however, was silent regarding under what circumstances, and to what extent, officers, agents, and employees could be held responsible for their tortious acts. *Ross*, 420 Mich at 596, 628. Given the divided, confusing, and often irreconcilable caselaw on the subject, *id*. at 596, *Ross* undertook the almost impossible task of attempting to clarify more than a century's worth of judicial and legislative commentary on governmental immunity, including clarifying the judicial debate regarding liability with respect to individual governmental employees.

With respect to individual liability, *Ross* explained that previous opinions of this Court had "obfuscated

the precise parameters of individual immunity," noting that in divided decisions the Court had set forth differing approaches to the issue. *Ross*, 420 Mich at 629-630. In one case, the end result was that employees were immune from tort liability "unless they had been engaged in *ultra vires* activities." *Id*. at 629, citing *Bush v Oscoda Area Sch*, 405 Mich 716; 275 NW2d 268 (1979). In another case, members of the Court defined the "parameters of individual immunity with reference to whether the tortfeasor was engaged in the exercise or discharge of a governmental function." *Ross*, 420 Mich at 631. See, also, *id*. at 629-630, citing *Lockaby v Wayne Co*, 406 Mich 65; 276 NW2d 1 (1979). Rejecting the formulations of both approaches, this Court explained that the governmental-function approach blurred the distinction between individual and governmental immunity, *Ross*, 420 Mich at 629-630, while the ultra vires component of individual immunity, which examined whether the acts were "unauthorized and outside the scope of employment," also had its "drawbacks," *id.* at 631. See, also, *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989) (defining "ultra vires" activity as an "activity that the governmental agency lacks legal authority to perform in any manner"). This was because the formulation of the ultra vires approach at the time of *Ross* broadly extended immunity to "every public official, employee, and agent whenever they engage[d] in [any] authorized act[]," which was "not justified by either prior case law or present-day realities." *Ross*, 420 Mich at 631.

Persuaded that Michigan's then existing framework regarding individual immunity was inept and in need of clarification, *Ross* adopted the approach to individual immunity that it believed best reflected the Legislature's intent. *Id*. at 596, 625-626, 635. The adopted approach was similar to that of other jurisdictions,

which provided different levels of immunity depending on the function of the officer. *Id*. at 632-634. Under this framework, "judges, legislators, and the highest executive officials of all levels of government are absolutely immune from all tort liability," as long as they are acting within their respective "judicial, legislative, or executive authority." *Id*. at 633. In contrast, "[l]ower level officials, employees, and agents are immune from tort liability" only if (1) the act was taken during the course of the official's, employee's, or agent's employment and the official, employee, or agent was acting, or reasonably believed he or she was acting, within the scope of his or her authority, (2) the act was done in good faith, and (3) the act was discretionary rather than ministerial in nature. *Id.* at 633-634. The justification for treating employees differently on the basis of their official functions was explained by *Ross* as follows:

> It is assumed through the broad grant of immunity to certain public employees that these officials and, therefore, their governmental agencies, will not be intimidated nor timid in the discharge of their public duties. Although absolute immunity may be necessary for unfettered governmental decision-making, courts have been reluctant, understandably, to extend its protection beyond select public employees who are delegated policy-making powers.
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> * * *
>
> * * * The policy which only provides a limited immunity to lower level executive officials, unlike the justifications for absolute immunity, reflects a recognition that official immunity should not shield malicious or intentionally unlawful behavior when the actor is not engaged in broad, essential governmental decision-making. Holding these public servants liable does not hamper or intimidate them in the faithful discharge of their duties since they are responding to established administrative guidelines, regulations and informal policy. It is assumed, therefore, that

> an unreasonable burden does not fall on an administrative system when courts hold lower level executive employees liable for their acts performed in bad faith. [*Id*. at 632-633, quoting Littlejohn & DeMars, *Governmental Immunity After Parker and Perry: The King Can Do Some Wrong*, 1982 Det C L Rev, 1, 27-28 (quotation marks omitted).]

Although *Ross* retained the traditional view that no individual immunity existed for ultra vires acts, *Ross*, 420 Mich at 631, 634, *Ross* also made clear that, under its approach, individual immunity was "obvious[ly] . . . *far less* than that afforded [to] governmental agencies," which were broadly granted immunity from tort liability whenever the agency engaged in a mandated or authorized activity—i.e., an activity that was not "ultra vires." *Id.* at 635 (emphasis added). See, also, *id.* at 620; MCL 691.1407(1); MCL 691.1401(b).

Shortly after *Ross* was decided, the Legislature responded by enacting 1986 PA 175, which, among other things, addressed individual immunity for governmental employees. With slight modifications, the Legislature codified *Ross*'s standard with respect to judges, legislators, and specific executive officials, thus rendering those officials "immune from tort liability" when acting within the scope of their respective authority. MCL 691.1407(5); *American Transmissions, Inc v Attorney General*, 454 Mich 135, 139-140; 560 NW2d 50 (1997). However, the Legislature altered *Ross*'s articulation of qualified immunity as it related to the negligent acts of what *Ross* referred to as "lower level" officials, employees, and agents.[62] Specifically, in ad-

[62] See *Odom v Wayne Co*, 482 Mich 459, 471; 760 NW2d 217 (2008), wherein a majority of this Court held that the Legislature retained *Ross*'s standard with respect to intentional torts, but, in enacting MCL 691.1407(2) and (3), modified *Ross*'s standard with respect to negligent acts. Thus, under the majority opinion in *Odom*, *Ross*'s standard applies

dressing individual immunity from tort liability for public employees, the Legislature enacted the following framework:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, *each officer and employee of a governmental agency*, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency *is immune from tort liability* for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency *if all of the following are met*:
>
> (a) *The officer, employee, member, or volunteer is acting* or reasonably believes he or she is acting *within the scope of his or her authority.*
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.
>
> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.
>
> * * *
>
> (5) 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. [MCL 691.1407 (emphasis added).]

Accordingly, in both MCL 691.1407(2) and (5), the Legislature indicated that certain governmental offic-

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to alleged intentional torts, whereas the standard articulated in MCL 691.1407(2) applies to alleged negligence.

ers and employees are "immune from tort liability" if specific conditions are met. Under MCL 691.1407(2), an officer or employee must act within the "scope of his or her authority" and meet other conditions, whereas, under MCL 691.1407(5), a judge, legislator, or specific high-level executive official is only entitled immunity from tort liability if the person is "acting within the scope of his or her *judicial*, *legislative*, or *executive* authority." (Emphasis added.) Because the statute does not define the latter phrase, and no opinion from this Court has expressly considered this issue, this Court must determine the meaning of the phrase that best effectuates the Legislature's intent.[63] *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994).

II. ANALYSIS

A. THE MAJORITY'S INTERPRETATION OF MCL 691.1407(5)

As previously noted, I cannot join the majority's analysis, which, in my opinion, fails to give effect to every word in the statute, and broadens the scope of absolute immunity beyond the intent of the Legislature.[64] Under MCL 691.1407(5), a "judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort

[63] The majority asserts that this dissent adopts a view that is not recognized in Michigan law and implicitly accuses this dissent of citing no caselaw in support of its position. The majority's assertions, however, are rather curious, given that even the majority acknowledges that no decision of this Court has specifically addressed the issue presented in this case. Indeed, I question whether this Court would have granted leave to appeal if binding, on-point authority existed.

[64] Although this Court has yet to expressly address whether a chief of police is an "elective or highest appointive executive official of all levels of government" for purposes of immunity from tort liability under MCL 691.1407(5), as noted by the majority, Petipren has effectively abandoned his previous argument that Jaskowski does not fall under this category.

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." (Emphasis added.) Thus, certain high-level executive officials are entitled to immunity from tort liability if the executive official acts within the scope of his or her *executive* authority.

The majority's analysis, however, begins by removing the phrase "scope of his or her . . . authority" from its context. Specifically, rather than considering whether the statutory references to "judicial," "legislative," and "executive" modify the phrase "authority"—in order to describe a specific and limited subset of each public official's authority that the official must act "within the scope of" to be entitled to immunity—the majority focuses on the phrases "judicial," "legislative," and "executive" to read them as a mere reference to the axiomatic power divide among the three branches of government. However, the language chosen by the Legislature did not expressly grant immunity from tort liability for actions taken by the highest executive official by virtue of his or her position in the executive *branch*. Instead, the Legislature granted immunity from tort liability for those actions that fall "within the scope of" an executive official's "executive authority." As a result, the majority's interpretation transforms the statutory reference to "executive authority" into a reference to the "executive branch of government." In my opinion, this is erroneous.

In reading the phrase "executive authority" as coextensive with the phrase "executive branch" as it is used in the Constitution, the majority's analysis results in a reading of the statute that is contrary to the well-

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See *People v Bean*, 457 Mich 677, 685 n 13; 580 NW2d 390 (1998). As a result, I will assume that this standard was met for purposes of this appeal.

established maxim that this Court presumes that *every word* in a statute should be given meaning. *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). See, also, *Robinson*, 486 Mich at 17-18. Specifically, by holding that the reference to "legislative," "judicial," and "executive" merely parallels the statute's earlier reference to *who* is entitled to assert immunity, the majority interprets the statute as granting an official immunity from tort liability for all actions "within his or her authority." Thus, the majority's interpretation renders the statutory references to "judicial," legislative," and "executive" within the phrase "*judicial, legislative, or executive* authority" mere reiterations, which, "by definition, creates surplus language." *Odom v Wayne Co*, 482 Mich 459, 471; 760 NW2d 217 (2008).[65] See, also, *In re MCI*, 460 Mich at 414 ("[A] court should avoid a construction that would render any part of the statute surplusage or nugatory."). Had the Legislature actually intended to grant judges, legislators, and specified high-level executives absolute immunity from tort liability for all actions "within the scope of his or her authority" generally, the Legislature could have easily and clearly stated that, as it did in other provisions of the GTLA. See, e.g., MCL 691.1407(2) (providing that officers and employees are immune from tort liability if, among other things, the officer or employee is "acting within the scope of his or her authority").

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[65] Indeed, had the Legislature intended the majority's interpretation—i.e., that the Legislature was merely referring to the axiomatic power divide between the three branches of government and, thus, the phrase "executive authority" encompasses *all* authority vested in the executive by virtue of his or her position within the executive branch—there would have been no need for the statute to refer to a public official's "judicial, legislative, or executive authority" because, as the majority notes, the Constitution expressly provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch" of government. Const 1963, art 3, § 2.

Although this Court has not previously defined the phrase "executive authority," and thus has not expressly determined whether the phrase "executive authority" is limited to a subset of a high-level official's authority or encompasses all authority vested in the official, this Court *has* explained that executive officials are *not* absolutely immune from tort liability for those acts that *do not* fall within the scope of the elective or highest appointive executive official's "executive authority." *American Transmissions*, 454 Mich at 140-141, citing *Marrocco v Raudlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988). This Court has also provided lower courts with a nonexhaustive list of objective factors to consider in determining whether an act falls within the scope of the executive official's executive authority. *American Transmissions*, 454 Mich at 141, 143 n 10, citing *Marrocco*, 431 Mich at 711.[66] The majority's broad interpretation of the phrase "executive authority," however, effectively discards the nonexhaus-

[66] Those factors include

> the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government. [*American Transmissions*, 454 Mich at 141 (citation and quotation marks omitted).]

Although *American Transmissions*, 454 Mich at 141 n 8, noted that a majority of this Court had previously opined that the inquiry into whether actions are within a public official's executive authority is *analogous* to the question whether lower-level officials or governmental agencies are engaged in governmental functions, as previously noted, *Ross* asserted that the immunity granted to individuals is "far less" than that afforded to governmental agencies, *Ross*, 420 Mich at 635. Further, *Ross* rejected "defin[ing] the parameters of individual immunity with reference to whether the tortfeasor was engaged in the exercise or discharge of a governmental function" because that approach "blurr[ed] two separate inquires." *Id.* at 630-631.

tive list of factors in favor of one inquiry: whether the official was authorized to perform the act—whether by statute or otherwise, including "authorization" under a job description or an affidavit provided by the executive. By granting immunity for *any* authorized act, the majority's analysis returns Michigan's approach to immunity, at least as it pertains to high-level executives, to a formulation akin to the ultra vires approach that was rejected by *Ross*, 420 Mich at 631, 633, and, subsequently, by the Legislature when it adopted statutory language that limits absolute immunity to *only* those actions that fall within the scope of a high-level executive official's *executive* authority and, thus, refused to extend absolute immunity to such officials whenever they engage in *any* authorized act. See *In re MCI*, 460 Mich at 415 ("Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected.").

B. AN ALTERNATIVE APPROACH TO MCL 691.1407(5)

In my opinion, the statutory language supports the notion that the Legislature did not, as the majority opines, intend to afford absolute immunity for *all* actions within a judge, legislator, or high-level executive's authority, generally. Instead, by modifying the word "authority" with the words "judicial, legislative, or executive" the Legislature only intended to grant absolute immunity from tort liability for harm resulting from activities that are truly executive, judicial, or legislative in nature. See *Merriam-Webster's Collegiate Dictionary, Tenth Edition* (1999) (defining "judicial," in part, as "of or relating to a judgment, the function of judging, the administration of justice, or the judiciary";

defining "legislative," in part, as "having the power or performing the function of legislating"; and defining "executive," in part, as "having administrative or managerial responsibility"); *Ross*, 420 Mich at 632-633 (explaining that the justification for affording absolute immunity to certain officials is to protect unfettered decision-making by those "engaged in broad, essential governmental decision-making") (citation and quotation marks omitted). Thus, in accordance with the notion that this Court presumes that every word within a statute has some meaning, *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009), I believe that the Legislature, in codifying *Ross*'s grant of absolute immunity for those officials acting within their respective *judicial*, *legislative*, and *executive* authorities, intended to describe a specific and limited subset of a judge's, legislator's, or high-level executive's authority that those officials must be "acting within the scope of" to obtain the benefit of immunity from tort liability. See *Ross*, 420 Mich at 632, citing Littlejohn & DeMars, 1982 Det C L Rev at 25-27.[67] In my view, broadly interpreting the phrase "executive authority" as encompassing *all authority* vested in a high-level executive extends abso-

[67] Although I would only consider the scope of the immunity as applied to the facts of the present case, see *Marrocco*, 431 Mich at 712 (BOYLE, J., concurring), notably, the Littlejohn & DeMars article cited in *Ross* explained that, at the common law, "judges were always protected by absolute immunity for their judicial acts," even when maliciously performed, and, likewise, legislators were shielded from tort liability when they acted "in the sphere of *legitimate legislative* activity." Littlejohn & DeMars, 1982 Det C L Rev at 26 (citation and quotation marks omitted) (emphasis added). Given *Ross*'s reliance on that authority, I question the majority's holding that the statutory reference to judicial, legislative, and executive authority was simply a legislative intent to inquire whether judges, legislators, and high-level executive officials exercised *any* authority vested in them by virtue of their positions within their respective branches of government, rather than defining a specific subset of each official's respective authority that is entitled to absolute immunity.

lute immunity beyond its purpose—to protect unfettered governmental decision-making afforded to those with policy-making powers. *Ross*, 420 Mich at 632-633, quoting Littlejohn & DeMars, 1982 Det C L Rev at 27-28. See, also, *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998) (explaining that the primary goal of this Court is to give effect to the Legislature's intent through reasonable construction of the statutory language "in consideration of the purpose of the statute and the object sought to be accomplished") (citation and quotation marks omitted).

Additionally, reading the statutory provision as a whole supports a narrower interpretation of the phrase "executive authority" than that adopted by the majority. See *Robinson*, 486 Mich at 15 (explaining that it is well established that statutes must be read together and, thus, no single section should be viewed in isolation).[68] When MCL 691.1407(5) is read in conjunction with MCL 691.1407(2), it is clear that the Legislature did not intend to insulate high-level executive officials from tort liability whenever they act within the scope of *any* aspect of their authority simply because they are cloaked with the title of "executive." Instead, when the highest appointive executive official commits a tort

[68] The majority faults my dissent for reading the statutory provisions as a whole, and accuses me of adding requirements into the statutory language and somehow failing to give effect to each word within the statute. My response is simple: the majority's claims, as with the bulk of the majority's responses to this dissent, hinge entirely on accepting the majority's premise that the word "executive" as used within the phrase "*executive* authority" is a mere reiteration that simply parallels the statute's earlier reference to *who* is entitled to assert immunity. And, respectfully, a faithful reading of this dissent illustrates that it does not add words to the statutory language as the majority claims, but simply gives effect and meaning to *each* word within the statute—including the word "executive" within the phrase "executive authority."

while *not* acting within the scope of his or her "*executive* authority" under MCL 691.1407(5), the language of the respective statutes and the statutory scheme supports the notion that the official is not entitled to *absolute* immunity but might nevertheless be entitled to *qualified* immunity under MCL 691.1407(2) or, alternatively, the requirements delineated in *Ross* concerning intentional torts.[69]

Specifically, MCL 691.1407(2) provides that, except as otherwise provided in MCL 691.1407, each "officer" and "employee" of a governmental agency[70] is immune from tort liability for injury to person or property caused by the officer or employee while in the course of employment if the officer or employee was, among other things, "acting within the scope of *his or her authority*." (Emphasis added.) Thus, unlike MCL 691.1407(5), which qualifies the type of authority that the high-level executive must be acting within the scope of to be entitled to absolute immunity, MCL 691.1407(2) does not limit its application to a specific subset of an employee or officer's authority but, instead, refers to the general authority of governmental officers and employees. Further, MCL 691.1407(2) broadly refers to "officers" and "employees" in discussing the qualified immunity available under that subsection. It does not, in contrast to the *Ross* test, refer to "lower level" officers and employees only. Thus, the subsection was likely devised to apply not only to lower-level officers and employees, but to high-level officials in certain circumstances as well. And, although MCL 691.1407(2) does not expressly refer to "executive officials," an

[69] See note 1 of this opinion.

[70] See MCL 691.1401(a), (e), and (g) (defining "governmental agency" to include the "state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces").

"executive official" is nevertheless an "employee" or "officer" of a governmental agency. See *Merriam-Webster's Collegiate Dictionary, Tenth Edition* (1999) (defining "officer" as an "AGENT" or "one who holds an office of trust, authority, or command," and defining "official" as "one who holds or is invested with an office : OFFICER"). Accordingly, the plain language of the statute as well as the statutory scheme supports the notion that an executive's title should not act to elevate *any* authorized act that is performed by a high-level executive into an act that is within the scope of his or her "executive authority" for purposes of absolute immunity. Instead, when a high-level executive is *not* acting within the scope of his or her *executive* authority, that executive should not be entitled to the "strong medicine" that is absolute immunity. *Forrester*, 484 US at 230 (citation and quotation marks omitted). Rather, as an employee or officer of a governmental agency, the high-level executive acting *outside* the scope of his or her executive authority is still entitled to seek the protections afforded by qualified immunity under MCL 691.1407(2) or *Ross* and, consequently, there is no unreasonable burden on the administration of government.

C. APPLICATION

As applied to this case, I disagree with the majority that Jaskowski was entitled to absolute immunity under MCL 691.1407(5). Specifically, when a chief of police engages in conduct performed by an ordinary police officer, such as conducting an arrest, I would hold that the chief of police is not entitled to absolute immunity simply because, as a police officer, the chief also has the authority to arrest. In carrying out the decision to arrest, Jaskowski was simply not acting within the

scope of his executive authority as a highest appointive executive official.[71] Instead, he was acting within his authority as an ordinary police officer.

Applying the factors articulated by a majority of this Court to assist courts in determining whether an act falls within the scope of a high-level executive's executive authority, see *American Transmissions*, 454 Mich at 141, it is clear that Jaskowski, as the chief of police and, consequently, a police officer, indisputably had the authority to conduct an arrest. Nevertheless, Jaskowski's conduct in this case involved the quintessential conduct of an ordinary police officer, rather than the "executive authority" of the highest-ranking official of a level of government, especially when considering the structure and allocation of powers within the police department itself as demonstrated by the essential duties and responsibilities of defendant as the chief of police. See *Petipren v Jaskowski*, 294 Mich App 419, 427-429, 432 n 5; 812 NW2d 17 (2011).[72] Accordingly, Jaskowski should only be entitled to seek qualified

[71] It is notable that had a lower-ranked police officer committed the same acts as Jaskowski, that officer would be entitled to seek, at most, the more limited, qualified immunity available under MCL 691.1407(2) or *Ross*, 420 Mich at 633-634. Thus, the majority effectively grants him absolute immunity simply because he is cloaked with the title of a high-level executive. The majority asserts that this comment "plainly oversimplifies" its holding. However, as this example illustrates, this comment is a fair response in light of the consequences of the majority's holding, which include, under the facts of this case, granting immunity to Jaskowski because he simply happens to have been the chief of police, rather than an ordinary patrol officer.

[72] Jaskowski's job description, discussed by the majority, is divided into separate sections, including one titled "FUNCTIONAL RESPONSIBILITIES *OF THE POLICE DEPARTMENT*," and one titled "ESSENTIAL DUTIES AND RESPONSIBILITIES" of the "*Chief of Police*." (Emphasis altered.) The duty to conduct arrests is noticeably absent from the latter section.

immunity as provided to officers and employees under MCL 691.1407(2) and *Ross*.

III. CONCLUSION

Because I believe that the phrase "executive authority" as used in MCL 691.1407(5) does not "encompass[] *all authority* vested in the highest appointive executive official of a level of government by virtue of his or her role in the executive branch," *ante* at 28 (emphasis added), but, instead, refers to a subset of authority within which the highest appointive executive official must act "within the scope of" to be entitled to absolute immunity, I respectfully dissent.

MARKMAN, J., concurred with CAVANAGH, J.

MCCORMACK and VIVIANO, JJ., took no part in the decision of this case.

MALPASS v DEPARTMENT OF TREASURY

WHEELER ESTATE v DEPARTMENT OF TREASURY

HUZELLA v DEPARTMENT OF TREASURY

WRIGHT v DEPARTMENT OF TREASURY

WHEELER v DEPARTMENT OF TREASURY

Docket Nos. 144430, 144431, 144432, 145367, 145368, 145369, and 145370. Argued March 5, 2013 (Calendar Nos. 1, 6). Decided June 24, 2013.

Tad and Brenda L. Malpass (Docket No. 144430), Tracy and Brenda K. Malpass (Docket No. 144431), and Fred and Barbara Malpass (Docket No. 144432) brought separate actions in the Court of Claims, seeking a reversal of the Department of Treasury's decision to deny the Malpasses' amended individual income tax returns for the years 2001, 2002, and 2003. The Malpasses owned East Jordan Iron Works, a Michigan corporation that operated an iron foundry in East Jordan, Michigan; they also owned Ardmore Foundry, Inc., a Michigan corporation that operated an iron foundry located in Ardmore, Oklahoma. Both companies were classified as S-corporations under the Internal Revenue Code. For the specified years, the Malpasses treated the companies as separate, non-unitary entities for taxation purposes, which resulted in income from East Jordan being attributed to Michigan and Ardmore's losses being attributed to Oklahoma. The Malpasses later filed amended returns for those tax years and requested refunds totaling more than $1 million, claiming that they could combine East Jordan and Ardmore's profits and losses because they were a unitary business. The department denied the Malpasses' amended returns. The court, Paula J. Manderfield, J., granted the Malpasses' motion for summary disposition, finding that East Jordan and Ardmore were a unitary business, that the unitary business principle applied to the Income Tax Act, MCL 206.1 *et seq*. (ITA), and that the Malpasses could combine the income and losses of East Jordan and Ardmore and then apportion the aggregate. The Court of Appeals, SHAPIRO, P.J., SAAD and BECKERING, JJ., reversed, finding that East Jordan and Ardmore were separate business entities and that the ITA did not allow individual taxpayers to combine their business income from sepa-

rate business entities and then apportion on the basis of the combined apportionment factors of the entities. 295 Mich App 263 (2012). The Supreme Court granted the Malpasses' application for leave to appeal. 493 Mich 864 (2012).

The Wheeler estate (Docket No. 145367), Nicholas and Lisa J. Huzella (Docket No. 145368), Patrick and Michaelon Wright (Docket No. 145369), and Thomas R. and Patsy Wheeler (Docket No. 145370) (collectively, the taxpayers) filed petitions in the Tax Tribunal, challenging the assessment of taxes for the tax years 1994 and 1995. Members of the Wheeler family were shareholders of Electro-Wire Products, Inc., a Michigan-based S-corporation. Electro-Wire acquired the assets of Temic Telefunken Kabelsatz, GmbH, which resulted in two general partnerships: Temic Telefunken Kabelsatz (TKG), the operating partnership, and Electro-Wire Products, GmbH (EWG), the holding partnership. The acquisition resulted in one S-corporation (Electro-Wire) and two general partnerships (TKG and EWG), with all the income and losses passing through to the owners as individual income. The taxpayers reported the income by treating the businesses as unitary and apportioned the income using the combined apportionment factors of both Electro-Wire and TKG. Following an audit, the department asserted that the unitary business principle did not apply to individuals and that the taxpayers were required to apply Electro-Wire's apportionment factors to its income alone, resulting in liabilities and interest totaling more than $2 million. The tribunal granted the taxpayers' motion for summary disposition, determining that under the ITA, the unitary business principle applied to individuals as well as to separate corporate entities. The Court of Appeals, HOEKSTRA, P.J., and SAWYER and SAAD, JJ., affirmed, concluding that Electro-Wire and TKG were a unitary business, the taxpayers could use combined reporting under the ITA, and that the apportionment could include income from business activity that was unitary with its Michigan business, Electro-Wire. 297 Mich App 411 (2012). The Supreme Court granted the Department of Treasury's application for leave to appeal. 493 Mich App 865 (2012).

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

Under the ITA, individual taxpayers may combine the profits and losses from unitary flow-through businesses and then apportion that income on the basis of those businesses' combined apportionment factors. For the 1994 and 1995 tax years, the

apportionment could properly be applied to a foreign entity if the foreign entity and the individual taxpayer's in-state business were unitary.

1. The unitary business principle provides that a state may tax multistate businesses on an apportionable share of the multistate business conducted in the taxing state. The following factors are appropriate guides for determining whether business operations are unitary: (1) economic realities; (2) functional integration; (3) centralized management; (4) economies of scale; and (5) substantial mutual interdependence. Individual taxpayers in Michigan may use either a separate-entity reporting method to apportion income, or a combined reporting method. Separate-entity reporting requires each entity with a nexus to the taxing state to be considered as a separate and distinct entity, regardless of whether it could comprise a unitary business with other entities. Combined reporting requires each member of a unitary business to compute its individual taxable income attributable to activities in the state by taking a portion of the combined net income of the group through the utilization of combined apportionment factors. In *Malpass*, the parties did not dispute that East Jordan and Ardmore were unitary. In *Wheeler*, considering the totality of the circumstances, the tribunal's finding that Electro-Wire and TKG were a unitary business was supported by competent, material, and substantial evidence on the whole record, and the Court of Appeals properly affirmed that conclusion.

2. MCL 206.4(2), 206.102, 206.103, and 206.110(1) clearly require an individual taxpayer with business income stemming from business activity both within and outside of the state to allocate and apportion all business income using the formula set forth in MCL 206.115. Section 115 provides for the application of formulary apportionment, but does not expressly require that a particular method of apportionment be used. Rather, the MCL 206.115 language is broad enough to allow both the separate-entity reporting and combined reporting method of formulary apportionment. Although the department has required individuals to use separate-entity reporting for flow-through business income in the past, it has not promulgated such a rule and the Supreme Court declined to adopt the department's preferred methodology; the ITA permits combined reporting because it satisfies the clear mandate of MCL 206.115 that all business income be apportioned to the state.

3. Taken together, MCL 206.103, 206.105, and MCL 206.20 require unitary businesses that include foreign entities to allocate and apportion their income as provided by the ITA. For the tax

years 1994 and 1995, the version of MCL 206.115 in effect at that time stated in part that all business income shall be apportioned to Michigan; the language of the statute did not limit formulary apportionment to the domestic entities of a unitary business. Accordingly, for the 1994 and 1995 tax years, under MCL 206.115 an individual may use combined reporting for income derived from a foreign entity that is unitary with a domestic business taxable in Michigan. In *Malpass*, the Court of Appeals erred by concluding that the ITA did not allow the Malpasses to first combine the income from their unitary flow-through entities and then apportion it on the basis of the combined apportionment factors of East Jordan and Ardmore. In *Wheeler*, the Court of Appeals properly affirmed the tribunal's conclusion that the ITA contained no geographical limitation for the 1994 and 1995 tax years; combined reporting was proper even though the unitary business of Electro-Wire and TKG included an entity located in a foreign country.

Malpass reversed and remanded to the Court of Claims for reinstatement of the order granting summary disposition in favor of the Malpasses.

Wheeler affirmed, but part III(A) of the Court of Appeals' opinion vacated because it relied on *Malpass*, which was reversed by this decision.

1. TAXATION — INCOME TAX — MULTISTATE BUSINESSES — UNITARY BUSINESSES — SEPARATE-ENTITY AND COMBINED REPORTING.

The unitary business principle provides that a state may tax multistate businesses on an apportionable share of the multistate business conducted in the taxing state; individual taxpayers in Michigan may use either a separate-entity reporting method to apportion income, or a combined reporting method; separate-entity reporting requires each entity with a nexus to the taxing state to be considered as a separate and distinct entity, regardless of whether it could comprise a unitary business with other entities; combined reporting requires each member of a unitary business to compute its individual taxable income attributable to activities in the state by taking a portion of the combined net income of the group through the utilization of combined apportionment factors; MCL 206.115, which provides for the application of formulary apportionment but does not expressly require that a particular method of apportionment be used, is broad enough to allow both the separate-entity reporting and combined reporting method of formulary apportionment; the Income Tax Act, MCL 206.1 *et seq*., permits individuals to use both separate-entity reporting and combined reporting for flow-through income from

unitary businesses because it satisfies the clear mandate of MCL 206.115 that all business income be apportioned to the state.

2. TAXATION — INCOME TAX — COMBINED REPORTING — UNITARY BUSINESSES — FOREIGN BUSINESSES.

For the 1994 and 1995 tax years, under MCL 206.115, an individual may apportion income derived from a foreign entity that is unitary with a domestic business taxable in Michigan.

Warner, Norcross & Judd, LLP (by *Jason L. Byrne*, *Stephen R. Kretschman*, and *Nicole L. Mazzocco*), for Tad and Brenda L. Malpass, Tracy and Brenda K. Malpass, and Fred and Brenda Malpass.

Honigman, Miller, Schwartz & Cohn, LLP (by June Summers Haas and John D. Pirich), for the estate of Thomas M. Wheeler, Nicholas and Lisa J. Huzella, Patrick and Michaelon Wright, and Thomas R. and Patsy Wheeler.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kevin T. Smith*, Assistant Attorney General, for the people.

Amici Curiae:

Marjorie B. Gell for the State Bar of Michigan Taxation Section.

VIVIANO, J. In these consolidated cases, we address the application of Michigan's statutory apportionment formula for individuals with flow-through business income under the Michigan Income Tax Act (ITA).[1] In both cases, the individual taxpayers received income

[1] MCL 206.1 *et seq*. The statutory provisions at issue in this opinion are to the versions of the ITA applicable to the tax years at issue. The Legislature has since amended many of these provisions. Except as discussed herein, those amendments have no bearing on these cases.

from in-state and out-of-state, flow-through businesses. The Michigan Department of Treasury (Department) refused the taxpayers' attempts to combine the flow-through income from their respective businesses and then apportion the income using the businesses' combined apportionment factors, and instead required the income of each entity to be apportioned separately.

We hold that the ITA does not prohibit individual taxpayers from combining the profits and losses from unitary flow-through businesses and then apportioning that income on the basis of the businesses' combined apportionment factors. Moreover, we hold that the ITA did not limit apportionment of income to domestic businesses during the 1994 and 1995 tax years, and that the apportionment could properly be applied to a foreign entity to the extent that the foreign entity and the individual taxpayer's in-state business were unitary.

Accordingly, (1) we reverse the Court of Appeals' judgment in *Malpass* and reinstate the order entered by the Court of Claims granting summary disposition in favor of the Malpasses, and (2) we affirm the Court of Appeals' judgment in favor of the Wheelers.

I. FACTS AND PROCEDURAL HISTORY

A. *MALPASS v DEPARTMENT OF TREASURY*

Plaintiffs, individual members of the Malpass family, owned and operated East Jordan Iron Works (East Jordan), an iron foundry in East Jordan, Michigan. They also owned and operated Ardmore Foundry, Inc. (Ardmore), an iron foundry in Ardmore, Oklahoma. Both were Michigan corporations. Because of their S-corporation classification under the Internal Revenue

Code,[2] all profits and losses flowed through the corporation to the family members individually.

For the tax years of 2001, 2002, and 2003, East Jordan operated at a profit and Ardmore operated at a loss. In their initial returns, the Malpasses treated the companies as separate, non-unitary entities. Accordingly, the Malpasses attributed East Jordan's income to Michigan and Ardmore's losses to Oklahoma. The Malpasses then amended their returns for the 2001, 2002, and 2003 tax years, treating East Jordan and Ardmore as a unitary business, and combining East Jordan's profits with Ardmore's losses. The combined amount from the unitary business was then apportioned to Michigan on the basis of the Michigan apportionment factors, resulting in claims for refunds totaling over $1 million.

After the Department rejected the Malpasses' amended returns, the individual taxpayers brought actions in the Court of Claims. The actions were consolidated, and on November 19, 2009, the Court of Claims granted summary disposition in favor of plaintiffs. The Court of Claims determined that East Jordan and Ardmore were a unitary business on the basis of an undisputed affidavit. It then concluded that the unitary business principle applied to the ITA and that the Malpasses could first combine the income and losses of East Jordan and Ardmore and then apportion the aggregate.

In a published opinion, the Court of Appeals reversed, concluding that East Jordan and Ardmore were separate and legally distinct business entities and that the ITA did not allow for combined reporting of separate entities.[3] The Court of Appeals concluded that the

[2] 26 USC § 1361.

[3] *Malpass v Dep't of Treasury*, 295 Mich App 263, 275; 815 NW2d 804 (2011).

Malpasses had received income from two separate businesses and were required to apportion the income of each entity separately.[4]

B. *WHEELER v DEPARTMENT OF TREASURY*

Members of the Wheeler family were shareholders of Electro-Wire Products, Inc. (Electro-Wire), a Michigan-based S-corporation that made electrical systems. Electro-Wire acquired the assets of Temic Telefunken Kabelsatz, GmbH, a German company. The asset purchase resulted in two general partnerships: Temic Telefunken Kabelsatz, GmbH (TKG), the operating partnership, and Electro-Wire Products, GmbH (EWG), the holding partnership. The end result of the acquisition was one S-corporation (Electro-Wire) and two general partnerships (TKG and EWG), with all the income and losses passing through to the owners as individual income.

For the tax years 1994 and 1995, the Wheelers reported the pass-through Electro-Wire income on their individual tax returns; the income included partnership income from TKG. The Wheelers treated the businesses as unitary and then apportioned the income using the combined apportionment factors of both companies. After an audit and a determination that the unitary business principle did not apply to individual taxpayers, the Department required the Wheelers to apportion the income stemming from Electro-Wire on the basis of Electro-Wire's apportionment factors and to disregard TKG's factors, resulting in liabilities and interest totaling over $2 million.

The Tax Tribunal granted summary disposition in favor of the Wheelers, finding that there was no language in the ITA that supported the Department's assertion that

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[4] *Id.*

the unitary business principle applied only on a separate-legal-entity level. In a published opinion, the Court of Appeals affirmed, concluding that the Wheelers could use combined reporting under the ITA and that the apportionment could extend to foreign-business activity that was unitary with its Michigan business.[5] The Court of Appeals also concluded that Electro-Wire and TKG were a unitary business.[6]

II. STANDARD OF REVIEW

In *Malpass*, we review de novo the trial court's decision on a motion for summary disposition.[7] Our review of the Tax Tribunal's decision in *Wheeler* is limited. In the absence of fraud, we review a Tax Tribunal decision for "misapplication of the law or adoption of a wrong principle."[8] We consider the Tax Tribunal's factual findings conclusive if they are "supported by competent, material, and substantial evidence on the whole record."[9] However, we review issues of statutory interpretation de novo.[10]

III. ANALYSIS

A. FORMULARY APPORTIONMENT IN MICHIGAN

The Due Process Clause of the Fourteenth Amendment imposes two requirements on a state's taxation of

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[5] *Wheeler v Dep't of Treasury*, 297 Mich App 411, 420, 422; 825 NW2d 588 (2012).

[6] *Id.* at 425.

[7] *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 644 (2013).

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

[9] *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011), quoting *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994) (quotation marks omitted).

[10] *Klooster*, 488 Mich at 295.

a business operating in interstate commerce: "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise."[11] A state is not required to isolate a business's intrastate activities from its interstate activities; instead, "it may tax an apportioned sum of the corporation's multistate business if the business is unitary."[12] This latter concept, known as the unitary business principle, has been referred to as the "linchpin of apportionability."[13] It allows a state to "tax multistate businesses 'on an apportionable share of the multistate business carried on in part in the taxing state.' "[14]

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[11] *Mobil Oil Corp v Comm'r of Taxes of Vermont*, 445 US 425, 436-437; 100 S Ct 1223; 63 L Ed 2d 510 (1980), citing *Moorman Mfg Co v Bair*, 437 US 267, 272-273; 98 S Ct 2340; 57 L Ed 2d 197 (1978).

[12] *Allied-Signal, Inc v Director, Div of Taxation*, 504 US 768, 772; 112 S Ct 2251; 119 L Ed 2d 533 (1992).

[13] *Mobil Oil*, 445 US at 438-439. Typically, controversies involving the unitary business principle and formulary apportionment feature the taxpayer raising constitutional objections to the state's taxation scheme. See *Mobil Oil Corp*, 445 US at 439; *Container Corp of America v Franchise Tax Board*, 463 US 159, 165-175; 103 S Ct 2933; 77 L Ed 2d 545 (1983); *F W Woolworth Co v Taxation & Revenue Dep't of New Mexico*, 458 US 354, 364-372; 102 S Ct 3128; 73 L Ed 2d 819 (1982); *ASARCO Inc v Idaho State Tax Comm*, 458 US 307, 322-330; 102 S Ct 3103; 73 L Ed 2d 787 (1982). Although there are no constitutional claims in this case, that does not render the basic constitutional principles underlying Michigan's formulary apportionment scheme irrelevant because the unitary business principle is the predicate for any formulary apportionment scheme.

[14] *Preston v Dep't of Treasury*, 292 Mich App 728, 733; 815 NW2d 781 (2011), quoting *Allied-Signal, Inc*, 504 US at 778. Until recently, the Department has taken the position that the unitary business principle does not apply to individual taxpayers, but now concedes that it does. Michigan adopted the Uniform Division of Income for Tax Purposes Act (UDITPA) when it enacted the Michigan Income Tax Act in 1967; UDITPA embodies the application of the formulary apportionment method in conjunction with the unitary business principle. See *Container Corp*, 463 US at 165, 170.

Our state has adopted formulary apportionment for individual taxpayers in the ITA.[15] Recognizing that Michigan is a formulary apportionment state, however, does not resolve the issue in this case because there are at least two different methods of applying the apportionment formula.[16] First, a state may use separate-entity reporting, which requires each entity with a nexus to the taxing state to be considered as a separate and distinct entity, regardless of whether it could comprise a unitary business with other entities.[17] Alternatively, a state may use combined reporting, which requires "each member of a group carrying on a unitary business [to] compute[] its individual taxable income attributable to activities in [the state] by taking a portion of the combined net income of the group through the utilization of combined apportionment factors."[18] The question in this case is whether the ITA prohibits individual taxpayers from using combined reporting.

To answer this question, we turn first to the statutory language.[19] Our goal in interpreting a statute "is to

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[15] MCL 206.115. During the tax years at issue in these cases, Michigan used three factors—payroll, property, and sales—to apportion in-state and out-of-state business income for individuals. Michigan's apportionment formula changed as of January 1, 2012, with the enactment of Michigan's corporate income tax act, MCL 206.601 *et seq*. Michigan now apportions solely on a sales factor. See MCL 206.115(2), as amended by 2011 PA 38 and 2011 PA 178.

[16] See, generally, 2 Pomp, State and Local Taxation (6th ed), pp 10:43-10:48.

[17] *Media Gen Communications v SC Dep't of Revenue*, 388 SC 138, 142, 146; 694 SE 2d 525 (2010); *see also* Pomp, pp 10:42, 10:43.

[18] *Media Gen Communications*, 388 SC at 142. The combined income is not used for taxing purposes, but it is used to determine the "portion of income from the entire unitary business attributable to sources within [the state] that is derived by members of the group subject to [the state's] taxing jurisdiction." *Id.* See also Pomp, pp 10:42-10:43.

[19] *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005).

give effect to the Legislature's intent, focusing first on the statute's plain language."[20] In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.[21]

Under the ITA, an individual taxpayer's entire income is taxable in Michigan if it is derived solely from activity within the state.[22] However, if the income is derived from business activity taxable both within and without this state, the ITA requires an individual taxpayer to "allocate and apportion his net income . . . ."[23] The ITA further states that, "[f]or a resident individual, . . . all taxable income from any source whatsoever, except that attributable to another state under [MCL 206.111 to MCL 206.115] and subject to [MCL 206.255], is allocated to this state."[24] Section 115, the only one of these sections applicable here, provides: "*All business income*, other than income from transportation services shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator which is 3."[25] The ITA defines "business income" as "income arising from transactions, activities, and sources in the regular course of the taxpayer's trade or business . . . ."[26]

These provisions require an individual taxpayer with business income stemming from business activity both

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[20] *Klooster*, 488 Mich at 296, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[21] *Sun Valley Foods Co*, 460 Mich at 237; *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[22] MCL 206.102.

[23] MCL 206.103.

[24] MCL 206.110(1).

[25] Emphasis added.

[26] MCL 206.4(2).

within and outside of the state to allocate and apportion "[a]ll business income" using the formula contained in MCL 206.115. Section 115 is unambiguous—it plainly provides for the application of formulary apportionment. However, the statute does not require that any particular method of apportionment be used—it is silent on this question. When, as here, "the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted."[27] Although section 115 does not require or prohibit any particular method of applying the statutory formula, the phrase, "[a]ll business income . . . shall be apportioned[,]" is certainly broad enough to encompass either of the approaches advocated by the parties.

The Department argues that combined reporting is prohibited because it is not expressly authorized in the ITA for individual taxpayers, like it is for corporate taxpayers.[28] However, the Department's argument is flawed. The argument is self-defeating because the ITA does not expressly authorize either method of reporting. Moreover, the provision of the corporate tax law applicable at the time of these returns, MCL 208.77(1), allowed for combined or consolidated returns by multiple corporate entities engaged in affiliated business that would otherwise be required to file separate returns. This is because Michigan imposes corporate taxes at the entity level; thus, absent a combined filing provision, unitary corporations would lack a means to file a single combined return. By contrast, income for

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[27] *Sun Valley Foods*, 460 Mich at 236.

[28] MCL 208.77. During the tax years at issue, a combined return provision existed in the Single Business Tax Act, MCL 208.1 *et seq*., as replaced by 2006 PA 325, giving the Department discretion to allow a corporation to file a consolidated or combined return.

individuals is already disbursed from the income-producing entities, aggregated by the taxpayer at the time of filing, and included on a single return. Thus, while the Legislature has included a combined return provision in the corporate tax code, such a provision is unnecessary for individual taxpayers, because they are already required to aggregate all their income on a single return.[29]

The Department also argues that it has always required the use of separate-entity reporting and has never approved combined reporting. Although the Department has certain rule-making authority, in this case, the Department has not promulgated a rule requiring separate-entity reporting for individual taxpayers.[30] To the extent that the Department has interpreted the statute to prohibit combined reporting, that interpretation is inconsistent with the broad scope of section 115; therefore, it " 'conflict[s] with the indicated spirit and purpose of the legislature.' "[31]

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[29] See MCL 206.315.

[30] The Department is free to promulgate administrative rules consistent with the ITA in accordance with procedures set forth in the Administrative Procedure Act, MCL 24.201 *et seq.* and MCL 205.3(b); see also MCL 206.471(1)(b) (providing that the Department may promulgate rules for "[t]he computation of the [income] tax"); MCL 206.471(1)(d) (providing that the Department may promulgate rules regarding the "ascertainment, assessment, and collection of the tax"). We do not address whether, or the extent to which, the Department may promulgate a rule requiring that an individual taxpayer use a particular method of reporting in the taxpayer's initial filing. We note, however, that any such rule would be subject to the current MCL 206.195, which gives the taxpayer the right to petition for an alternative method if the initial filing required by the Department "do[es] not fairly represent the extent of the taxpayer's business activity in this state." MCL 206.195(1)(c).

[31] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935).

Faced with a statutory provision that is broad enough to encompass both reporting options—but does not choose between them—the Department asks this Court to adopt its preferred methodology. However, we decline this invitation to engage in interstitial rule making because "[t]o supply omissions transcends the judicial function."[32] Instead, in the absence of a policy choice by the Legislature, we conclude that the ITA permits either reporting method.[33]

In sum, we reject the Department's position that the ITA requires separate-entity reporting. Instead, we hold that combined reporting is permitted by the ITA because it satisfies the clear statutory mandate that "[a]ll business income . . . shall be apportioned to this state . . . ."[34]

B. THE ITA'S APPLICATION TO FOREIGN ENTITIES

Beyond our determination that an individual taxpayer can use combined reporting for flow-through business income, we also must consider whether this method could extend geographically outside the United States during the tax years of 1994 and 1995. In *Wheeler*, the Department argues that even if combined

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[32] *Iselin v United States*, 270 US 245, 251; 46 S Ct 248; 70 L Ed 566 (1926).

[33] Although not significant to the Court's analysis, we note that combined reporting ensures that "the substance of the business activities in the state [] control tax consequences, not the organizational structure of the business or the entities conducting those activities," Pomp, p 10-48; is "wholly consistent with, and a natural extension of, the apportionment method[,]" *Coca Cola Co v Dep't of Revenue*, 271 Or 517, 528; 533 P2d 788 (1975); and, perhaps for these reasons, is a "growing trend[.]" Pomp, p 10-44. However, the separate-entity approach is also consistent with formulary apportionment. See W. Hellerstein, *Income Allocation*, 12 Int'l Transfer Pricing J. 103, 105 (2005).

[34] MCL 206.115.

reporting is permitted under the ITA, it does not apply to a foreign entity that is unitary with a domestic business taxable in Michigan.[35] Again, our analysis of this issue begins with the statute's text.[36]

The statutory basis for taxing out-of-state income is § 103, which states:

> Any taxpayer having income from business activity which is taxable both *within and without this state*, other than the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this act.[37]

MCL 206.105 specifies when a taxpayer's income is taxable in another state and, thus, required to be allocated and apportioned under § 103. It provides:

> For purposes of allocation and apportionment of income from business activity under this act, a taxpayer is taxable in another state if (a) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, or (b) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.[38]

Finally, MCL 206.20 defines "state" as "any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, *and any foreign country*, or political

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[35] We note that the United States Supreme Court has upheld the apportionment of business income of unitary foreign entities. See, e.g., *Barclays Bank PLC v Franchise Tax Bd of Cal*, 512 US 298; 114 S Ct 2268; 129 L Ed 2d 244 (1994); *Container Corp of America*, 463 US 159 (1983).

[36] *Casco Twp*, 472 Mich at 571.

[37] MCL 206.103 (emphasis added).

[38] MCL 206.105.

subdivision, thereof."[39] Taken together, these provisions require a taxpayer to allocate and apportion his income if "in [a foreign country] he is subject to a net income tax . . . or [a foreign country] has jurisdiction to subject the taxpayer to a net income tax . . . ."[40] Thus, unitary businesses that include foreign entities must allocate and apportion their income as provided by the ITA.[41]

We turn now to the ITA provisions dealing with business income to determine if the act otherwise excludes the income of a foreign entity for purposes of allocation and apportionment. Section 115, which deals with the apportionment of business income, states in pertinent part, "*All* business income . . . shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3."[42] Moreover, the apportionment factors themselves employ universal language when explaining the scope of relevant business activity. MCL 206.119 states that "[t]he payroll factor is a fraction, . . . the denominator of which is the total compensation paid *everywhere* during the tax period."[43] Likewise, MCL 206.121 states that "[t]he sales factor is a fraction, . . . the denominator of which is the total sales of the taxpayer *everywhere* during the tax period."[44]

Nowhere in the ITA did the Legislature limit formulary apportionment to the domestic entities of a unitary business. In fact, to the extent that the Legislature

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[39] MCL 206.20 (emphasis added).

[40] MCL 206.105.

[41] MCL 206.103.

[42] Emphasis added.

[43] Emphasis added.

[44] Emphasis added.

discussed geographic limitations, it expressly required taxpayers with income taxable in a foreign country to allocate and apportion their income as provided in the act, which includes § 115's directive that *all* business income be apportioned using the apportionment factors.[45] Therefore, we reject the Department's argument that the ITA prohibits application of formulary apportionment to income from a foreign entity that is unitary with a domestic business.

Accordingly, we conclude that a unitary business with income from a business in a foreign country could be apportioned under the version of the ITA in effect during the tax years of 1994 and 1995.[46]

C. APPLICATION TO *MALPASS*

On appeal, the parties in *Malpass* do not dispute whether East Jordan and Ardmore were a unitary business. The Court of Appeals, despite determining that the businesses had unitary characteristics, wrongly concluded that the ITA does not allow individual taxpayers with flow-through business income from separate legal entities to use combined reporting.[47]

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[45] See MCL 206.20, 206.103, and 206.105.

[46] The Legislature has limited the scope of the corporate income tax to domestic corporations in recent amendments. 2011 PA 38. The ITA now defines "unitary business group" as a "group of United States persons that are corporations, insurance companies, or financial institutions, other than a foreign operating entity . . . ." MCL 206.611(6). The Department argues that this shows that the Legislature only intended to include businesses within the United States. However, we are not persuaded that the recent amendment limiting the scope of corporate income tax should affect our interpretation of the ITA for the tax years 1994 and 1995.

[47] *Malpass*, 295 Mich App at 270. In its opinion, the Court of Appeals erroneously concluded that the ITA does not allow combined reporting. *Id.* ("[N]othing in the ITA allows for combined-entity reporting."); *id.* at 272 ("There is no provision in the ITA that allows individuals to combine their business income from separate businesses and then use a combined

For the reasons already stated, we hold that the ITA did not prohibit the Malpasses from first combining the income from their unitary flow-through entities and then apportioning it on the basis of the combined apportionment factors of East Jordan and Ardmore. Therefore, we reverse the Court of Appeals' judgment in *Malpass* and reinstate the order entered by the Court of Claims granting summary disposition in favor of the Malpasses.

D. APPLICATION TO *WHEELER*

Unlike in *Malpass*, the parties in *Wheeler* dispute whether the Michigan and German entities were a unitary business. The Tax Tribunal found that they were, and the Court of Appeals affirmed. To consider business operations unitary, the United States Supreme Court has held, "[T]here [must] be some sharing or exchange of value not capable of precise identification or measurement—beyond the flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation."[48] Accordingly, a unitary business exists when the income-producing companies have "functional integration, centralization of management, and economies of scale."[49] Other United States Supreme Court decisions have added to these guideposts.[50] The Court of Appeals relied on the following five factors

apportionment formula on the total."). However, the Court of Appeals reached this conclusion in cursory fashion without analyzing the relevant provisions of the ITA. Instead, the Court of Appeals fixated on the corporate form of the business entities, even though the ITA makes no distinctions based on corporate formalities.

[48] *Container Corp*, 463 US at 166.

[49] *Mobil Oil*, 445 US at 438.

[50] See *F W Woolworth Co*, 458 US at 364-372; *ASARCO Inc*, 458 US at 319, 322-329; *Container Corp*, 463 US 159.

in determining whether the Michigan and German entities were a unitary business: "(1) economic realities; (2) functional integration; (3) centralized management; (4) economies of scale, and (5) substantial mutual interdependence."[51] We agree that these factors are appropriate guides for determining whether businesses are unitary. Moreover, as the United States Supreme Court held in *Container Corp*, "We need not decide whether any one of these factors would be sufficient as a constitutional matter to prove the existence of a unitary business."[52] These factors are not exhaustive or exclusive. Nor is any one factor dispositive. Instead, a court should consider the totality of the circumstances when determining if businesses are unitary.[53]

Turning to the evidence offered by the parties, and aware of our limited review of the factual determinations made by the Tax Tribunal, we agree with that body's conclusion that the businesses here were unitary. The Court of Appeals affirmed the findings of the Tribunal. Because we agree with the thorough analysis of the Court of Appeals, we adopt its conclusions and holding in full:

> The first factor, economic realities, addresses whether the regularly conducted activities of the businesses in question are related. *Holloway*, 152 Mich App at 832. The record shows that the underlying businesses of Electro-

[51] *Wheeler Estate*, 297 Mich App at 422-423, citing *Holloway Sand & Gravel, Co, Inc v Dep't of Treasury*, 152 Mich App 823, 831; 393 NW2d 921 (1986).

[52] *Container Corp*, 463 US at 179-180.

[53] See, generally, *Holloway Sand*, 152 Mich App at 835 (mentioning a "sixth factor" resulting from the taxpayer's treatment of capital gains from one of the businesses); see also *Container Corp*, 463 US at 179 (approving a California Court of Appeals reliance on "a large number of factors" to conclude that a domestic corporation and its foreign subsidiaries were unitary).

Wire and TKG were identical because both were engaged in the manufacturing and assembling of electrical distribution systems. Respondent claims that this is immaterial because the two businesses were engaged in the same underlying business before Electro-Wire purchased TKG. However, there is no requirement under *Holloway* or related cases that potentially unitary businesses develop the same underlying activities collaboratively; the only requirement is that the underlying businesses be related to each other.

The second factor, functional integration, concerns the extent to which business functions are blended to promote a unitary relationship. Petitioners presented evidence that, before it was acquired by Electro-Wire, TKG was part of the Daimler Group. Once Electro-Wire purchased TKG, however, this relationship was severed, leaving TKG without critical support services, which were assumed by Electro-Wire. These services included direct management of TKG's business activities and support for component engineering, manufacturing and industrial engineering, cost estimating, business development, finance, and executive administration. Respondents presented no rebuttal evidence, but set forth on appeal a list identifying ways in which Electro-Wire and TKG were not integrated. However, this belated argument is not persuasive because there is no requirement that businesses be 100 percent integrated in order to classify them as unitary.

The third factor examines the extent to which management was centralized across the potentially unitary business. Petitioners submitted unrebutted evidence that TKG's overall management decisions were centralized and directed by Electro-Wire managers in North America and that Electro-Wire hired and fired all TKG officers and managers. Again, respondent presented no rebuttal evidence, but alleges that Electro-Wire did not engage in day-to-day management of TKG. Again, however, the only requirement under *Holloway* is centralized management, not complete management.

The fourth factor looks for the presence of economies of scale. Petitioners presented unrebutted evidence of eco-

> nomic benefits generated by the combination of Electro-Wire and TKG, such as an expanded customer base, sharing of unique and proprietary processes, and improved financing terms. Respondent presented no evidence to challenge this, but argues that petitioners failed to show profits through bulk purchasing or improved allocation of resources. These are typically considered to be common economies of scale, but respondent does not explain how cheaper component parts, an expanded customer base, increasing economic diversification, and improved financing conditions are not also benefits derived from economies of scale.
>
> The fifth and final factor considers whether substantial mutual interdependence exists. Petitioners submitted unrebutted evidence that acquiring TKG was essential for Electro-Wire to remain a supplier for Ford and that remaining a supplier for Ford was essential to Electro-Wire's survival. The Tax Tribunal found that Electro-Wire was dependent on TKG, but was unable to conclude whether or not TKG was similarly dependent on Electro-Wire, and thus resolved this factor partially in favor of petitioners.[54]

Based on the foregoing, we hold that the Tax Tribunal's factual finding that Electro-Wire and TKG were a unitary business was "supported by competent, material, and substantial evidence on the whole record."[55] Because there was evidentiary support for all of the unitary factors, the Court of Appeals properly affirmed the Tax Tribunal's conclusion that Electro-Wire and TKG constituted a unitary business. Because we discern no limitations on the geographical boundaries to which the combined reporting could extend, the Wheelers could combine the profits and losses from Electro-Wire and TKG and then apportion, using the companies' combined apportionment factors.

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[54] *Wheeler Estate*, 297 Mich App at 423-425.

[55] *Klooster*, 488 Mich at 295.

IV. CONCLUSION

In *Malpass*, we hold that the ITA permitted the individual taxpayers to combine the flow-through business income from the unitary business of East Jordan and Ardmore and then apportion, using the combined apportionment factors of the unitary business. Accordingly, we reverse the Court of Appeals and remand to the Court of Claims for reinstatement of the order granting summary disposition in favor of plaintiffs.

In *Wheeler*, we hold that the Court of Appeals properly determined that the Wheelers could combine their flow-through income from the unitary business of Electro-Wire and TKG. In so doing, we hold that the ITA contained no geographical limitations for the tax years of 1994 and 1995 and that combined reporting was proper even though the unitary business included an entity located in a foreign country. We affirm the judgment of the Court of Appeals, but we vacate Section III(A) of the Court of Appeals' opinion because that analysis is inconsistent with our analysis herein and relied on the Court of Appeals' erroneous decision in *Malpass*, which we reverse today.

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

PEOPLE v CLARY

Docket No. 144696. Argued January 9, 2013 (Calendar No. 8). Decided June 25, 2013.

Rayfield Clary was convicted by a jury in the Wayne Circuit Court, Daniel Patrick Ryan, J., of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial was defendant's second. Defendant's first trial was declared a mistrial because of a hung jury. Defendant appealed his convictions. The Court of Appeals, MURRAY, P.J., and TALBOT and SERVITTO, JJ., reversed defendant's convictions in an unpublished opinion per curiam, issued February 16, 2012 (Docket No. 301906), concluding, among other things, that defendant had been improperly impeached with his silence when the prosecution made repeated references to his failure to testify at his first trial. The Supreme Court granted leave to appeal. 491 Mich 933 (2012).

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

Under the Fifth Amendment of the United States Constitution, no person may be compelled in any criminal case to be a witness against himself. The United States Supreme Court has held that the Fifth Amendment forbids using a defendant's failure to take the stand at trial as substantive evidence of guilt. However, the United States Supreme Court has also held, in *Raffel v United States*, 271 US 494 (1926), that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence at a previous trial. In this case, defendant's silence at his previous trial was used for impeachment purposes. Thus, it was admissible under *Raffel*. In *Doyle v Ohio*, 426 US 610 (1976), the Supreme Court held that when a person under arrest is informed, as *Miranda* requires, that he may remain silent and that anything he says may be used against him, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence at the time of arrest to be used to impeach an explanation subsequently offered at trial. Accordingly, the prosecution's references at trial to defendant's postarrest, post-*Miranda* silence with the police were improper. Therefore,

the disposition reached by the Court of Appeals, reversing defendant's convictions, was affirmed. If a third trial is held, under *Doyle* defendant's postarrest, post-*Miranda* silence with the police would be inadmissible, but if defendant were to testify at a third trial, under *Raffel* the prosecution could again refer to defendant's failure to testify at his first trial without violating his constitutional rights. A defendant in a criminal case does not have to testify. However, if he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness.

Judgment of the Court of Appeals reversed to the extent that it held that defendant was improperly impeached with his silence at his first trial; decision of the Court of Appeals reversing defendant's convictions affirmed; Supreme Court's June 6, 2012, order granting leave to appeal in this case otherwise vacated; prosecution's application for leave to appeal denied; case remanded to the trial court for further proceedings.

Justice MCCORMACK, concurring, joined all but part III(D) and footnote 9 of the majority opinion, writing separately to elaborate on the tension between *Raffel* and *Doyle*, and noting that the law remains unclear concerning the evidentiary value of a defendant's silence even if its admission is not barred by the United States Constitution. Although no United States Supreme Court opinion since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his silence at a previous trial, the significance of that fact is highly questionable in light of the due process rationale set forth in *Doyle*. State courts also remain free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial, and the majority correctly left it to the trial court to decide as an evidentiary matter whether testimony concerning defendant's silence at his first trial would be admissible at a third trial.

Justice CAVANAGH, concurring in part and dissenting in part, concurred in the result that defendant was entitled to a new trial. Justice CAVANAGH agreed with Justice MCCORMACK that the decision in *Raffel* was anomalous in light of the due process and fundamental fairness concerns subsequently articulated in *Doyle* and he also agreed with her that aside from the constitutional issues raised in this case, that there were concerns weighing against a broad rule of admissibility of a defendant's silence as an evidentiary matter. Whether challenged testimony is admissible under the Michigan

Rules of Evidence, including MRE 403, is a question that must be answered whenever the prosecution seeks to elicit evidence concerning a defendant's silence.

Justice VIVIANO took no part in the decision of this case.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *David A. McCreedy*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat* and *Jessica L. Zimbelman*) for defendant.

Amicus Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Bruce H. Edwards*, Assistant Attorney General, for the Department of the Attorney General.

MARKMAN, J. Defendant's first trial was declared a mistrial because of a hung jury. Following defendant's second jury trial, he was convicted of assault with intent to murder and possession of a firearm during the commission of a felony. On appeal, the Court of Appeals reversed defendant's convictions, concluding *inter alia* that defendant had been improperly impeached with his silence when the prosecutor made repeated references to his failure to testify at his first trial. We granted leave requesting that the parties address: (1) whether the prosecutor's impeachment of defendant's testimony using defendant's failure to testify at his earlier trial violated defendant's Fifth Amendment right against self-incrimination and (2) whether prior consistent statements by the complainant were admissible under MRE 801(d)(1)(B). *People v Clary*, 491 Mich 933 (2012).

Because we believe that the prosecutor's impeachment of defendant's testimony with his failure to testify at his earlier trial was not improper, we reverse the judgment of the Court of Appeals to that extent. The Court of Appeals also addressed whether the prosecutor's references to defendant's post-arrest, post-*Miranda* silence were improper and held that reversal was not required because the record was unclear regarding whether the post-arrest silence also constituted post-*Miranda* silence. However, our review of the transcript of defendant's arraignment indicates that defendant was informed of his *Miranda* rights at his arraignment, and thus we hold that the prosecutor's references to defendant's post-arrest, post-*Miranda* silence at trial plainly violated *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Accordingly, we do not disturb the ultimate disposition reached by the Court of Appeals, i.e., the reversal of defendant's convictions. We otherwise vacate this Court's June 6, 2012 order granting leave to appeal and deny the prosecutor's application for leave to appeal because we are not persuaded that this Court should review the remaining question presented. Finally, we remand this case to the trial court for further proceedings consistent with this opinion. If defendant chooses to testify at a third trial, the prosecutor may again refer to defendant's failure to testify at his first trial without violating defendant's constitutional rights.

I. FACTS AND HISTORY

At defendant's first trial, the complainant testified that defendant shot him. Defendant did not testify. The trial was eventually declared a mistrial because of a hung jury. At defendant's second trial, the complainant again testified that defendant shot him, but this time

defendant testified that he did not shoot the complainant. The prosecutor impeached defendant's testimony by asking him why he had not provided that testimony at the first trial.[1] The prosecutor also commented on defendant's silence at his first trial during closing arguments.[2] Following defendant's second jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The Court of Appeals reversed defendant's convictions, concluding, among other things, that defendant was improperly impeached with his silence when the prosecutor made several references to defendant's failure to testify at his first trial. *People v Clary*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2012 (Docket No. 301906). We granted the prosecutor's application for leave to appeal. *Clary*, 491 Mich 933.

II. STANDARD OF REVIEW

Whether defendant was improperly impeached with his silence is a question of law that we review de novo. *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009).

III. ANALYSIS

A. BACKGROUND

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be compelled

[1] For instance, the prosecutor asked defendant, "You didn't tell that jury the same story you're telling this jury, did you, sir?" and "[I]f that was the truth and that was so important, why didn't you tell the last jury?"

[2] Specifically, the prosecutor said, "Well, ladies and gentleman, if it's the truth, if it's the truth and you're on trial, why wouldn't you tell the first jury?"

in any criminal case to be a witness against himself . . . ." US Const, Am V. See also Const 1963, art 1, § 17. The Fifth Amendment has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v Hogan*, 378 US 1, 3; 84 S Ct 1489; 12 L Ed 2d 653 (1964). Pursuant to *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), in order to protect the privilege against compelled self-incrimination during custodial police interrogations, the suspect "must be warned that he has a right to remain silent [and] that any statement he does make may be used as evidence against him . . . ." The United States Supreme Court has held that "the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence [at trial] or instructions by the court that such silence is evidence of guilt." *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965). That is, the Fifth Amendment prohibits using a defendant's failure to take the stand as substantive evidence of guilt. *Id*. The Court has also held that " '[w]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, [and] that anything he says may be used against him,' " "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence [at the time of his arrest] to be used to impeach an explanation subsequently offered at trial." *Doyle*, 426 US at 618-619 (citation omitted); see also *Borgne*, 483 Mich at 186-188; *People v Shafier*, 483 Mich 205, 212-214; 768 NW2d 305 (2009).[3]

[3] Cf. *United States v Robinson*, 485 US 25, 34; 108 S Ct 864; 99 L Ed 2d 23 (1988) ("It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge,

However, the United States Supreme Court has also held that "the use of prearrest silence to impeach a defendant's credibility violates [n]either the Fifth [n]or the Fourteenth Amendment to the Constitution." *Jenkins v Anderson*, 447 US 231, 232, 238, 240; 100 S Ct 2124; 65 L Ed 2d 86 (1980); see also *People v Cetlinski (After Remand)*, 435 Mich 742, 757; 460 NW2d 534 (1990) ("[N]either the Fifth Amendment nor the Michigan Constitution preclude[s] the use of prearrest silence for impeachment purposes."). Moreover, it has also held that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Fletcher v Weir*, 455 US 603, 607; 102 S Ct 1309; 71 L Ed 2d 490 (1982). Finally, it has held that "the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence" at his first trial. *Jenkins*, 447 US at 235, citing *Raffel v United States*, 271 US 494; 46 S Ct 566; 70 L Ed 1054 (1926).

B. *RAFFEL* AND *STEWART*

In *Raffel*, 271 US at 496, 499, the United States Supreme Court held that it was not "error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial."

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as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence."); *People v Sutton (After Remand)*, 436 Mich 575, 580; 464 NW2d 276 (1990) ("[S]ilence is admissible to impeach a defendant's claim that he did not remain silent.").

> The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. He may be examined for the purpose of impeaching his credibility. His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed.[4] His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.
>
> If, therefore, the questions asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination, they were proper questions . . . . [*Id*. at 496-497 (citations omitted).]

The Court then held that asking the defendant about his silence at his first trial was logically relevant and competent within the scope of the general rules of cross-examination:

> [W]e do not think the questions asked of him were irrelevant or incompetent. For if the cross-examination had revealed that the real reason for the defendant's failure to

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[4] See *People v Prevost*, 219 Mich 233, 238; 189 NW 92 (1922) (" 'The exemption from unfavorable comment is applicable only when the accused wholly refrains from testifying. If he voluntarily goes upon the stand, he waives this exemption, and the State may comment upon his testimony as fully as upon that of any other witness, and may call attention to his silence and demeanor while there, or at the preliminary examination, to his refusal to answer incriminating questions; or to deny prominent and damaging facts of which he must have some personal knowledge[.]' "), quoting Underhill, Criminal Evidence (2d ed), § 68; *People v McCrea*, 303 Mich 213, 285; 6 NW2d 489 (1942) (" 'The privilege of the defendant against self-incrimination and its corollary, the prohibition against comment by counsel for the government upon his failure to testify, have been jealously protected by the courts. But, when the defendant elects, voluntarily, to testify, he waives his privilege, subjects himself to cross-examination and impeachment, and makes comment upon his testimony [or his refusal to testify] entirely proper.' ") (citation omitted).

> contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story, his answers would have a bearing on his credibility and on the truth of his own testimony in chief.[5]
>
> It is elementary that a witness who upon direct examination denies making statements relevant to the issue, may be cross-examined with respect to conduct on his part inconsistent with this denial. The value of such testimony, as is always the case with cross-examination, must depend upon the nature of the answers elicited; and their weight is for the jury. But we cannot say that such questions are improper cross-examination, although the trial judge might appropriately instruct the jury that the failure of the defendant to take the stand in his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny. [*Id*. at 497-498.][6]

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[5] While Justice CAVANAGH may be correct that *Raffel* " 'did not *focus* on the question whether the cross-examination there involved was in fact *probative* in impeaching the defendant's credibility,' " *post* at 288 (emphasis added; citation omitted), *Raffel* also was not silent on the subject either. Instead, *Raffel*, 271 US at 497-498, expressly held that the defendant's prior silence was not "irrelevant" and may "have a bearing on his credibility and on the truth of his own testimony in chief." Contrary to Justice CAVANAGH's suggestion, we do not hold that "a defendant's silence is per se highly probative, that a defendant's silence at a previous trial is 'plain evidence of guilt' that should not be suppressed, or that the use of a defendant's silence as an impeachment tool should be applied with 'special vigor . . . .' " *Post* at 290 n 6. Instead, we simply hold that a defendant's prior silence might be, under certain circumstances, probative evidence with regard to a defendant's credibility, or lack thereof, and that when it is, assuming that its admission is otherwise permitted under the rules of evidence, it should not be excluded from the evidence presented to the jury.

[6] Justice CAVANAGH cites Justice LEVIN's concurrence/dissent in *Cetlinski*, 435 Mich at 788-789, for the proposition that " 'a defendant's silence is *not* generally admissible.' " *Post* at 289 (emphasis in the original). However, this seems to be inconsistent with the *majority* opinion in *Cetlinski*, 435 Mich at 760 n 31, which held that "prior silence of a witness with regard to a fact to which he has testified, where such silence occurs under circumstances in which he would be expected to speak out, may be used to impeach during cross-examination," as well as with

In summary, the Court held:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify. [*Id*. at 499.]

We are not persuaded by the Court of Appeals' attempt to distinguish *Raffel*. The Court of Appeals stated, "Unlike the defendant in *Raffel*, defendant in this case did not contradict the testimony of a witness offered at both his first and second trial." *Clary*, unpub op at 8. We respectfully disagree. In both *Raffel* and the instant case, the defendant contradicted the testimony

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majority opinions from the United States Supreme Court. See, e.g., *Jenkins*, 447 US at 239 ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."), citing 3A Wigmore, Evidence (Chadbourn rev), § 1042, p 1056; *Baxter v Palmigiano*, 425 US 308, 319; 96 S Ct 1551; 47 L Ed 2d 810 (1976) ("[T]he Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. Indeed, . . . [s]ilence is often evidence of the most persuasive character.") (citations and quotation marks omitted); *United States v Hale*, 422 US 171, 176; 95 S Ct 2133; 45 L Ed 2d 99 (1975) ("Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation."); *Grunewald v United States*, 353 US 391, 422-423; 77 S Ct 963; 1 L Ed 2d 931 (1957) ("Innocent men are more likely to [remain silent] in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.").

of a witness offered at both the first and second trials. In *Raffel*, the defendant contradicted the testimony of a government agent who testified that the defendant had made admissions of guilt, and in the instant case, defendant contradicted the testimony of the complainant who testified that defendant shot him.

We are equally unpersuaded by the Court of Appeals' conclusion that the instant case is more like *Stewart v United States*, 366 US 1; 81 S Ct 941; 6 L Ed 2d 84 (1961). Unlike in *Raffel* and the instant case, in *Stewart* the defendant did not contradict the testimony of a witness offered at both his first and second trials. As *Stewart*, 366 US at 5-6, explained:

> The *Raffel* case . . . involved a situation in which Raffel had sat silent at his first trial in the face of testimony by a government agent that Raffel had previously made admissions pointing to his guilt. On a second trial, Raffel took the stand and denied the truth of this same testimony offered by the same witness. Under these circumstances, this Court held that Raffel's silence at the first trial could be shown in order to discredit his testimony at the second trial on the theory that the silence itself constituted an admission as to the truth of the agent's testimony. The result was that Raffel's silence at the first trial was held properly admitted to impeach the specific testimony he offered at the second trial. Here, on the other hand, the defendant's entire "testimony" comprised nothing more than "gibberish without meaning" with the result that there was no specific testimony to impeach.

This "gibberish" was apparently offered to demonstrate that the defendant was insane, which was the defendant's chief defense at all three of his trials, and not to contradict the testimony of any witness. The United States Supreme Court held that because the defendant's silence was not used for impeachment purposes, it was not admissible under *Raffel*. In this case, however, defendant's silence was clearly used for impeach-

ment purposes and, thus, it is admissible under *Raffel*.[7] We therefore hold that defendant was not improperly impeached with his silence when the prosecutor made repeated references to his failure to testify at his first trial. Accordingly, if defendant chooses to testify at a third trial, the prosecutor may again refer to defendant's failure to testify at his first trial without violating defendant's constitutional rights.[8]

C. *DOYLE* AND *JENKINS*

However, the prosecutor may not again refer to defendant's post-arrest, post-*Miranda* silence with the police because to do so would clearly violate *Doyle*, 426 US at 618-619, which prohibits the admission of post-arrest, post-*Miranda* silence with the police. At defen-

[7] Moreover, "[t]he decision in *Stewart v. United States* was based on federal evidentiary grounds, not on the Fifth Amendment," *Jenkins*, 447 US at 237 n 4 (citation omitted), and thus it is not binding on this Court. See *People v Finley*, 431 Mich 506, 514; 431 NW2d 19 (1988).

[8] Defendant alternatively argues that his silence at his first trial is barred as an evidentiary matter. But see *Cetlinski*, 435 Mich at 760 n 31 ("[P]rior silence of a witness with regard to a fact to which he has testified, where such silence occurs under circumstances in which he would be expected to speak out, may be used to impeach during cross-examination."). Because defendant did not previously raise this issue, the lower courts did not address it, and thus we will not address it either. However, on remand, defendant is not precluded from raising this issue. To this extent, we agree with Justice CAVANAGH that "the fact that impeaching a defendant with his or her silence at a prior trial might be constitutional does not mean that, as an evidentiary matter, a defendant's prior silence is *automatically admissible* in a later trial when a defendant elects to waive his constitutional and statutory rights in favor of testifying." *Post* at 288-289 (emphasis altered). That is, we agree with Justice CAVANAGH that the admission of a defendant's prior silence, as with any other piece of evidence, must comply with the rules of evidence, including MRE 401 (defining relevant evidence), MRE 402 (providing that relevant evidence is generally admissible), and MRE 403 (providing that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

dant's second trial, the prosecutor impeached defendant by asking him why, after he was arrested and arraigned, he had not told the police that he did not shoot the complainant. The prosecutor also referred to this silence during her closing argument. The Court of Appeals held that there was no *Doyle* violation because "[a]fter reviewing the record, it is unclear whether the post-arrest silence referenced by the prosecutor was also post-*Miranda* silence." *Clary*, unpub op at 5. This Court subsequently granted defendant's motion to consider the transcript of defendant's arraignment, which shows that defendant had been informed of his *Miranda* rights at his arraignment. *Clary*, 821 NW2d 314 (Mich, 2012). Given this new information, it seems clear that the prosecutor's references to defendant's post-arrest, post-*Miranda* silence with the police violated *Doyle*. Accordingly, we hold that if there is a third trial, defendant's post-arrest, post-*Miranda* silence with the police is inadmissible.

Defendant argues that there is a tension between *Raffel* and *Doyle* because while *Doyle* holds that post-*Miranda* silence is admissible, *Raffel* holds that silence at an earlier trial is admissible to impeach a defendant who testifies at a subsequent trial, even though this silence is also post-*Miranda* silence. Although we recognize this tension, we also recognize that *Raffel* has not been overruled by *Doyle* or by any other United States Supreme Court decision. Indeed, *Doyle* expressly held that it was "unnecessary" to address in that case the constitutionality of a prosecutor's inquiry into silence after the time of arrest because that later silence "present[s] different considerations . . . ." *Doyle*, 426 US at 616 n 6. Specifically, *Doyle* explained:

> In addition, error of constitutional dimension is asserted because each petitioner was cross-examined as to post-

> arrest, preliminary hearing, and general pretrial silence when he testified as a defense witness at the other petitioner's trial. These averments of error present different considerations from those implicated by cross-examining petitioners as defendants as to their silence after receiving *Miranda* warnings at the time of arrest.[9] In view of our disposition of this case we find it unnecessary to reach these additional issues. [*Id.* (emphasis omitted).]

Therefore, it appears that *Doyle*'s rule prohibiting the admission of post-*Miranda* silence applies to silence at the time of arrest, while *Raffel*'s rule permitting the admission of post-*Miranda* silence applies to silence at an earlier trial when the defendant takes the stand at a subsequent trial. This conclusion is further underscored by the fact that after *Doyle* was decided, the United States Supreme Court in *Jenkins* recognized the continued vitality of *Raffel*'s rule that a defendant's silence at his first trial can be used to impeach the defendant at a subsequent trial if the defendant decides to take the stand. *Jenkins*, 447 US at 235-238. Not only did *Jenkins* favorably discuss *Raffel* at length, but it also expressly rejected the suggestion "that the constitutional rule of *Raffel* was limited by later decisions of the Court," explaining that "no Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence." *Id.* at 237 n 4.

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[9] See Note, *The Admissibility of Prior Silence to Impeach the Testimony of Criminal Defendants*, 18 U Mich J L Reform 741, 752, 766 (1985) (Because "[t]he government inducement to remain silent, which may be caused by the shock of arrest, the fearful nature of custody, the *Miranda* warnings, or any combination thereof, will gradually lose its influence on the defendant as pressure is diminished and advice of counsel [is] obtained," "silence occurring long after the *Miranda* 'inducement' may be used for impeachment.").

D. "CHILLING" FIFTH AMENDMENT RIGHTS

Defendant suggests that a person facing a trial will be less likely to rely on his right to remain silent if he knows that his reliance on that right can be subsequently used against him, that is to say, exercise of the Fifth Amendment right against self-incrimination will be "chilled." However, as *Jenkins*, 447 US at 236-237, explained, "The *Raffel* Court explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights." In other words, *Raffel* specifically considered the argument that "the adoption of the rule contended for by the Government might operate to bring pressure on the accused to take the stand on the first trial, for fear of the consequences of his silence in the event of a second trial; and might influence the defendant to continue his silence on the second trial because his first silence may there be made to count against him," and held that this argument was "without substance." *Raffel*, 271 US at 498-499.

> We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence.[10] When he does take the stand, he is under the same pressure: to testify fully,

[10] See *Williams v Florida*, 399 US 78, 83-84; 90 S Ct 1893; 26 L Ed 2d 446 (1970) ("The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."); *Barnes v United States*, 412 US 837, 847; 93 S Ct 2357; 37 L Ed 2d 380 (1973) ("Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases

> rather than avail himself of a partial immunity. And the accused at the second trial may well doubt whether the advantage lies with partial silence or with complete silence. Even if, on his first trial, he were to weigh the consequences of his failure to testify then, in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or at his option, testify fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not. [*Id.* at 499 (citations omitted).]

It is well established that "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' " *Jenkins*, 447 US at 236, quoting *Chaffin v Stynchcombe*, 412 US 17, 30; 93 S Ct 1977; 36 L Ed 2d 714 (1973). More specifically, "[i]t is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free." *McKune v Lile*, 536 US 24, 41; 122 S Ct 2017; 153 L Ed 2d 47 (2002) (opinion by Kennedy, J.). For example, in *Crampton v Ohio*, decided with *McGautha v California*, 402 US 183, 185, 211; 91 S Ct 1454; 28 L Ed 2d 711 (1971),[11] the Court held that Ohio's single-trial procedure, which allowed a defendant to "remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment," was "constitutionally permissible." As the Court explained:

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the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination.").

[11] The decision in *Crampton* was later vacated on other grounds. *Crampton v Ohio*, 408 US 941; 92 S Ct 2873; 33 L Ed 2d 765 (1972).

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. . . .
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> . . . It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case. . . .
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> * * *
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> It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like.[12] Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify. [*Id.* at 213-215 (citations omitted).]

Similarly, in *Chaffin*, 412 US at 18, 29, the Court held that "in those States that entrust the sentencing responsibility to the jury, the Due Process Clause of the Fourteenth Amendment [does not] bar[] the jury from rendering higher sentences on retrials following rever-

[12] Similarly, "a statement taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used to impeach a defendant's credibility." *Jenkins*, 447 US at 237, citing *Harris v New York*, 401 US 222, 225; 91 S Ct 643; 28 L Ed 2d 1 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.").

sals of prior convictions," even though the potential of "harsher sentences on retrial . . . [may] have a 'chilling effect' on the convicted defendant's exercise of his right to challenge his first conviction either by direct appeal or collateral attack." "The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction." *Id.* at 35. See also *Brady v United States*, 397 US 742, 751; 90 S Ct 1463; 25 L Ed 2d 747 (1970) (declining "to hold . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"); *People v Wyngaard*, 462 Mich 659, 673-674; 614 NW2d 143 (2000) ("[T]he tactical decision that an inmate must make regarding whether to testify at a disciplinary hearing, when his testimony might potentially be used against him in a subsequent criminal proceeding, while perhaps quite difficult, does not constitute 'compulsion' under the Fifth Amendment.") (citation and quotation marks omitted). Likewise, the fact that a defendant deciding whether to take the stand might consider that, if he does not take the stand *and* a mistrial is declared *and* the prosecutor decides to retry him *and* he subsequently decides to take the stand at his second trial, the prosecutor might be able to use his silence at his first trial to impeach his testimony at the second trial, does not place an impermissible burden on the defendant's right to not take the stand in the first place. That is, it does not "compel" the defendant "to be a witness against himself," which is all the Fifth Amendment prohibits.

"In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice." *Jenkins*, 447 US at 238. In this case, as in *Jenkins*, the challenged governmental practice is impeachment on cross-examination of a defendant, and as *Jenkins*, 447 US at 238, explained:

> Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[the] interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."
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> Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial. [Citation omitted; alteration in the original.][13]

A defendant in a criminal case does not have to testify.

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[13] See Department of Justice, Office of Legal Policy, *Report to the Attorney General on Adverse Inferences from Silence*, 22 U Mich J L Reform 1005, 1007 (1989) ("While the nature of the evidence available in criminal prosecutions varies widely from case to case, there is one constant among the potential sources of evidence—the defendant himself is almost invariably aware of whether he actually committed the offense with which he is charged. The criminal justice system's approach to that uniquely knowledgeable individual (the defendant) as a source of evidence has an important bearing on its effectiveness in the pursuit of truth and substantive justice."); Note, 18 U Mich J L Reform at 756 ("Use of prior silence to impeach a defendant's trial testimony aids in the truth-testing function. Because the defendant has a critical interest in the outcome of his trial, he may have a great incentive to perjure himself or distort the facts when he testifies. Therefore, truth-testing functions

However, "[i]f he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness . . . ." *Brown v United States*, 356 US 148, 154; 78 S Ct 622; 2 L Ed 2d 589 (1958); see also *People v Collier*, 426 Mich 23, 38; 393 NW2d 346 (1986) ("When a defendant at trial elects to waive his privilege not to testify and takes the stand, attempted impeachment is a time-honored method of advancing the truthfinding function."). "Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all." *Brown*, 356 US at 155. However, "[h]e cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, [also] an immunity from cross-examination on the matters he has himself put in dispute." *Id.* at 155-156. Indeed, if the Fifth Amendment were interpreted to confer a " 'right to set forth to the jury all the facts which tend in [the defendant's] favor without laying himself open to cross-examination upon those facts,' " "[i]t would make of the Fifth Amendment not only a human safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." *Id.* at 155-156 (citation omitted). Because " '[t]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility,' " *id.* at 156 (citation omitted), the Fifth Amendment has never been interpreted as conferring that right, and we refuse to do so here today.[14]

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of impeachment and cross-examination should be applied with special vigor to assure the veracity of the defendant's testimony.").

[14] As explained in the *Report to the Attorney General*, 22 U Mich J L Reform at 1119-1120:

IV. CONCLUSION

For these reasons, we hold that defendant was not improperly impeached with his silence when the prosecutor made repeated references to defendant's failure to testify at his first trial. We therefore reverse the judgment of the Court of Appeals to the extent that it conflicts with this holding. We also hold that the prosecutor's references to defendant's post-arrest, post-*Miranda* silence at trial plainly violated *Doyle*. Accordingly, we do not disturb the ultimate disposition reached by the Court of Appeals, i.e., the reversal of defendant's convictions. We otherwise vacate this Court's June 6,

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> Any constraints on the discovery or use of evidence that the Constitution actually prescribes must, of course, be scrupulously observed. It is a very different matter, however, to create new "rights," based on misinterpretations of the Constitution, which limit legislative discretion in seeking to improve the processes of justice for the benefit of the whole public, and impede government in discharging its primary mission of ensuring the security of its people in their lives and liberty:
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> "Truth here is the aim . . . . When the guilty go undetected, or, if detected, are nonetheless set free because plain evidence of guilt is suppressed, the price is exacted from what must be the first right of the individual, the right to be protected from criminal attack in his home, in his work, and in the streets. Government is constituted to provide law and order. The Bill of Rights must be understood in the light of that mission.
>
> "There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will . . . . Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be 'compelled' to give evidence against himself."
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> In particular, the [F]ifth [A]mendment does not state or fairly imply that rules must be adopted to protect the defendant from the inferences which are normally drawn from silence in the face of incriminating circumstances. [Citation omitted.]

2012 order granting leave to appeal and deny the prosecutor's application for leave to appeal because we are not persuaded that this Court should review the remaining question presented. We also remand this case to the trial court for further proceedings consistent with this opinion. If defendant chooses to testify at a third trial, the prosecutor may again refer to his failure to testify at his first trial without violating defendant's constitutional rights.

YOUNG, C.J., and KELLY and ZAHRA, JJ., concurred with MARKMAN, J.

MCCORMACK, J. (*concurring*). I join all but part III(D) and footnote 9 of the majority opinion. I write separately for two reasons: first, to elaborate on the majority's discussion of the tension between the holdings in *Raffel v United States*[1] and *Doyle v Ohio*[2] and second, to note that the law remains unclear concerning the evidentiary value of a defendant's silence even if its admission is not barred by the United States Constitution. Accordingly, while there are significant points on which I agree with part III(D) of the majority opinion, I believe it is also important to highlight countervailing concerns regarding the use of silence.

As the majority opinion correctly observes, *Raffel* has not been overruled, and the United States Supreme Court has recognized its continued vitality. I further agree with the majority that the Court of Appeals' attempts to distinguish *Raffel* are not persuasive. For these reasons, I agree that under controlling precedent the Constitution does not bar the admission of evidence concerning defendant's silence at his first trial.

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[1] *Raffel v United States*, 271 US 494; 46 S Ct 566; 70 L Ed 1054 (1926).

[2] *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976).

I am doubtful, however, that much of *Raffel*'s reasoning remains sustainable in light of the subsequent *Doyle* decision. In particular, *Raffel*'s holding that any Fifth Amendment protection is waived when a defendant elects to testify at his or her second trial and the prosecution questions the defendant about his or her failure to testify at the first trial seems incompatible with *Doyle*'s reasoning. *Doyle* explained that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[3] Thus, questioning a defendant about why he or she did not testify at an earlier trial casts the defendant's prior silence in a negative light when the defendant might have previously relied on a constitutional protection—something expressly forbidden by *Doyle*.[4] And as the majority observes, silence at trial is also post-*Miranda* silence. Moreover, the compulsion to speak at a first trial is similar to the compulsion to speak during a custodial interrogation by police. In both scenarios, the suspect/defendant is being accused of committing a crime and presented with the evidence supporting his or her guilt.

Thus, while I recognize that "no Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence,"[5]

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[3] *Id*. at 618.

[4] Poulin, *Evidentiary use of silence and the constitutional privilege against self-incrimination*, 52 Geo Wash L R 191, 215 (1984) ("Thorough analysis reveals that impeachment use of privileged silence impairs the policies underlying the fifth amendment privilege. Permitting impeachment by silence invades the accused's mental privacy protected by the fifth amendment because the government can use the silence as insight into the accused's mind, to discredit his sworn in-court testimony.").

[5] *Jenkins v Anderson*, 447 US 231, 237 n 4; 100 S Ct 2124; 65 L Ed 2d 86 (1980).

the *significance* of that statement is highly questionable in light of the due process rationale of *Doyle*.[6] Because *Jenkins* involved the question of whether it was permissible to comment on a defendant's prearrest silence, which might very well not involve reliance on a constitutional protection because the suspect might be unaware of his or her right to remain silent,[7] the Supreme Court in *Jenkins* was not forced to directly confront the tension between *Raffel* and *Doyle*.[8]

In this case, that tension is both present and particularly concerning because it is readily apparent from the record that defendant relied on his Fifth Amendment right in choosing to remain silent after receiving *Miranda*

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[6] See, e.g., *id*. at 241 n 2 (Stevens, J., concurring) ("[T]here is a serious question about the continuing vitality of *Raffel*."); *id.* at 245 n 10 ("It strikes me as anomalous that, assuming *Raffel* has survived *Doyle*, a defendant who takes the stand is deemed to waive his Fifth Amendment objection to the use of his pretrial silence, but not to waive what I regard as a much less focused, and hence weaker, due process objection. Perhaps the Court's opinion can best be understood by assuming that *Raffel* is not good law on its facts under the *Doyle* rationale.") (citation omitted); see also *Raithel v State*, 40 Md App 107, 117; 388 A2d 161 (1978) ("The reasoning employed in *Johnson* [*v United States*, 318 US 189; 63 S Ct 549; 87 L Ed 704 (1943)], *Grunewald* [*v United States*, 353 US 391; 77 S Ct 963; 1 L Ed 2d 931 (1957)], and *Doyle* is fundamentally inconsistent with the notion contained in *Raffel* that an accused completely waives his privilege against self-incrimination by testifying and it makes no difference that an accused's prior silence might then be used as a weapon against him.").

[7] But see Brief for the American Civil Liberties Union as Amicus Curiae in *Salinas v Texas*, ___ US ___; 133 S Ct 928; 184 L Ed 2d 719 (2013) (granting cert), filed February 26, 2013, p 15 ("Now, in 2013, pre-arrest, pre-*Miranda* silence is just as likely to be attributed to pre-existing knowledge of *Miranda*'s rights as to any other reason . . . .").

[8] *Jenkins*, 447 US at 240 ("The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case.").

warnings.[9] Thus, the precise unfairness about which the *Doyle* Court was concerned—allowing impeachment using silence premised on the assertion of a constitutional right—is present in this case. While the majority correctly holds that "defendant's post-arrest, post-*Miranda* silence with the police is inadmissible," the competing rationales set forth in *Raffel* and *Doyle* are not easily reconcilable with regard to the period following a post-*Miranda* police interrogation.[10] Nor are they any more consistent when the silence occurred at a prior criminal proceeding. In other words, that a defendant waives his or her Fifth Amendment right when he or she chooses to take the stand, yet due process and fundamental fairness prohibit impeachment of a testifying defendant with post-*Miranda* silence because the defendant relied on that right, presents an analytical Gordian knot.

Despite this unresolved conflict in the law, I concur with the majority opinion because *Raffel* is directly controlling here and has not been overruled, whereas

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[9] When the prosecution asked defendant why he didn't think it was important enough to tell the police the same story he told the jury at his second trial, defendant answered "I exercised my Fifth Amendment Right." Although defendant did not repeat this assertion in response to questioning about why he did not testify at his first trial, *Doyle* does not require that a defendant have *actually* relied on his Fifth Amendment right for due process to be violated; it is sufficient that he *may* have relied on that right. See *Doyle*, 426 US at 619 n 10.

[10] See *Brecht v Abrahamson*, 507 US 619, 628-629; 113 S Ct 1710; 123 L Ed 2d 353 (1993) ("[T]he State's references to petitioner's silence after [receiving *Miranda* warnings], *or more generally to petitioner's failure to come forward with his version of events at any time before trial* crossed the *Doyle* line.") (emphasis added; citation omitted); *Gov't of Virgin Islands v Davis*, 561 F3d 159, 164-165 (CA 3, 2009) (rejecting the government's argument that "*Doyle* only limits a prosecutor from referencing at trial a defendant's post-*Miranda* silence at the time of his arrest, and that *Raffel* thus permits impeachment at trial on the defendant's silence during any other time prior to trial" in part on the basis of "the obvious distinction that *Raffel* speaks only to the privilege against self-incrimination rather than due process").

Doyle has not been extended to this context. Thus, it must be the correct result unless or until the United States Supreme Court reconciles the adverse rationales underlying its holdings in *Raffel* and *Doyle*. I look forward to that case.

My second and related point involves the use of a defendant's silence as an evidentiary matter. While part III(D) of the majority opinion articulates the arguments for why the use of silence is not barred under the Fifth Amendment, I believe it is important to identify some factors militating against a broad rule in favor of admissibility as an evidentiary matter. To begin with, it is telling that in the same case in which the United States Supreme Court recognized the continued vitality of *Raffel*, it nevertheless noted that state courts "remain[] free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."[11] This Court has done so on several occasions.[12] The United States Supreme Court and many commentators recognize that "every post-arrest silence is insolubly ambiguous . . . ."[13] As one court has observed:

> The right of an accused not to testify is absolute; he may not even be called as a witness unless he so chooses. To

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[11] *Jenkins*, 447 US at 240.

[12] See, e.g., *People v Cetlinski (After Remand)*, 435 Mich 742, 760; 460 NW2d 534 (1990) (noting that the Court has "adopted the evidentiary rule that nonverbal conduct by a defendant, a failure to come forward, is relevant and probative for impeachment purposes when the court determines that it would have been 'natural' for the person to have come forward with the exculpatory information under the circumstances"), citing *People v Collier*, 426 Mich 23; 393 NW2d 346 (1986).

[13] *Doyle*, 426 US at 617. See also *United States v Hale*, 422 US 171, 176; 95 S Ct 2133; 45 L Ed 2d 99 (1975) ("In most circumstances silence is so ambiguous that it is of little probative force."). See generally Thompson, *Methinks the lady doth protest too little: Reassessing the probative value of silence*, 47 U Louisville L R 21 (2008).

> view his decision not to testify as being inconsistent with a later exculpatory statement would be to presume that the exercise of a right that is inextricably linked to the presumption of innocence constitutes conduct that can be viewed as inconsistent with innocence. Although such cross-examination might not be unconstitutional, the constitutional context in which the privilege is initially asserted strips it of the evidentiary value it might otherwise be thought to have.[14]

Thus, while part III(D) of the majority opinion thoroughly discusses the policy rationales for why the Fifth Amendment does not bar impeachment with prior silence when a defendant chooses to testify, it is important to note that equally compelling countervailing policies have led many courts to exclude such impeachment evidence given its potential to be highly prejudicial. The majority correctly leaves it for the trial court to decide in the first instance whether testimony concerning defendant's silence at the first trial is admissible as an evidentiary matter, including an inquiry into whether its admission would be substantially more prejudicial than probative under MRE 403.

With these observations, I do not join part III(D) or footnote 9, but otherwise concur with the Court's excellent opinion.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in the result that defendant is entitled to a new trial.

As Justice MCCORMACK aptly notes, the United States Supreme Court's 1926 decision in *Raffel v United States*, 271 US 494; 46 S Ct 566; 70 L Ed 1054 (1926), appears to present an anomaly in light of the due

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[14] *Commonwealth v Jones*, 229 Pa Super 236, 245-246; 327 A2d 638 (1974).

process and fundamental fairness concerns subsequently articulated in *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976). "Under the rationale of *Doyle*, due process is violated *whenever* the prosecution uses for impeachment purposes a defendant's post-*Miranda*[1] silence." *Brecht v Abrahamson*, 507 US 619, 629; 113 S Ct 1710; 123 L Ed 2d 353 (1993) (emphasis added).[2] This is because it is fundamentally unfair to assure a defendant that he has the right to remain silent and, thus, that his silence will not be used against him, only to later breach that promise by "using [the defendant's] silence to impeach an explanation subsequently offered at trial." *Id*. at 628 (citations and quotation marks omitted). On the basis of this rationale, I agree with Justice MCCORMACK that to hold that the prosecution, under these facts, may impeach a defendant on the basis of his or her failure to testify at a previous trial presents an "analytical Gordian knot."

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] But, see, *Brecht*, 507 US at 628-629 (finding a *Doyle* violation on the basis of the state's general references to the "petitioner's failure to come forward with his version of events at any time before trial"); *Jones v Indiana*, 265 Ind 447, 451; 355 NE2d 402 (1976) (explaining that there is no difference between a defendant's continued silence after an immediate postarrest custody and throughout the pretrial period because a "defendant who receives *Miranda* warnings is advised that he may remain silent; he is not warned that the right continues only while he is in the custody of the arresting officers" and "[p]enalizing the accused for silence before trial is no less punishment for the exercise of a right than penalizing silence at the time of arrest"), cited with approval by the majority opinion in *People v Collier*, 426 Mich 23, 36 n 3; 393 NW2d 346 (1986); *Neely v State*, 86 Wis 2d 304, 318; 272 NW2d 381 (Wis App, 1978) (stating that "the *Doyle* rationale equally applies to a comment on any pre-trial silence" because to say that the Constitution gives a defendant the right to remain silent, but then allow the prosecution to use the defendant's exercise of that right against him or her, is just as fundamentally unfair as when that right is communicated in giving *Miranda* warnings), disapproved of in part on other grounds in *Neely v State*, 97 Wis 2d 38, 292 NW2d 859 (Wis, 1980).

Aside from the constitutional issues raised in this case, I agree with Justice MCCORMACK that there are matters that weigh *against* a broad rule in favor of the admissibility of a defendant's silence as an evidentiary matter.

As Justice MCCORMACK notes, *Raffel* held that "the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence." *Jenkins v Anderson*, 447 US 231, 237 n 4; 100 S Ct 2124; 65 L Ed 2d 86 (1980). Yet, *Raffel* "did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility." *Grunewald v United States*, 353 US 391, 420; 77 S Ct 963; 1 L Ed 2d 931 (1957). Indeed, although the United States Supreme Court has indicated that states are "free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial," *Jenkins*, 447 US at 240,[3] the United States Supreme Court has also reiterated that "*in no case* has [it] intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach *any* testimony which a defendant elects to give at a later trial," *Stewart v United States*, 366 US 1, 5; 81 S Ct 941; 6 L Ed 2d 84 (1961) (emphasis added).[4] Accordingly, the fact that

[3] See, also, *Fletcher v Weir*, 455 US 603, 607; 102 S Ct 1309; 71 L Ed 2d 490 (1982) ("A state is entitled . . . to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.")

[4] See, also, *Stewart*, 366 US at 6 n 13, 7 n 14 (rejecting the notion that a prior refusal to testify can be used to impeach a defendant's general credibility and explaining that "[i]f the failure to testify at a previous trial were to amount to evidence that testimony at a subsequent trial was feigned or perjurious, the fact of failure to testify would always be admissible"); *Grunewald*, 353 US at 419-420 (explaining that *Raffel*

impeaching a defendant with his or her silence at a prior trial might be constitutional does *not* mean that, as an evidentiary matter, a defendant's prior silence is automatically admissible in a later trial when a defendant elects to waive his constitutional and statutory rights in favor of testifying.[5] See *People v Cetlinski (After Remand)*, 435 Mich 742, 773; 460 NW2d 534 (1990) (LEVIN, J., concurring in part and dissenting in part); *Jenkins*, 447 US at 240-241. Rather, "whether the challenged testimony [is] admissible under an evidentiary analysis, [is] a question that *must* be answered *whenever* the prosecutor seeks to elicit a defendant's . . . silence." *Cetlinski*, 435 Mich at 775 (LEVIN, J., concurring in part and dissenting in part) (emphasis added). See, also, *Grunewald*, 353 US at 418-419. In cases such as this, the issue thus includes whether a defendant's invocation of a constitutional privilege involves such inconsistency with a defendant's later trial testimony that impeachment by reference to a defendant's prior silence is probative.

Notably, in other contexts, a majority of this Court has explained that impeachment with a defendant's silence "should be approached with caution." *People v Collier*, 426 Mich 23, 34; 393 NW2d 346 (1986) (citation and quotation marks omitted). I agree because, in my view, "whether or not the . . . Constitution is implicated, a defendant's silence is *not* generally admissible"; a defendant's silence may not be "routinely admitted" without "carefully examin[ing] the evidentiary admissibility of a defendant's . . . silence . . . ." *Cetlinski*, 435 Mich at 788-789 (LEVIN, J., concurring in part and

should not be read "as establishing as a matter of law that . . . a prior claim of privilege with reference to a question later answered at the trial is always to be deemed to be a prior inconsistent statement, irrespective of the circumstances under which the claim of privilege was made").

[5] US Const, Am V; Const 1963, art 1, § 17; MCL 600.2159.

dissenting in part). And "[a] defendant's 'silence' does not necessarily mean anything," generally rendering it of little probative significance and decreasing its potential for advancing the truth-seeking process. *Id*. at 776. See, also, *People v Conyers*, 52 NY2d 454, 458-459; 438 NYS2d 741; 420 NE2d 933 (1981). Accord *United States v Zaccaria*, 240 F3d 75, 79 (CA 1, 2001) ("[S]ilence per se generally has little or no probative value for impeachment purposes.").[6] See, also, MRE 401 and MRE 403.

Indeed, there might be possible explanations for a defendant's failure to testify, even if entirely innocent of the charge against him, including "[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and the offences charged against him," or simply relying "upon the presumption of the law that [the defendant] was innocent of the charge, and leav[ing] the government to establish his guilt in the best way it could." *Wilson v United States*, 149 US 60, 65-66; 13 S Ct 765; 37 L Ed 650 (1893).[7] Jurors, however, are "not necessarily sensitive to the . . . alternative explanations for a defendant's [previous] silence" and thus may draw an "unwarranted inference of guilt" resulting in a substantial

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[6] Accordingly, to the extent that the majority opinion can be read to suggest that a defendant's silence is per se highly probative, that a defendant's silence at a previous trial is "plain evidence of guilt" that should not be suppressed, or that the use of a defendant's silence as an impeachment tool should be applied with "special vigor," I must part ways with the majority. Also, I simply note that *Raffel* "assumed that the defendant's failure to testify at the first trial could *not* be used as evidence of guilt in the second trial[.]" *Grunewald*, 420 n 32 (emphasis added).

[7] See, also, *Commonwealth v Jones*, 229 Pa Super 236, 246-247; 327 A2d 638 (Pa Super, 1974) (explaining that there may be "reasons why a defendant might choose not to testify[,] such as fear of being confused or misunderstood or a general inability to articulate"); *Doyle*, 426 US at 617 ("[E]very post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.").

risk of prejudice to a criminal defendant. *Conyers*, 52 NY2d at 459. See, also, *Grunewald*, 353 US at 424. As the United States Supreme Court has recognized, "[t]oo many, even those who should be better advised, view [the Fifth Amendment] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Id*. at 421 (citation and quotation marks omitted). Accordingly, as Justice MCCORMACK notes, in this context, one jurisdiction has explained that, although cross-examining a defendant with his or her prior silence " 'might not be unconstitutional, the constitutional context in which the privilege is initially asserted strips it of the evidentiary value it might otherwise be thought to have.' " *Ante* at 286, quoting *Jones*, 229 Pa Super at 245-246.[8] Given that the evidentiary matter in this case presents "grave constitutional overtones," I generally find this rationale persuasive. *Grunewald*, 353 US at 423.

In sum, although *Raffel* and the Fifth Amendment of the United States Constitution may permit impeachment with a defendant's prior silence in this context, a defendant's silence must still be admissible under the Michigan Rules of Evidence, including MRE 403.

VIVIANO, J., took no part in the decision of this case.

[8] Cf *Cetlinski*, 435 Mich at 790 (LEVIN, J., concurring in part and dissenting in part) (addressing the evidentiary value of pre- and postarrest, pre-*Miranda* silence and stating that the use of a defendant's silence for impeachment purposes "cannot be justified in the absence of unusual circumstances" because "evidence of a defendant's . . . silence may have a disproportionate impact upon the minds of the jurors and . . . the potential for prejudice inherent in such evidence outweighs its marginal probative worth"), quoting *Conyers*, 52 NY2d at 459.

PEOPLE v ELLIOTT

Docket No. 144983. Argued March 6, 2013 (Calendar No. 9). Decided June 25, 2013.

Samuel Lee Elliott was convicted by a jury in the Jackson Circuit Court of armed robbery, MCL 750.529. A man had entered a gas station, told the attendant he had a gun, and demanded the store's money. Elliott, who had been on parole following a prior conviction, was arrested the following day pursuant to a warrant for failing to report to his parole officer. Elliott's brother had contacted the police, informing them that Elliott had robbed the gas station. Elliott was interrogated by the police after he was informed of his rights pursuant to *Miranda v Arizona*, 384 US 436 (1966). The police stopped questioning Elliott after he invoked his right to counsel. Three days later, while still in jail, Elliott confessed to a parole officer when she questioned him about the robbery in conjunction with serving Elliott with notice of additional parole-violation charges. The parole officer had not informed Elliott of his *Miranda* rights before questioning him. Defense counsel moved to suppress the confession. The court, Thomas D. Wilson, J., denied the motion, concluding that the parole officer had not acted as a law enforcement officer when questioning Elliott. Following his conviction and sentencing, Elliott appealed. The Court of Appeals, BECKERING, P.J., and OWENS and SHAPIRO, JJ., reversed and remanded for a new trial, holding that a parole officer is a law enforcement officer for *Miranda* purposes, that Elliott was in custody when the parole officer interrogated him, that Elliott's confession was inadmissible because he had invoked his right to counsel before questioning, and that the trial court's error in admitting the confession was not harmless. 295 Mich App 623 (2012). The Supreme Court granted the prosecution's application for leave to appeal. 491 Mich 938 (2012).

In an opinion by Justice MARKMAN, joined by Justices KELLY, ZAHRA, and VIVIANO, the Supreme Court *held*:

In *Miranda*, the United States Supreme Court held that the Fifth Amendment's prohibition against compelled self-incrimination requires that the accused be given a series of

warnings before being subjected to custodial interrogation. The right to have counsel present is a corollary of the right against compelled self-incrimination because the presence of counsel during custodial interrogation is one way in which to ensure that statements made during custodial interrogation are not the product of compulsion. If custodial interrogation is not preceded by an adequate warning, statements made during the interrogation may not be introduced into evidence at the accused's trial. Once the accused has invoked the right to counsel, the accused may not be subjected to further custodial interrogation until counsel has been made available to the accused unless the accused initiates further communication, exchanges, or conversations with the police. In the absence of a post-invocation custodial interrogation, there can be no infringement of the right to have counsel present during a custodial interrogation. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. When a parolee is incarcerated for an alleged parole violation, "custodial" means more than just the normal restrictions that exist as a result of the incarceration; incarceration alone is not enough to create a custodial situation for *Miranda* purposes. Whether incarceration constitutes custody for *Miranda* purposes depends on whether it exerts the coercive pressure that *Miranda* was designed to guard against—the danger of coercion that results from the interaction of custody and official interrogation. The first step is to determine whether the accused's freedom of movement was curtailed. If so, the court must then ask whether the relevant environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. In this case, the meeting took place in the jail library, it lasted only 15 to 25 minutes, Elliott was not physically restrained, and a reasonable person in Elliott's position, a parolee, would be aware that a parole officer acts independently of the police who placed him or her in custody and that the parole officer has no control over the jail, its staff, or the individuals incarcerated there. On balance, these facts were consistent with an environment in which a reasonable person would have felt free to terminate the interview and leave. Thus, Elliott's freedom of movement was not curtailed. However, even if Elliott's freedom of movement was curtailed, Elliott failed to show that the meeting presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. Elliott presented no evidence of coercion or psychological intimidation. Any inherently coercive attributes of the parolee/parole officer relationship, which the Court of Appeals relied on in reaching its decision, were

inapplicable in this case because the parole officer who questioned Elliott was not Elliott's supervising officer and thus they did not have the kind of unique relationship of trust and confidence that the Court of Appeals assumed that they did. Viewing the totality of the circumstances, there was no custodial interrogation. Because Elliott was not subjected to custodial interrogation by the parole officer, even if she was a law enforcement officer, neither Elliott's right to be given a series of warnings before custodial interrogation nor his right to have counsel present during custodial interrogation was violated. Accordingly, the trial court did not err by admitting Elliott's confession.

Judgment of the Court of Appeals reversed; defendant's conviction and sentence reinstated.

Chief Justice YOUNG, concurring, agreed with the majority's decision to reverse the judgment of the Court of Appeals and reinstate Elliott's conviction and sentence. Even if the parole officer's interrogation of Elliott was a custodial interrogation by a law enforcement officer, defendant waived any right to have counsel present during the interrogation. The parole officer testified at trial that Elliott had submitted a letter to the police indicating that he wanted to speak with them again and that defendant had reiterated that request when speaking with her. Thus, Elliott initiated further communication, exchanges, or conversations with the police, and the parole officer did not violate Elliott's Fifth Amendment rights.

Justice MCCORMACK, joined by Justice CAVANAGH, dissenting, asserted that the Court of Appeals correctly reversed Elliott's conviction and remanded for a new trial, although she agreed with the majority that the dispositive issue was whether Elliott was subjected to custodial interrogation, not the nature of the relationship between Elliott and the parole officer. Because *Miranda* applied to the initial questioning of defendant by the police and Elliott had requested counsel, Elliott could not be subjected to further custodial interrogation about the robbery until counsel had been made available to him or he initiated communication. The parole officer's questioning of Elliott violated his Fifth Amendment rights under *Edwards v Arizona*, 451 US 477 (1981), because the custodial environment established at the initial police interview never ceased and defendant did not initiate the conversation with the parole officer. Alternatively, Justice MCCORMACK asserted that the parole officer's questioning of Elliott constituted its own custodial interrogation for *Miranda* purposes. Justice MCCORMACK concluded that Elliott had not waived his Fifth Amendment right to counsel given that Elliott did not initiate the

interview with the parole officer, that the prosecution never made a waiver argument, and that Elliott's alleged letter to the police was not in the record.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Linda D. Ashford, P.C. (by *Linda D. Ashford*), for Samuel Lee Elliott.

Amicus Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *B. Eric Restuccia*, Deputy Solicitor General, for the Department of the Attorney General.

MARKMAN, J. We granted leave to appeal to consider whether the trial court erred by admitting defendant's confession to a parole officer. The Court of Appeals held that the admission of defendant's confession violated *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), because Evans was a "law enforcement officer" for purposes of *Miranda*. We respectfully disagree because this is not a sufficient condition for the application of these decisions. Even if every parole officer constitutes a "law enforcement officer," neither an accused's right under *Miranda* to be given a series of warnings nor an accused's right under *Edwards* to have counsel present apply absent "custodial interrogation" by the officer. Because defendant was not subjected to "custodial interrogation" by the parole officer as that term has come to be understood under *Miranda* and its progeny, neither defendant's *Miranda* nor defendant's *Edwards* rights were violated,

regardless of whether the parole officer was a law enforcement officer. Thus, the trial court did not err by admitting defendant's confession. By focusing on the wrong constitutional question, the Court of Appeals considerably expanded the domain of *Miranda*, particularly with regard to parole officers. Accordingly, we reverse the judgment of the Court of Appeals and reinstate defendant's conviction and sentence.

I. FACTS AND HISTORY

In 2006, defendant was convicted of unarmed robbery in violation of MCL 750.530, and the trial court sentenced him to serve a prison term of 3 to 15 years.[1] In February 2010, at the discretion of the parole board, defendant was granted parole and provisionally released from prison. Upon release, defendant was placed under the supervision of a parole officer and required to abide by certain conditions of parole. These conditions included that defendant not engage in behavior that constitutes a violation of any federal, state, or local law, that he not use or possess controlled substances, and

[1] Defendant was adjudicated responsible as a juvenile in 1982 for assault and battery and in 1983 for fourth-degree criminal sexual conduct. In 1987, defendant pleaded guilty to minor in possession. In 1990, he pleaded guilty to operating a vehicle while under the influence of alcohol, and in 1991, he pleaded guilty to three counts of assault and battery and one count of disturbing the peace. In that same year, he also pleaded guilty to assaulting a police officer and, when he violated probation, he was sent to prison. Also in 1991, in separate cases, he pleaded guilty to malicious destruction of property over $100 and malicious destruction of property under $100. In 1992, he pleaded guilty to misdemeanor resisting a police officer and spent 20 days in jail. In 1993, he pleaded guilty to both possessing an open intoxicant and urinating in public. In 1994, he was convicted of unarmed robbery and sentenced to 5 to 30 years in prison. In 2003, shortly after his release from prison, he pleaded guilty to resisting a police officer and received yet another prison term.

that he follow the parole officer's instructions and report as required by the officer.

On June 17, 2010, defendant was taken into custody by police pursuant to a warrant for failing to report, and the next day, his parole officer, Jason Golightly, served defendant with a notice of parole violation pertaining to that failure. On the same day, after advising defendant of his *Miranda* rights, detectives of the Jackson Police Department questioned defendant concerning a robbery that had occurred at approximately 4:00 a.m. on June 16, 2010, at a Jackson gas station. After voluntarily answering several questions, defendant requested an attorney. The police then discontinued the interrogation.

On June 21, 2010, while defendant was still incarcerated, his parole officer was on vacation, so another officer, Cheryl Evans, went to the jail to serve defendant with an amended notice of parole violation that identified three additional parole violations, one of which related to the June 16 robbery.[2] Evans testified as follows regarding what occurred at the jail:

> *Q*. And what, exactly does ["serve him parole violation charges and get his statement"] mean? What do you do? What's the process when that happens?
>
> *A*. When a person is served with a parole violation charge, when we determine they -- or we believe they have

[2] Before going to the jail, Evans reviewed the police report that was created following the robbery. She learned from another parole officer that defendant's brother had turned defendant in. She also talked to a detective, Ed Smith, who had questioned defendant at the jail a few days earlier. Evans testified that "what we generally do is, if they're in the middle of an investigation, we just ask them whether or not -- if I can go talk to the person without interfering with their investigation, because our issue is separate than theirs." Smith testified that he told Evans that defendant had requested an attorney, but Evans testified that she did not recall Smith telling her that.

violated a condition of their parole, we have charges made up. They're on a piece of paper.

We then go and meet with the person. We serve them the charges, which means I say "Count I," "Count II" -- or, for him, it was Count -- it was an additional count, so it was Count III, Count IV, Count V. And then I review it with him. I ask him for a statement. We talk a little bit. And then he decides whether he signs the bottom -- not saying he's guilty -- just signs that he received the charges.

Then he's offered a preliminary parole violation hearing, which is a probable cause hearing. And, again, he waived that, but waiving that does not admit he's guilty. It's just that he's waiving the preliminary hearing.

Q. So, did you do all this with the Defendant?

A. Yes.

* * *

Q. And did he give you a statement?

A. Yes, he did.

Q. Did one of the charges have to do with the robbery at the Admiral gas station?

A. Yes.

Q. Did he give you a statement as to those charges?

A. Yes.

Q. And what did he say?

A. We talked generally about everything that was going on and he said that he'd been having a rough time. He said that he was living with his cousin, Laurie Brooks, who has a couple of kids, and that he felt -- he wasn't able to get a job and hold a job -- and he felt that he was putting a lot of financial stresses on her. And he also said, you know, he, himself, got a little stressed about it and was having a lot of trouble adjusting and he slipped and started using his cocaine again.

And he said he went into the Admiral gas station. He told me that he walked in there to the clerk, asked the clerk

> for some cigarettes. The clerk turned around to get cigarettes. As the clerk turned around -- he actually showed me what he did -- he leaned forward like this onto the counter and told the guy in a low voice to -- told him to give him the money and he wouldn't get hurt, and then he said the guy gave him the money and he left.

Relevant here, the meeting between Evans and defendant took place in the jail library and lasted approximately 15 to 25 minutes. Evans did not inform defendant of his *Miranda* rights or tell defendant that he was not required to speak to her absent a lawyer being present. According to Evans, during the meeting, defendant told her that he had submitted a letter indicating that he wished to talk to the police again, and at the end of the meeting, defendant asked Evans to convey to the police that he wished to speak to them.

Defendant was eventually charged with armed robbery for the gas station incident, and he was tried before a jury. At the beginning of trial, defendant moved to suppress Evans's testimony regarding defendant's confession, arguing that it was improperly obtained because defendant had not been informed of his *Miranda* rights and because defendant had previously requested counsel. After conducting a hearing, the trial court determined that Evans had not been acting in concert with law enforcement officials and that Evans was not herself a law enforcement officer obligated to give *Miranda* warnings. Accordingly, the court denied defendant's motion and admitted Evans's testimony regarding defendant's confession. The jury convicted defendant of armed robbery, and he was sentenced as a fourth-offense habitual offender to a prison term of 15-30 years.

Defendant appealed, arguing that the trial court had erred when it denied his motion to suppress Evans's testimony regarding his confession and that the error

was not harmless. In a published opinion, the Court of Appeals held that a parole officer is a law enforcement officer for purposes of *Miranda*, that defendant was in custody when Evans interrogated him, and that the statements made by defendant were thus "inadmissible in a subsequent trial [because] the parolee invoked the right to counsel before questioning." *People v Elliott*, 295 Mich App 623, 646; 815 NW2d 575 (2012). The Court of Appeals agreed with defendant that the trial court's error in denying the motion to suppress was not harmless given the significance the prosecutor had placed on Evans's testimony. *Id.* at 647-648. The Court of Appeals reversed defendant's conviction and remanded for a new trial. *Id.* at 626. We granted the prosecutor's application for leave to appeal. *People v Elliott*, 491 Mich 938 (2012).[3]

II. STANDARD OF REVIEW

"We review a trial court's factual findings in a ruling on a motion to suppress for clear error. To the extent that a trial court's ruling on a motion to suppress

[3] The Court of Appeals also held that the trial court did not clearly err by finding that Evans had not acted in concert with, or at the request of, the police. *Elliott*, 295 Mich App at 636. Defendant does not appeal that holding. Thus, our order granting the prosecutor's application stated as follows:

> The parties shall address whether, and, in light of *Howes v Fields*, 565 US ___; 132 S Ct 1181; 182 L Ed 2d 17 (2012), under what custodial circumstances, a parole officer not acting in concert with police is required to provide the warnings prescribed by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), before questioning an in-custody parolee who, during police questioning, has previously invoked his right to counsel under *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), about an offense giving rise to an alleged parole violation, if the parole officer's testimony concerning the parolee's responses to such questioning is to be admissible at the trial for that offense. [*Elliott*, 491 Mich 938.]

involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). Whether a court applied the correct constitutional standard is reviewed de novo. *People v McRae*, 469 Mich 704, 710; 678 NW2d 425 (2004).

III. ANALYSIS

In *Miranda*, the United States Supreme Court held that the Fifth Amendment's prohibition against compelled self-incrimination requires that the accused be given a series of warnings before being subjected to "custodial interrogation."[4] *Miranda*, 384 US at 444 ("Prior 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."). The right to have counsel present during custodial interrogation is a corollary of the right against compelled self-incrimination, because the presence of counsel at custodial interrogation is one way in which to "insure that statements made in the government-established atmosphere are not the product of compulsion." *Id.* at 466; see also *id.* at 470. If the custodial interrogation is not preceded by an adequate warning, statements made during the custodial interrogation may not be introduced into evidence at the accused's criminal trial. *Id.* at 444-445.

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[4] The United States Constitution and the Michigan Constitution both prohibit "compelled" self-incrimination. US Const, Am V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."); Const 1963, art 1, § 17 ("No person shall be compelled in any criminal case to be a witness against himself . . . .").

The prosecutor concedes that *Miranda* warnings were not given by the parole officer. Thus, the pertinent question is whether the meeting with the parole officer that resulted in defendant's inculpatory statements constituted custodial interrogation. If the meeting did not constitute custodial interrogation, the ruling of the trial court was correct and the statements were properly admitted into evidence. See *People v Hill*, 429 Mich 382, 397; 415 NW2d 193 (1987) (indicating that *Miranda* warnings are not required unless the accused is subject to custodial interrogation). On the other hand, if the meeting did constitute custodial interrogation, the ruling of the trial court was in error and the statements were improperly admitted into evidence.

There is no dispute that defendant invoked his right to have counsel present during custodial interrogation when he was questioned on June 18 by Jackson police detectives about the gas station robbery and that the invocation triggered certain safeguards pursuant to *Edwards*, 451 US at 484-485. In *Edwards*, the United States Supreme Court created "additional safeguards" for when the accused invokes his right to have counsel present during custodial interrogation:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [H]aving expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. [*Edwards*, 451 US at 484-485.]

Edwards concerns only the manner in which the accused, after invoking his right to have counsel present

during custodial interrogation, can validly waive that right and thereafter be subjected to further custodial interrogation absent counsel.[5] If the accused is never subjected to custodial interrogation after he has invoked his right to counsel, *Edwards* is inapplicable. In other words, according to *Edwards*, the right the accused invokes under *Miranda* is the right to have counsel present during custodial interrogation. *Edwards*, 451 US at 485-486 ("The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation."). In the absence of a post-invocation custodial interrogation, there can be no infringement of that right. See, e.g., *Maryland v Shatzer*, 559 US 98, 111; 130 S Ct 1213; 175 L Ed 2d 1045 (2010) ("In every case involving *Edwards*, the courts must determine whether the suspect was in custody when he requested counsel *and when he later made the statements he seeks to suppress*."); *Edwards*, 451 US at 487 ("We think it is clear that Edwards was subjected to custodial interrogation [at a second meeting with the police] . . . and that this occurred at the instance of the authorities.").

The pertinent question in this case is not, as the Court of Appeals believed it to be, "whether Evans was

[5] The prosecutor does not argue that defendant validly waived the right to have counsel present during custodial interrogation. Rather, he simply argues that defendant did not have the right to have counsel present during his meeting with Evans. Because we agree, we also do not address waiver in this opinion. That is, unlike the dissenting opinion, we conclude that because the parole officer did not subject defendant to custodial interrogation, defendant had no right to counsel during his meeting with the parole officer. Because we conclude that defendant had no right to counsel to waive, we do not need to address the concurring opinion's conclusion that defendant waived that right. The dissenting opinion would broaden the concept of custodial interrogation and thereby ensure that in some unknown number of future cases, voluntary confessions such as that which occurred in this very case, would be rendered inadmissible.

a law enforcement officer under *Miranda* as a matter of law given her status as a parole officer . . . ." *Elliot*, 295 Mich App at 636. Although *Miranda* discussed the constitutional safeguards in terms of "questioning initiated by law enforcement officers," *Miranda*, 384 US at 444, neither *Miranda*'s right to be given a series of warnings nor *Edwards*'s right to have counsel present apply absent custodial interrogation, regardless of whether a parole officer constitutes a law enforcement officer. Thus, to determine whether a defendant's *Miranda* or *Edwards* rights have been violated, we must first resolve whether the meeting with the parole officer constituted custodial interrogation.[6] Because we

[6] Although we agree with the dissent that defendant "could not be subjected to further *custodial interrogation* about the robbery until counsel had been made available to him or he initiated communication," *post* at 325-326 (emphasis added), we disagree that "Evans's interview of defendant about the robbery [cannot] be viewed as noncustodial because custody, for purposes of *Miranda* and *Edwards*, was not broken between the initial interrogation by the police and Evans's subsequent questioning three days later," *post* at 326. For all of the reasons set forth in this opinion, we believe that defendant's meeting with the parole officer cannot be viewed as the same as his meeting with the police in terms of constituting "custodial interrogation." Further, however, we believe it is clear that these constituted entirely distinct episodes, distinct in terms of when they occurred, distinct in terms of their participants, distinct in terms of who was doing the interrogation, distinct in terms of their venue, distinct in terms of their subject matter and purpose, distinct in terms of their coercive aspects, and distinct in terms of the overall environment in which they took place. That *one* of these episodes can be characterized as involving custodial interrogation carries no particular significance in terms of whether the *other* can be similarly characterized, as it must be, before defendant's *Miranda* rights are implicated. Although, by treating these distinct episodes as part of a "continuing" sequence of events that "never ceased" the dissent can impute the attributes of one meeting to the other meeting, we do not believe this accurately describes the relationship between the events. Indeed, the dissent itself acknowledges that the police "stopped questioning" defendant when he invoked his right to have counsel present, and the dissent identifies no reason why the custodial interrogation that existed during

conclude that defendant was not subjected to custodial interrogation by the parole officer, we need not further consider whether a parole officer not acting in concert with or at the request of the police may be considered a law enforcement officer for purposes of *Miranda*. By focusing on the wrong constitutional question, the Court of Appeals considerably expanded the domain of *Miranda*, particularly with regard to parole officers.

A. "CUSTODIAL INTERROGATION"

In *Miranda*, the United States Supreme Court defined "custodial interrogation" as "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*. Custodial interrogation occurs "during 'incommunicado interrogation of individuals in a police-dominated atmosphere.' " *Illinois v Perkins*, 496 US 292, 296; 110 S Ct 2394; 110 L Ed 2d 243 (1990), quoting *Miranda*, 384 US at 445. "That atmosphere is said to generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' " *Perkins*, 496 US at 296, quoting *Miranda*, 384 US at 467. " 'Fidelity to the doctrine announced in *Miranda* requires that it be enforced . . . only in those types of situations in which the concerns that powered the decision are implicated.' " *Perkins*, 496 US at 296, quoting *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

Where, as here, a parolee is incarcerated for an alleged parole violation, "custodial" means more than

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the meeting with the police should necessarily be thought to carry over to the meeting with the parole officer. The only relevant question under *Edwards* is whether the *meeting with the parole officer* did or did not constitute custodial interrogation, and we believe that it did not.

just the normal restrictions that exist as a result of the incarceration. Indeed, the United States Supreme Court has held that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*." *Howes v Fields*, 565 US ___, ___; 132 S Ct 1181, 1190; 182 L Ed 2d 17 (2012); see also *Shatzer*, 559 US at 112-113. Instead, whether "incarceration constitutes custody for *Miranda* purposes . . . depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against—the 'danger of coercion [that] results from the *interaction* of custody and official interrogation.' " *Shatzer*, 559 US at 112 (emphasis and alteration in original), quoting *Perkins*, 496 US at 297. In determining whether defendant was presented with the same inherently coercive pressures that were the basis for the decision in *Miranda*, we find *Fields* instructive.

In *Fields*, a Michigan prisoner, Randall Fields, was escorted from his prison cell by a corrections officer to a conference room in which he was questioned by two sheriff's deputies about criminal activity he had allegedly engaged in before coming to prison. Fields was questioned for between five and seven hours and was at no time given *Miranda* warnings or advised that he did not have to speak with the deputies. Fields was told more than once that he was free to leave and return to his cell. The deputies were armed, but Fields remained free of restraints. The conference room door was sometimes open and sometimes shut. Several times during the interview Fields stated that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell. After Fields eventually confessed and the interview concluded, he had to wait an additional 20 minutes for an escort before returning to his cell well after the time when he generally went to bed.

Under these facts, the United States Supreme Court held that Fields was not in custody for purposes of *Miranda*, and set forth the following constitutional standards:

> As used in our *Miranda* case law, "custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of "the objective circumstances of the interrogation," a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." And in order to determine how a suspect would have "gauge[d]" his "freedom of movement," courts must examine "all of the circumstances surrounding the interrogation." Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.
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> Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have "decline[d] to accord talismanic power" to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. "Our cases make clear . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody."
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> When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which

> the interrogation is conducted. [*Fields*, 565 US at ___; 132 S Ct at 1189-1190, 1192 (citations omitted; alterations in original).]

The Court then held that questioning a person in prison does not generally "involve the shock that very often accompanies arrest," that "when a prisoner is questioned, he knows that when the questioning ceases, he will remain under confinement," that a prisoner "is unlikely to be lured into speaking by a longing for prompt release," and that a prisoner knows his questioners "probably lack the authority to affect the duration of his sentence." *Id.* at ___; 132 S Ct at 1190-1191. The Court found it "important" that Fields "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted." *Id*. at ___; 132 S Ct at 1193. However, it also noted that Fields "was not advised that he was free to decline to speak with the deputies." *Id*. at __; 132 S Ct at 1193. Despite this failing, the Court held that Fields was not in custody for purposes of *Miranda*.

Pursuant to *Fields*, the first constitutional step is to determine "whether an individual's freedom of movement was curtailed . . . ." *Fields*, 565 US at ___; 132 S Ct at 1189. If so, the court should then ask "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at ___; 132 S Ct at 1190. Thus, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Id.* at ___; 132 S Ct at 1189.

In the instant case, the meeting at issue took place in the jail library, it was of short duration (15 to 25 minutes), defendant was not physically restrained, and he was escorted to the library by a deputy, not by the parole officer. We note, as does the dissent, that one

difference between this case and *Fields* is that defendant in this case was never told that he was free to leave the meeting and return to his cell. However, given that the meeting in this case lasted approximately 15 to 25 minutes, and the one in *Fields* lasted for five to seven hours, we do not think this fact is particularly compelling, much less dispositive, under the circumstances.[7] More significant is the fact that defendant was not free to leave the jail library by himself. In this respect, this situation resembles that of the defendant in *Fields*:

> Because he was in prison, respondent was not free to leave the conference room by himself and to make his own way through the facility to his cell. Instead, he was escorted to the conference room and, when he ultimately decided to end the interview, he had to wait about 20 minutes for a corrections officer to arrive and escort him to his cell. *But he would have been subject to this same restraint even if he had been taken to the conference room for some reason other than police questioning; under no circumstances could he*

[7] See *Stansbury v California*, 511 US 318, 322; 114 S Ct 1526; 128 L Ed 2d 293 (1994) ("In determining whether an individual was in custody, a court must examine *all of the circumstances* surrounding the interrogation . . . .") (emphasis added). The dissent states that "the *Fields* majority cited the fact that the defendant in that case was told he was free to leave as the '[m]ost important' factor in its determination that the defendant was not in custody." *Post* at 329 (alteration in original). More precisely, however, the Court found this fact to be the "most important" only in "offset[ting]" the facts that *supported* the "argument that *Miranda*'s custody requirement was met: The interview lasted for between five and seven hours in the evening and continued well past the hour when respondent generally went to bed; the deputies who questioned respondent were armed; and one of the deputies, according to respondent, '[u]sed a very sharp tone' . . . ." *Fields*, 565 US at __; 132 S Ct at 1193 (alteration in original). As defendant in this case was not interviewed for five to seven hours late into the night by armed deputies who used a sharp tone, it is of considerably less relevance that the parole officer did not apprise defendant that he was free to return to his cell, because no such similarly harsh circumstances *existed* in the first place that needed to be "offset" by this fact.

have reasonably expected to be able to roam free. [*Id.* at ___; 132 S Ct at 1193 (emphasis added).]

Moreover, much like the prisoner in *Fields*, a "reasonable person" in defendant's "position," i.e., a *parolee*,[8] would be aware that a parole officer is acting independently of the police who placed him in custody and has no control over the jail, its staff, or the individuals incarcerated there.[9] Thus, on balance, we conclude that defendant's "freedom of movement" was not "curtailed" during the meeting at the jail library. *Id.* at ___;

[8] *Berkemer v McCarty*, 468 US 420, 442; 104 S Ct 3138; 82 L Ed 2d 317 (1984) ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004) ("Courts must examine 'all of the circumstances surrounding the interrogation' and determine 'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.' "). Relevantly, the suspect in *Yarborough* was also not told "that he was free to leave." *Id*. at 655.

[9] *Fields*, 565 US at ___; 132 S Ct at 1191 (2012), quoting *Perkins*, 496 US at 297 (" 'When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners.' "). See also, In *JDB v North Carolina*, ___ US ___, ___; 131 S Ct 2394, 2404, 2406; 180 L Ed 2d 310 (2011) (stating that "so long as the child's age was known to the officer at the time of police questioning . . . its inclusion in the custody analysis is consistent with the objective nature of [the *Miranda* custody] test" because "a child's age differs from other personal characteristics that . . . have no objectively discernible relationship to a reasonable person's understanding of his freedom of action"). *JDB* thus distinguished age from a suspect's "prior *interrogation history* with law enforcement," noting that the latter could not be considered without compromising the objective nature of the custody analysis because the effect of this experience is contingent on the psychology of the individual suspect. *Id.* at ___; 131 S Ct at 2404. We do not think it is an unreasonable or "subjective" conclusion that a parolee is more generally aware, precisely because he or she is a parolee, that a parole officer acts independently of the police and has no control over the jail, its staff, or the individuals incarcerated there.

132 S Ct at 1189.[10] The facts are consistent with an " 'environment in which a reasonable person would have felt free to terminate the interview and leave.' " *Id.* at ___; 132 S Ct at 1193, quoting *Yarborough v Alvarado*, 541 US 652, 664-665; 124 S Ct 2140; 158 L Ed 2d 938 (2004).

Even if defendant could show that his freedom of movement was somehow curtailed during the meeting, he still fails to explain how the meeting "present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*, 565 US at ___; 132 S Ct at 1189-1190 ("[W]hether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. . . . We have 'decline[d] to accord talismanic power' to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.") (citation omitted; second alteration in original). See also *United States v Salyers*, 160 F3d 1152, 1159 (CA 7, 1998) ("Custody 'implies a situation in which the suspect knows he is speaking with a government agent and does not feel free to end the conversation; *the essential element of a custodial interrogation is coercion*.' "), quoting *United States v Martin*, 63 F3d 1422, 1429 (CA 7, 1995) (emphasis added).

In this case, there is no evidence of coercion or any other manner of psychological intimidation. The parole

[10] The dissent, *post* at 331 n 17, errs in its suggestion that *Fields* did not discuss defendant's status as an inmate in the "freedom of movement" inquiry in that case. See *Fields*, 565 US at ___; 130 S Ct at 1193 (stating that because the respondent was in prison "under no circumstances could he have reasonably expected to be able to roam free"). We believe that defendant's "parolee status" is similarly relevant. See also, *Shatzer*, 559 US at 107-108.

officer visited defendant as part of her job as a parole officer; her only reasons for speaking to defendant were to advise him of parole violation charges,[11] advise him of his right to a preliminary hearing on those charges,[12] and to see if he was prepared to waive his right to a preliminary hearing. The officer was required to do all of this as part of her job, regardless of whether defendant was in or out of jail. Defendant cannot show inherently coercive pressures that caused him to discuss the robbery with the parole officer. Defendant was in jail for other parole violation charges (absconding) that were unrelated to the charges Evans was there to serve. Also, unlike in *Fields*, defendant was not questioned for an extended period of time by *armed* police officers who used a " 'sharp tone' " and "profanity." *Fields*, 565 US at ___; 132 S Ct at 1193 (citation omitted). And also unlike in *Fields*, in which the defendant indicated on several occasions during the interview that he did not want to talk to the police officers, defendant in this case did not even once indicate that he did not want to talk to the parole officer. Nor is there any evidence that the meeting "continued well past the hour" when defendant "generally went to bed," *id*. at ___; 132 S Ct at 1193, that the officer had the authority to alter the duration of defendant's incarceration,[13] or

[11] See MCL 791.239a(2) ("Prior to the preliminary hearing, the accused parolee shall be given written notice of the charges . . . .")

[12] See MCL 791.239a(1) ("Within 10 days after an arrest for an alleged violation of parole, the parolee shall be entitled to a preliminary hearing to determine whether there is probable cause to believe that the conditions of parole have been violated or a fact-finding hearing held pursuant to [MCL 791.240a].")

[13] Contrary to the dissent's suggestion, the mere fact that Evans, who was not even defendant's supervising parole officer, "was present at the jail to serve parole violation charges on defendant" does not mean that Evans had the " 'authority to affect the duration of his sentence . . . .' " *Post* at 332, quoting *Fields*, 565 US at ___; 132 S Ct at 1191. As explained

that defendant could not terminate the meeting. This situation does not represent custodial interrogation because defendant was not subjected to the type of coercive pressure against which *Miranda* was designed to guard. It is hardly the sort of incommunicado, police-dominated atmosphere involving custodial interrogation and the "overbearing" of the subject's will toward which *Miranda* was directed. Accordingly, in our judgment, there was no "custodial interrogation" as that term has come to be understood under *Miranda* and its progeny.

The dissent argues that *Fields* and *Shatzer* (another opinion that held that imprisonment alone is insufficient to create a custodial interrogation situation within the meaning of *Miranda*) are significantly distinguishable from the instant case because the defendants in those cases "were both serving sentences for unrelated crimes and living in the prison in which they were interviewed." *Post* at 327. However, the dissent fails to recognize that a parolee who is incarcerated as a result of violating a condition of his parole is at that juncture no different than a prisoner who was never paroled in the first place, at least in the sense that both are imprisoned as a result of their underlying offenses. Defendant here was arrested by the police pursuant to a warrant that was issued because he had absconded

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in *Fields*, 565 US at ___; 132 S Ct at 1191, "a prisoner, unlike a person who has *not* been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence." (Emphasis added.) Also, the dissent offers no factual support for its assertion that "Evan's influence [c]ould have been critical" regarding "how much time defendant served . . . ." *Post* at 332-333 n 21. Instead, it appears that Evans merely filled in for defendant's supervising parole officer and completed the single discrete task of serving defendant with an amended notice of parole violations, and that defendant's supervising parole officer was the one ultimately responsible for overseeing his parole violation.

from parole. Because defendant was on parole and a warrant for his return had been issued as a result of his violation of a condition of parole, defendant, pursuant to Michigan law, could not be considered anything other than a "prisoner," as were the defendants in *Fields* and *Shatzer*. *People v Holder*, 483 Mich 168, 172-173; 767 NW2d 423 (2009) ("A paroled prisoner is not considered released; rather, the prisoner is simply permitted to leave the confinement of prison."); MCL 791.238(1) ("Each prisoner on parole shall remain in the legal custody and under the control of the department."); MCL 791.238(2) ("A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner . . . ."). Therefore, we do not agree that *Fields* and *Shatzer* are distinguishable, much less "significantly" so, on this basis.

In viewing the totality of circumstances in *Fields* and in the present case, we believe that if there was no custodial interrogation in the *Miranda* sense in *Fields*, there was certainly no custodial interrogation in the instant case. In *Fields*, the defendant was questioned by armed police officers; here, defendant was questioned, if you can even call it that, by an unarmed parole officer. In *Fields*, the defendant was questioned by armed police officers who were trying to obtain a confession from the defendant; here, defendant met with an unarmed parole officer who was there for the principal purpose of serving defendant with an amended notice of parole violations. In *Fields*, the defendant was questioned by armed police officers for about 5 to 7 hours; here, defendant met with an unarmed parole officer for 15 to 25 minutes. In *Fields*, the armed police officers used a "sharp tone" and "profanity" while questioning the defendant for several hours; here, the unarmed

parole officer was altogether cordial and sympathetic with defendant during their brief meeting. In *Fields*, the armed police officers continued to question the defendant until well past his regular bedtime; here, the unarmed parole officer did not keep defendant up late at night. In *Fields*, the defendant repeatedly stated that he did not want to talk to the armed police officers; here, defendant never indicated in any manner that he did not wish to talk to the unarmed parole officer. We believe it is clear that the totality of circumstances in *Fields* far more closely resembles the kind of custodial interrogation that generated the extraordinary protections of *Miranda* than does the totality of circumstances in the present case-- yet even in *Fields*, such circumstances were viewed by the United States Supreme Court to be insufficient to trigger the requirements of *Miranda*.

Moreover, the "inherently coercive" attributes of the parolee/parole officer relationship that the Court of Appeals relied on in reaching its conclusions are wholly inapplicable here because Evans *was not defendant's supervising officer*. The Court of Appeals explained:

> The rationale for the suppression of statements elicited during a custodial interrogation by a law enforcement officer who does not adhere to *Miranda* is to "combat" the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 US at 467; see also [*People v*] *Williams*, 244 Mich App [533, 539; 624 NW2d 575 (2001)]. Such "inherently compelling pressures" exist in the relationship between a parolee and a parole officer. Indeed, this Court has recognized that "both parolees and probationers are under heavy psychological pressure to answer inquiries made by their supervising officers." *People v Faulkner*, 90 Mich App 520, 524; 282 NW2d 377 (1979) (quotation marks and

> citations omitted). This heavy psychological pressure exists because of the unique relationship between a parolee and parole officer.
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> . . . [T]he parolee-parole officer relationship often becomes a relationship of trust and confidence, as does the probationer-probation officer relationship addressed by Justice Marshall in *Murphy*. See *Murphy*, 465 US at 459–460 (Marshall, J., dissenting). As a parolee develops trust and begins to confide in a parole officer, the parole officer is more likely to elicit from the parolee incriminating statements that the parolee would likely not make to a police interrogator. [*Elliot*, 295 Mich App at 643.]

However, the Court of Appeals failed to recognize that the parole officer in the instant case was not *defendant's* parole officer and thus that they did not have the kind of "unique relationship" of "trust and confidence" that the Court of Appeals assumed that they did.[14] Indeed, much, if not all, of the persuasive authority cited by the Court of Appeals seems inapposite when someone *other* than the defendant's supervising parole officer is conducting the meeting.[15]

B. *MINNESOTA v MURPHY*

In *Minnesota v Murphy*, 465 US 420; 104 S Ct 1136; 79 L Ed 2d 409 (1984), the respondent was given a suspended prison sentence and placed on probation. During the course of a meeting at his probation officer's office, the respondent, upon questioning by his probation officer, admitted that he had committed a rape and

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[14] Even if, as the dissent asserts, defendant and Evans had developed a "unique relationship" of "trust and confidence" that created some "psychological pressure" on defendant to answer Evans's inquires, this would not necessarily have converted defendant's otherwise voluntary statements into compelled ones.

[15] See, e.g., *Elliott*, 295 Mich App at 642-643, citing *Murphy*, 465 US at 459-460 (Marshall, J., dissenting).

murder in 1974. The probation officer had previously received information from a treatment counselor that respondent had admitted to the 1974 crimes.

The respondent moved to suppress the confession, but the trial court found that he had not been in custody at the time of the confession and that the confession was neither compelled nor involuntary despite the absence of *Miranda* warnings. The Minnesota Supreme Court reversed, holding that the respondent's

> failure to claim the privilege when he was questioned was not fatal to his claim "[b]ecause of the compulsory nature of the meeting, because [the respondent] was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that [the respondent's] answers were likely to be incriminating." [*Murphy*, 465 US at 425, quoting *State v Murphy*, 324 NW2d 340, 344 (Minn, 1982) (first alteration in original).]

The United States Supreme Court reversed, holding that *Miranda* warnings are not necessary during the course of a routine probation interview, even when there is a connection between the probation officer-interviewer and the criminal investigative process. The Court rejected the proposition that the fact that the probation officer was consciously seeking incriminating evidence was relevant. *Murphy*, 465 US at 431 ("[T]he probation officer's knowledge and intent have no bearing on the outcome of this case."). The Court also rejected the argument that the respondent might have reasonably expected that his statements to the probation officer would remain confidential:

> [W]e cannot conclude that [the probation officer's] actions would have led a reasonable probationer to believe that his statements to her would remain confidential. A probationer cannot pretend ignorance of the fact that his probation officer "is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace offic-

> ers." . . . The fact that [the respondent] apparently expressed no surprise on being informed that his statements would be made available to the police, moreover, strongly suggests that he was not misled by any expectation that his statements would remain confidential. [*Id.* at 432.]

Finally, the Court held that

> the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained. Since [the respondent] was not physically restrained and could have left the office, any compulsion he might have felt from the possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator. [*Id.* at 433 (citation omitted).][16]

Some courts have noted that a parole officer's questioning can be inherently more coercive than a law enforcement officer's questioning because the parole officer can put the parolee in prison more easily than can a police officer.[17] However, whatever the merits of this analysis, this concern does not exist to the same extent once the accused is *already* in jail for a parole

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[16] The Court further noted that the rule in *Miranda* was crafted to apply to a situation that "thrusts an individual into 'an unfamiliar atmosphere' or 'interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner.' " *Murphy*, 465 US at 433, quoting *Miranda*, 384 US at 457. The situation is one that "is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess." *Murphy*, 465 US at 433.

[17] See 2 LaFave, Criminal Procedure (3d ed), § 6.10(c), p 878 ("[S]ome courts have reached [the conclusion] that custodial interrogation (other than routine interviews) by a probation or parole officer is governed by *Miranda* because the probationer or parolee is under 'heavy psychological pressure to cooperate' with one who can recommend his imprisonment.") (citations omitted); *State v Gallagher*, 46 Ohio St 2d 225, 227; 348 NE2d 336 (1976) ("[A] parolee is under heavy pressure to cooperate

violation because the primary source of the parole officer's potential for coercion no longer exists. In this sense, a meeting *after* the accused has been arrested for violating his parole presents a less threatening situation than one conducted by a parole or probation officer before the accused has been arrested. In this case, defendant had already been given notice that his parole was being revoked and that he was in jail for that reason. Thus, no parole officer could threaten to put him in jail; he was already there. Moreover, this was not *his* parole officer. Defendant could not reasonably be under any illusions that Evans would have possessed any power to immediately free *or* detain him when he was not even her charge. As was the case in *Murphy*, there "is no direct evidence that [defendant] confessed because he feared that his probation would be revoked if he remained silent." *Id.* at 437. Similarly, defendant's request at the end of the meeting that the parole officer convey to the police that he wished to speak to them "strongly suggests that he was not misled by any expectation that his statements would remain confidential." *Id.* at 432.

C. *ESTELLE v SMITH*

Unlike the dissent, we disagree that *Estelle v Smith*, 451 US 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981), is particularly "instructive" with regard to the question at issue here-- custody. *Post* at 333. Indeed, *Estelle* did not even address that issue. Instead, *Estelle* simply assumed that the respondent in that case was in custody for *Miranda* purposes because he "was in custody at the Dallas County Jail when the examination was ordered

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with his parole officer * * * (who, allegedly,) had the power to recommend the return to prison of a parolee under his charge . . . .") (citation and quotation marks omitted).

and when it was conducted." *Id.* at 467. Moreover, since *Estelle* was decided, the Court has affirmatively held that prisoners are not invariably in custody for purposes of *Miranda*. See *Fields*, 565 US at ___; 132 S Ct at 1190. Because *Estelle* predated *Fields* and thus did not engage in the analysis that *Fields* now requires in determining whether an accused/prisoner was in custody for *Miranda* purposes, we do not believe that *Estelle* is relevant with regard to whether defendant was in custody for *Miranda* purposes, which the dissent agrees is the controlling issue.[18]

Moreover, *Estelle* is also significantly distinguishable because it involved a court-ordered psychiatric examination. In *Estelle*, the Court held that the admission of a psychiatrist's testimony to establish an element of proof necessary to support the imposition of capital punishment violated the respondent's Fifth Amendment privilege against compelled self-incrimination. The psychiatrist's testimony related to a 90-minute pretrial competency examination that the psychiatrist had administered to the respondent.[19] The Court em-

[18] The dissent cites *Estelle* for the proposition that somebody other than a police officer, such as a psychiatrist who performs a court-ordered psychiatric examination, can conduct a custodial interrogation for purposes of *Miranda*. We do not necessarily disagree with this proposition. However, as both this and the dissenting opinions recognize, "the dispositive issue is whether defendant was subject to custodial interrogation, not the nature of the relationship between the questioner and defendant." *Post* at 324. Because we conclude that defendant was not subjected to a custodial interrogation for *Miranda* purposes, it is wholly unnecessary to address whether a parole officer is a law enforcement officer for *Miranda* purposes. *Infra* at 303-305.

[19] The Court explained the circumstances of the examination and how those circumstances implicated the Fifth Amendment:

> The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment. The state trial

phasized that the competency examination "was ordered even though defense counsel had not put into issue [the respondent's] competency to stand trial or his sanity at the time of the offense," *Estelle*, 451 US at 457 n 1, and that this was a "compulsory examination," to which the respondent was "compelled to respond," yet "he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death," *id.* at 467-468. The Court summarized:

> To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated.
>
> * * *
>
> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be *compelled to respond* to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. . . .
>
> . . . [U]nder *Miranda v Arizona*, we must conclude that, when faced while in custody with a *court-ordered psychiatric inquiry*, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling

judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent. Consequently, the interview with Dr. Grigson cannot be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense. Indeed, if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen. [*Estelle*, 451 US at 465 (citation omitted).]

> influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. [*Id.* at 466, 468 (citation omitted; emphasis added).]

Unlike what occurred in *Estelle*, there was no court-ordered "compulsory examination" to which defendant was "compelled to respond" in this case. As a result, *Estelle* is wholly inapplicable.[20]

IV. CONCLUSION

Neither an accused's right under *Miranda* to be given a series of warnings nor an accused's right under *Edwards* to have counsel present apply absent custodial interrogation. Because defendant was not subjected to custodial interrogation by the parole officer, even if she was a law enforcement officer, neither of those rights were violated, and thus the trial court did not err by admitting defendant's confession. Accordingly, we reverse the judgment of the Court of Appeals and reinstate defendant's conviction and sentence.

KELLY, ZAHRA and VIVIANO, JJ., concurred with MARKMAN, J.

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[20] We also note that *Estelle* concerned the *Sixth Amendment* right to counsel, not the Fifth Amendment right to counsel:

> Because psychiatric examinations of the type at issue here are conducted after adversary proceedings have been instituted, we are not concerned in this case with the limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in *Miranda*. See *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378. Rather, the issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination. [*Estelle*, 451 US at 470 n 14 (citation omitted).]

YOUNG, C.J. (*concurring*). I concur in the majority's decision to reverse the judgment of the Court of Appeals and reinstate defendant's conviction and sentence. Even if parole officer Cheryl Evans's interrogation of defendant was a custodial interrogation by a law enforcement officer, the facts here indicate that defendant waived any right to have counsel present during this interrogation.[1] As a result, I believe that the question whether defendant's interrogation was custodial for *Miranda* purposes is immaterial to the result in this case.

Evans testified at trial that defendant had submitted a letter to police indicating that he wanted to talk with them again and that defendant had reiterated that request when talking with her.[2] Because defendant had already sought to discuss the case with the police at the time Evans questioned him about the robbery, he "initiate[d] further communication, exchanges, or conversations with the police."[3] Furthermore, this initiation of communication with Evans (even assuming for the purposes of *Miranda* that she was a law enforcement

[1] The parties have not argued the waiver issue. However, we generally do not disturb a trial court's ruling when it reaches the right result for the wrong reason. See, e.g., *People v Brownridge*, 459 Mich 456, 462; 591 NW2d 26 (1999). Moreover, in this case, every member of the Court agrees that the relevant issue in this case is not—as the trial court and Court of Appeals ruled and the parties argued—whether Evans acted as a "law enforcement officer" pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] While Justice MCCORMACK would not rely on Evans's testimony, this testimony has not been challenged, much less rebutted.

[3] *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Even though defendant did not initiate the particular conversation with Evans, he nevertheless initiated communication with law enforcement officials and, in doing so, "evinced a willingness and a desire for a generalized discussion about the investigation . . . ." *Oregon v Bradshaw*, 462 US 1039, 1045-1046; 103 S Ct 2830; 77 L Ed 2d 405 (1983) (plurality opinion); *accord id.* at 1055 (Marshall, J., dissenting)

officer) was knowing and intelligent.[4] Initially, "defendant was properly advised of his rights and understood them . . . ."[5] And his request at the end of the meeting that Evans reiterate to the police his desire to speak with them underscores that his waiver was knowing and intelligent. Moreover, as the majority rightly notes, this request " 'strongly suggests that he was not misled by any expectation that his statements [to her] would remain confidential.' "[6] Therefore, as Evans did not violate defendant's Fifth Amendment rights, I concur that his conviction should be affirmed.

MCCORMACK, J. (*dissenting*). I believe that the Court of Appeals correctly reversed defendant's conviction and remanded for a new trial. I would therefore affirm its judgment, although I agree with the majority that the dispositive issue is whether defendant was subject to custodial interrogation, not the nature of the relationship between the questioner and defendant. While the nature of the relationship between the questioner and the defendant may inform the determination of whether custodial interrogation occurred, it is not the lynchpin of the analysis. However, because I conclude in this case that defendant was subject to custodial interrogation by the parole officer, I disagree with the majority that his statements to her were admissible at trial. Accordingly, I respectfully dissent.

("[I]n order to constitute 'initiation' under *Edwards*, an accused's inquiry must demonstrate a desire to discuss the subject matter of the criminal investigation.").

[4] See *id*. at 1044-1045.

[5] *Id*. at 1046 (citation and quotation marks omitted).

[6] *Ante* at 319, quoting *Minnesota v Murphy*, 465 US 420, 432; 104 S Ct 1136; 79 L Ed 2d 409 (1984).

I. APPLICATION

Because the majority correctly sets forth much of the applicable law and determines that custodial interrogation is the decisive issue, I turn right to the case at hand: Did the circumstances surrounding parole officer Cheryl Evans's questioning of defendant amount to custodial interrogation, making his statements inadmissible at his later trial for the robbery because the interrogation violated *Miranda v Arizona*[1] and *Edwards v Arizona*,[2] in light of defendant's prior request for counsel? Unlike the majority, I conclude that the answer is yes.

A. DEFENDANT'S INITIAL ARREST AND INTERROGATION

Like the parties, the majority does not dispute that the initial police interrogation concerning the robbery for which defendant was convicted constituted custodial interrogation to which *Miranda* applies.[3] Nor can that conclusion be seriously questioned. Defendant was arrested and taken to jail, depriving him of his freedom of movement, and he was subjected to the precise "station house questioning" by police officers that was found to be inherently coercive in *Miranda*.[4] The officers were thus obligated to, and did, give defendant *Miranda* warnings. Because *Miranda* applied, defendant's request for counsel triggered *Edwards*, and he could not

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

[3] See *People v Elliott*, 295 Mich App 623, 633; 815 NW2d 575 (2012) ("[I]t is not disputed that defendant's June 18, 2010, police interrogation constituted a custodial interrogation under *Miranda*.").

[4] *Howes v Fields*, 565 US ___, ___; 132 S Ct 1181, 1190; 182 L Ed 2d 17 (2012).

be subjected to further custodial interrogation about the robbery until counsel had been made available to him or he initiated communication. The detectives honored his request, stopped questioning him, and according to Smith, even told Evans that defendant had invoked his right to counsel before she interviewed him.

B. DEFENDANT WAS SUBJECT TO CUSTODIAL INTERROGATION WHEN EVANS QUESTIONED HIM

This leaves one issue: whether Evans's questioning of defendant three days later violated *Edwards*. I disagree with the majority that Evans's interview of defendant about the robbery can be viewed as noncustodial because custody, for purposes of *Miranda* and *Edwards*, was not broken between the initial interrogation by the police and Evans's subsequent questioning three days later.

1. *EDWARDS*, NOT *FIELDS*, CONTROLS HERE

I conclude that Evans's interview with defendant violated *Edwards* because the custodial environment established at the initial police interview never ceased, and defendant did not initiate this conversation. The United States Supreme Court in *Maryland v Shatzer* described the "paradigm *Edwards* case" as one in which "the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated."[5] While defendant was technically arrested for violating his parole, the custodial interrogation that immediately followed his arrest indisputably involved the gas station robbery. Thus, that defendant was not initially arrested for the

[5] *Maryland v Shatzer*, 559 US 98, 106; 130 S Ct 1213; 175 L Ed 2d 1045 (2010).

robbery is of no moment. As in other paradigmatic *Edwards* cases described in *Shatzer*, defendant never "regained a sense of control or normalcy" after he was "initially taken into custody for the crime under investigation."[6] In this case, just as in *Edwards*, defendant made the inculpatory statements at issue three days after his initial police interview, during which everyone agrees he invoked his right to counsel while confined to the local jail.[7]

These facts stand in stark contrast to those of the defendants in *Shatzer* and *Fields*, who were both serving sentences for unrelated crimes and living in the prison in which they were interviewed. In those cases, the defendants were interviewed in their "accustomed surroundings," and when returned to the general prison population they simply resumed their "daily routine."[8] In this case, defendant did not live at the Jackson County Jail. The majority asserts that defendant "could not be considered anything other than a 'prisoner,' as were the defendants in *Fields* and *Shatzer*."[9] That argument is untenable given the similarities between this case and the paradigmatic *Edwards* case and the significant differences between this case and *Shatzer* and *Fields*. Defendant had not been placed back into his "normal" correctional facility environment, although he might legally have been a "prisoner" due to his parole status.[10] However, and most

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[6] *Id.* at 107.

[7] See *id.* (describing the facts in *Edwards*).

[8] *Id.* at 113.

[9] *Ante* at 314.

[10] See *ante* at 314. The majority's citation to the parole statutes for the proposition that all parolees are "prisoners" under *Michigan* law does not justify incorporation of that very broad understanding of "prisoner" into the *Miranda* context. State statutes do not control the application of federal constitutional principles.

important, it is not in dispute that he was not placed in custody for *Miranda* purposes for violating parole, but rather so that the police could interrogate him about the robbery. In short, it is unclear the extent to which *Shatzer* and *Fields* apply outside the context of prison inmates incarcerated on an unrelated charge and interviewed somewhere within the correctional facility that serves as their day-to-day home. But it is clear to me that here *Edwards*, and not *Fields*, controls.

Further, the custodial environment established during the initial police interview was not broken merely because it was a parole officer rather than a police officer who later questioned defendant about the same subject. First, the relationship between the questioner and the offender is not decisive. Second, Evans questioned defendant about the very crime for which he was previously questioned by the police officers and had invoked his Fifth Amendment right to counsel. Accordingly, defendant's prior assertion of his right to counsel was still in effect when Evans interviewed him in the jail library. Because he did not initiate that discussion, it was in violation of *Edwards*.

Some of the facts relied on by the majority to support its position, in fact, further illustrate why this case is governed by *Edwards* and not *Fields*. For example, the majority notes that, as in *Fields*, defendant here was not free to leave the jail library by himself and roam free. But the significance of that fact in *Fields* was to demonstrate that the defendant's freedom of movement was curtailed *all the time* because he lived in a prison as a result of a prior conviction and sentence.[11] In other

[11] See *Fields*, 565 US at ___; 132 S Ct at 1194 ("Returning to his cell would merely have returned him to his usual environment. . . . 'Interrogated suspects who have previously been convicted of crime live in

words, being unable to roam free was the defendant's normal life, which inherently made that restriction less coercive. By contrast, before his arrest and custodial interrogation by the police three days earlier, defendant's freedom of movement was not restricted by daily incarceration. While the facts of *Fields* may be similar on this point, their legal significance is not.[12]

2. EVEN UNDER *FIELDS*, CUSTODIAL INTERROGATION OCCURRED

Even assuming that the majority is correct that defendant's ongoing *Miranda*/*Edwards* status was irrelevant and the *Fields* framework is applicable here instead, and I firmly believe it is not, a comparison between the facts of this case and *Fields* demonstrates that defendant was subjected to custodial interrogation. As in *Fields*, defendant did not invite the interview with Evans or consent to it in advance and he was not advised that he was free to decline to speak with Evans. Unlike in *Fields*, however, defendant in this case was not told that he was free to leave. Notably, the *Fields* majority cited the fact that the defendant in that case was told he was free to leave as the "[m]ost important" factor in its determination that the defendant was not in custody.[13] The Court went to the trouble to repeat its emphasis on this factor as "especially" important at the

prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation.' "), quoting *Shatzer*, 559 US at 113.

[12] This conclusion is further supported by the fact that in the typical *Miranda* analysis, the inability to leave the interview freely is considered a factor *supporting* a finding of custody for purposes of *Miranda*. See, e.g., *JDB v North Carolina*, ___ US ___, ___; 131 S Ct 2394, 2411; 180 L Ed 2d 310 (2011).

[13] *Fields*, 565 US at ___; 132 S Ct at 1193.

end of its opinion.[14] Thus, I disagree with the majority that this fact is neither controlling nor particularly compelling here.

The majority believes that defendant's parolee status itself is relevant to the freedom of movement inquiry because it makes him more familiar with law enforcement and the type of environment in which he was interviewed. However, given that *Miranda* requires an analysis of whether "in light of 'the *objective* circumstances of the interrogation,' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave,' "[15] defendant's *subjective* beliefs about his freedom of movement are irrelevant. As the United States Supreme Court has held, "a suspect's prior interrogation history with law enforcement has no role to play in the custody analysis because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place."[16] I see no distinction between a defendant's prior history with law enforcement

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[14] *Id*. at ___; 132 S Ct at 1194 ("Taking into account all of the circumstances of the questioning—including especially the undisputed fact that respondent was told that he was free to end the questioning and to return to his cell—we hold that respondent was not in custody within the meaning of *Miranda*.").

[15] *Fields*, 565 US at ___; 132 S Ct at 1189 (emphasis added; citation omitted; alteration in original).

[16] *JDB*, ___ US at ___; 131 S Ct at 2404 ("Because the effect in any given case would be 'contingent [on the] psycholog[y]' of the individual suspect, the Court explained, such experience cannot be considered without compromising the objective nature of the custody analysis."), quoting *Yarborough v Alvarado*, 541 US 652, 668; 124 S Ct 2140; 158 L Ed 2d 938 (2004); see also *Alvarado*, 541 US at 666-667 (stating that "[o]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration. *The only indications in the Court's opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors*," and that "[t]here is an important conceptual difference between the *Miranda* custody test

and his parolee status. A parolee is a parolee *because of* his or her prior history with law enforcement. That "inquiry turns too much on the suspect's subjective state of mind and not enough on the 'objective circumstances of the interrogation.' "[17]

Also in critical contrast to *Fields*, when defendant was questioned by Evans, he indisputably had asserted his Fifth Amendment right to counsel. Fields, who had been incarcerated for some time for some other unrelated offense and presumably had become acclimated with his incarceration, was not previously questioned about the subject of his interrogation, nor had he therefore previously asserted his Fifth Amendment right to counsel. Irrespective of the reason for defendant's initial arrest, defendant here had been continually incarcerated during the three days after the police had questioned him and he had invoked his right to counsel. The effect of this difference is hard to underestimate.

Because a reasonable person faced with these objective circumstances would not have felt at liberty to terminate the interrogation and leave, the first part of

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and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test") (emphasis added).

[17] *Alvarado*, 541 US at 669 (citation omitted). The majority supports its reliance on the relevance of defendant's parolee status by citing to *Fields* and its discussion of whether the interrogator has "official power" over the defendant. See *ante* at 310 n 9. This is wrong for two reasons. First, that quote appears nowhere in the *Fields* discussion of the freedom-of-movement inquiry; rather, it is mentioned in the discussion of whether "imprisonment alone," i.e., *when the deprivation of freedom of movement is already established*, is sufficient to create a custodial situation within the meaning of *Miranda*. Second, the quotation only establishes that the questioner's power over the *defendant* is relevant. It does not make relevant whether a reasonable parolee would know that his parole officer "has no control over the jail, its staff, or the individuals incarcerated there."

the *Miranda* inquiry is satisfied. I also conclude that Evans's interview with defendant presented the "same inherently coercive pressures as the type of station house questioning at issue in *Miranda*"[18] even if it is considered as a discrete event distinct from defendant's initial custodial interrogation. Defendant was summoned to the jail library and was given no indication that he could decline to attend or leave the interview at any time. He was interviewed about the basis for his parole violations by Evans, the person serving as his parole officer for purposes of their meeting and with whom defendant had a prior relationship.[19] Perhaps most importantly, defendant had already been advised that he had a right to counsel before answering questions about the robbery, had taken that invitation up and requested counsel, but had not yet been provided counsel when he found himself questioned again about the same subject. Finally, Evans plainly had "authority to affect the duration of his sentence,"[20] as she was present at the jail to serve parole violation charges on defendant that could undoubtedly affect the amount of time defendant spent incarcerated.[21] Under these cir-

[18] *Fields*, 565 US at ___; 132 S Ct at 1190.

[19] The majority attaches great significance to the fact that Evans was not defendant's regular parole officer. However, it is significant that Evans testified that she had supervised defendant in the past, that she "couldn't even count the number of times" she had been in contact with him, and that she and defendant "have respect for each other for the way he's dealt with us in the past and the way that I've dealt with him." Thus, the majority's assertion that no "unique relationship" existed between the two of them is, at the very least, open to debate. Moreover, that Evans was not defendant's regular parole officer did not remove or dilute her power over him given that she was plainly a state actor responsible for overseeing his parole violation case at the time of the interview.

[20] *Id*. at ___; 132 S Ct at 1191.

[21] Indeed, had defendant not been convicted of the armed robbery, the parole violations may have been *dispositive* of how much time defendant

cumstances, the interview subjected defendant to inherently coercive pressures for purposes of *Miranda*. Accordingly, Evans's interview with defendant constituted its own custodial interrogation even under the *Fields* framework on which the majority relies.

Estelle v Smith is also instructive in determining whether Evans's interview with defendant constituted its own custodial interrogation.[22] In that case, a psychiatrist interviewed the defendant in jail to evaluate the defendant's competency to stand trial. The United States Supreme Court held that the state could not introduce the defendant's statements or the psychiatrist's conclusions, which were based on those statements. The Court noted that "[t]he considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here."[23] The *Estelle* Court further observed that the defendant was in custody when the examination was conducted, and noted that the fact that he was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, was

served, and Evans's influence would have been critical. Additionally, at the time of Evans's interview, the parole violations had not been adjudicated; she was there to serve defendant with the violation charges. What penalty would result from the charges was still unknown to defendant during this interview.

[22] *Estelle v Smith*, 451 US 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981). I articulate my argument in this manner because as explained in part I(B)(1) of my opinion, my primary contention is that the custodial environment established at the initial police interview never ceased, so *Edwards* controls.

[23] *Id*. at 467. The majority contends that *Estelle* is irrelevant to the custody issue because the Court simply assumed the defendant in *Estelle* was in custody for *Miranda* purposes because he was in jail. I disagree. In fact, the *Estelle* Court analyzed whether the psychiatric examination involved a coercive environment. Thus, it is instructive with regard to the custody issue.

"immaterial."[24] The crucial inquiry, rather, was the role the psychiatrist played at the defendant's trial, which included testifying for the prosecution on the crucial issue of respondent's future dangerousness. In providing that testimony, the Court ruled, "his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting."[25]

It is not disputed that defendant was in physical custody when Evans conducted the interview, that his interrogation was related to the robbery, or that he had previously asserted his Fifth Amendment right to counsel when questioned by police about the same subject. The role Evans played at the time of the interview is "immaterial" per *Estelle*.[26] The significant issue about Evans's role is the one she played at defendant's trial when she was directly adversarial to defendant; she testified that he made statements admitting to the robbery at issue, which were presented as substantive evidence of defendant's guilt, and the prosecution referred to her as "probably the most crucial" witness. Just like in *Estelle*, regardless of her previous role in collecting defendant's statement in the first place, by providing such testimony, Evans's "role changed and became essentially like that of an agent of the State" recounting statements obtained in violation of *Edwards*.[27]

II. WAIVER

The Chief Justice joins the majority's result on the basis that defendant waived his Fifth Amendment right

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[24] *Id*.

[25] *Id*.

[26] This fact renders inapt the prosecution's attempt to analogize the parole officer/parolee relationship *generally* to the social worker/client relationship.

[27] *Id*.

to counsel by initiating further communication with the police. I respectfully disagree with his waiver argument for three reasons. First, I do not believe and I know of no authority to support, the proposition that *Miranda* can be circumvented by an ex post facto waiver analysis when defendant, having asserted his right to counsel, did not in fact initiate the subsequent conversation in which the incriminating statements were made.[28] It is undisputed that defendant did not initiate the interview with Evans. Second, the prosecution never made a waiver argument, in this Court or in the lower courts. Third, defendant's alleged letter appears nowhere in the record and there is no evidence the police ever actually received it, so I would not rely solely on Evans's testimony about defendant's statement about sending a letter in order to find waiver here.

III. CONCLUSION

I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals. I would hold that the custodial environment established during defendant's initial police interview as well as his invocation of his right to counsel remained in effect at the

[28] See *Miranda*, 384 US at 479 ("[The defendant] must be warned *prior to any questioning* that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. *But unless and until such warnings and waiver are demonstrated by the prosecution at trial*, no evidence obtained as a result of interrogation can be used against [the defendant].") (emphasis added); see also *Shatzer*, 559 US at 111 n 7 ("*Edwards* establishes a *presumption* that a suspect's waiver of *Miranda* rights is involuntary.").

time Evans interviewed him. Because defendant did not initiate the interview with Evans, the admission of Evans's testimony regarding defendant's statements to her violated *Edwards*. Alternatively, I would hold that Evans's questioning of defendant constituted its own custodial interrogation for *Miranda* purposes. The Court of Appeals correctly concluded that defendant's statements to Evans were inadmissible and should have been suppressed.[29] Accordingly, I would affirm the judgment of the Court of Appeals remanding this case for a new trial.

CAVANAGH, J., concurred with MCCORMACK, J.

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[29] Although the prosecution has not argued that the admission was harmless in this Court, I agree with the Court of Appeals that the admission of defendant's statements to Evans was not harmless for the reasons stated in the Court of Appeals opinion.

PEOPLE v MUSSER

Docket No. 145237. Argued March 6, 2013 (Calendar No. 5). Decided July 12, 2013.

John M. Musser was convicted by a jury in the Kent Circuit Court of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and one count of assault and battery, MCL 750.81, for sexually touching an eleven-year-old girl in 2009 while the complainant and her family were at defendant's house. During defendant's interview with the police, the detectives made statements regarding the complainant's truthfulness, as well as that of child-victims in general. In addition, one detective indicated during the interview that he had completed hundreds of forensic interviews. The circuit court, James R. Redford, J., admitted the detectives' recorded statements to defendant during the police interview over defense objection, reasoning that the statements gave context to defendant's statements. After defendant moved for a mistrial, the circuit court instructed the jury that the detectives' statements were not evidence and were only to provide context for defendant's statements. The Court of Appeals, SAWYER, P.J., and MURPHY, C.J. and O'CONNELL, J., agreed with the circuit court's reasoning and affirmed in an unpublished opinion per curiam, issued February 21, 2012 (Docket No. 301765). The Supreme Court granted defendant's application for leave to appeal. 493 Mich 860 (2012).

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

Out-of-court statements made by police investigators during the interrogation of a defendant that vouch for the credibility of another, that are not offered for the truth of the matter asserted but to provide context for the defendant's statements, are admissible if they are relevant for their proffered purpose in accordance with MRE 401; even if relevant, such statements may be excluded under MRE 403 if the probative value is substantially outweighed by the danger of unfair prejudice and a party may request, pursuant to MRE 105, that the scope of such testimony be properly limited and the jury instructed accordingly.

1. It is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial because it is within the jury's province to determine the truthfulness of witnesses. Pursuant to MRE 401, the party seeking to introduce a police interrogator's out-of-court statements through a recording or written transcript of the interview must explain how the statements are relevant to the proffered purpose of providing context for the defendant's responses. Even if the statements are relevant, they may be excluded under MRE 403 if the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced; in child-sexual-abuse cases the danger of prejudice is high because such cases often hinge on credibility assessments. If such statements are admitted, a party under MRE 105 may request an instruction restricting the evidence to its proper scope.

2. In this case, the circuit court abused its discretion by failing to redact the majority of the detectives' out-of-court statements from the interrogation recording in which they commented on credibility; most of the statements had no probative value and, even if there was some probative value to the statements that the trial court erroneously failed to redact, the prejudicial effect of the remaining statements outweighed any probative value because of the dangers inherent in child-sexual-abuse cases. Admission of the statements undermined the reliability of the verdict because the jury may have relied on the detectives' repeated out-of-court statements regarding the complainant's credibility, there was a lack of physical evidence and the comments created an aura of expertise for the one police investigator. The belated limiting instruction did not cure the error.

Court of Appeals' judgment reversed, defendant's convictions vacated, and the case remanded to the trial court for further proceedings.

WITNESSES — OUT-OF-COURT STATEMENTS — VOUCHING FOR CREDIBILITY — CONTEXT FOR STATEMENTS — STATEMENTS MADE DURING POLICE INTERROGATION.

Out-of-court statements made by police investigators during the interrogation of a defendant that vouch for the credibility of another, that are not offered for the truth of the matter asserted but to provide context for the defendant's statements, are admissible if they are relevant for their proffered purpose in accordance with MRE 401; even if relevant, such statements may be excluded under MRE 403 if the probative value is substantially outweighed

> by the danger of unfair prejudice; a party may request, pursuant to MRE 105, that the scope of such testimony be properly limited and the jury instructed accordingly.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

Dickinson Wright PLLC (by *Dennis C. Kolenda*) and *Richard A. Glaser, PLLC* (by *Richard A. Glaser*), for defendant.

Amicus Curiae:

David Gilbert and *Heather Garretson* for the State Bar of Michigan, Criminal Law Section.

CAVANAGH, J. Defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and assault and battery, MCL 750.81,[1] arising out of accusations made by an eleven-year-old girl. The Court of Appeals affirmed defendant's convictions. We granted leave to appeal to consider whether out-of-court statements made by police investigators during an interrogation of a defendant that vouch for the credibility of another must be redacted from a recording of the interview before it is played for the jury.

At this juncture, we find it unnecessary to adopt a bright-line rule requiring the automatic redaction of such statements. Instead, applying our rules of evidence, we hold that if such out-of-court statements are not offered for the truth of the matter asserted, the

[1] We note that there is a discrepancy between the judgment of sentence and the jury's actual verdict. Because we are vacating defendant's convictions, this discrepancy is irrelevant.

statements may be admissible to the extent that the proponent of the evidence establishes that they are relevant for their proffered purpose as defined by MRE 401. Further, even if relevant, the statements may be excluded under MRE 403. Finally, upon request, the statements must be restricted to their proper scope and the jury instructed accordingly. MRE 105.

Under the facts of this case, we hold that the trial court abused its discretion by allowing all the detectives' statements commenting on credibility to be presented to the jury on the basis that the statements provided "context" for defendant's statements, when most of the detectives' statements were irrelevant for that purpose. Because the error in this case undermined the reliability of the verdict, we reverse the judgment of the Court of Appeals, vacate defendant's convictions, and remand the case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The convictions in this case relate to events occurring in the Spring of 2009 while the complainant and her family were at defendant's home.

The complainant testified that she, her mother, father, and brother went to defendant's home to watch a hockey game with defendant and his family. According to the complainant, she became tired and slouched back on one of defendant's couches, attempting to fall asleep. One of defendant's children was asleep in the same room on another couch, while the adults and another child were downstairs in defendant's basement. Two other children were asleep somewhere else in defendant's home. The complainant testified that while she was feigning sleeping, defendant put his hands on her inner thighs and later touched her breasts while cover-

ing her with a blanket. The complainant also stated that defendant put his thumb under the waistband of her pants, which was near her underwear line. According to the complainant, after defendant left, she went downstairs and asked her parents if they could leave. The complainant's mother, Jennifer, testified that everything seemed normal when they left and, although there was testimony that the two families continued to see each other after the incident, Jennifer testified that the complainant was not interested in going to defendant's home. The complainant did not tell anyone about the incident for nearly a year.

A friend of the complainant testified that in late April 2010, she and the complainant were talking about secrets when the complainant stated that someone had touched her while at a gathering, but she did not indicate where she had been touched. Although the friend told the complainant that she needed to tell someone, the complainant did not do so until approximately two weeks later after getting into an argument with her mother.

Jennifer testified that in May 2010, she had been teasing the complainant over her homework when the complainant ran out of the room, upset. Jennifer followed the complainant to her bedroom to find out what was wrong. When the complainant began to cry and indicated that she did not wish to speak, Jennifer asked her a series of questions, including whether she was fighting with a friend or whether someone in the neighborhood had hurt her. When the complainant answered negatively to Jennifer's questions, Jennifer asked the complainant if she was having a problem with a grownup, to which the complainant nodded "yes." Jennifer eventually asked the complainant if the problem was with defendant, who, according to the com-

plainant's father, was a good friend with whom his family had spent countless hours. In response, the complainant shook her head "yes" and started to cry, but she would not reveal any of the details. Soon thereafter, the complainant's parents took the complainant to the Kent County Sheriff's Department (KCSD), which referred them to the Children's Assessment Center of Grand Rapids—a center that assesses children following reports of suspected child abuse. On May 11, 2010, the complainant was interviewed by KCSD Detective Edward Kolakowski. During that interview, the complainant revealed the full extent of the incident for the first time.

That same day, Detective Kolakowski and Detective William Heffron interviewed defendant. Defendant was informed by Detective Kolakowski when he arrived at the Sheriff's Department that the complainant had accused him of inappropriate touching while their families were watching a game a year earlier at defendant's home. Throughout the interview, defendant denied any improper contact with the complainant, but remembered coming upstairs to get a drink while the complainant and her family were watching a hockey game. Defendant stated that he saw the complainant asleep, hugged her, and gave her a kiss on her cheek or forehead. Defendant acknowledged that he had been drinking that night, that the complainant seemed vulnerable because she appeared to be asleep, and that his hands accidentally touched the skin of the complainant's back when he put his arms around her. Defendant, however, explained that none of his actions were sexual, and he did not touch the complainant inappropriately or in the places that she claimed that she was touched. Defendant stated that he and the complainant had always been affectionate, and the complainant had often greeted defendant with a hug and a kiss when they saw each other.

During the interview, Detective Kolakowski and Detective Heffron made statements regarding the complainant and child-victims generally, including the following:

> DETECTIVE KOLAKOWSKI: . . . *Kids have a hard time lying about this stuff because they don't even want to talk about it, let alone they don't even want to talk about it to a mere fucking stranger*.
>
> DETECTIVE HEFFRON: Especially a 12 year old girl.
>
> DETECTIVE KOLAKOWSKI: And she tells me what happened? And she tells our counselors what happened? And these are — and —and with these interviews, too, it's not just a interview of, "tell me what happened," . . . they're . . . done with . . . Michigan adopted, basically, a forensic interview protocol that there's a special way that kids have to be interviewed. They're not interviewed like I can interview you, all right? . . . [Y]ou know what? If you can't do it for yourself, do it for your own little girl . . . . Make sure she knows that men have to answer to the truth. And make sure that [the complainant] knows that, you know what? [Y]eah, someone fucked up . . . . She's having a devastating time. She loves you. She cares about you. She cares about your family. You want to know what her concern was? You want to know why she waited to tell? Do you want me to tell you?
>
> [DEFENDANT]: Sure.
>
> DETECTIVE KOLAKOWSKI: I'll tell you. . . .
>
> * * *
>
> DETECTIVE HEFFRON: *You know there's a big difference when we interview 4, 5, 6 year olds and when they get up around 10, 11, 12, 13. There's a big difference. Four, five, six year old kids, they're easy to manipulate by parents, aunts, uncles—they're easy to manipulate. They're terrible actors. They're terrible. When kids start getting a little bit older they're better actors. They're—they're older, they're seeing more. She's 12. The big issue here is if she wanted to*

get you in trouble—she's smart enough, and she's only—and she's 12—if, for whatever reason, she wanted to get you in trouble she would—she would—

[DEFENDANT]: That she would say that I fucked her?

DETECTIVE HEFFRON: Absolutely.

[DEFENDANT]: Yeah.

DETECTIVE HEFFRON: *Absolutely. "He put his hand down my pants, his finger was in my vagina" all of this "his mouth was on my breast"—that's what they would do if they're gonna lie to get somebody in trouble, . . . an older kid like that. Little kids, they never've [sic] been exposed to that stuff. They don't know. But it's pretty credible when she tells us, "Hey, he touched . . . me here" and "he put his hand on my breasts" and . . . "his hand started going down my pants but he couldn't." That's pretty credible; that's pretty detailed. Again, if there's no reason for her to make this crap up, why would she say it? This is the last thing . . . she wanted to do was talk to a total stranger about something like this. Why? Why is she gonna put herself through that if it didn't happen? We can't find anything. Kids don't lie about this stuff. They lie about their homework being done; they lie about, "yep, I did the dishes" when they didn't . . . [T]hey lie about "yeah, we were in bed by 10:00." They don't lie about this stuff if maybe she's in trouble for something. This is not the kind of stuff that kids make up to try to get out of some trouble that they're in. That's why this is so disturbing. . . . And again, if she's talking about "his hand was on my breast," she's not gonna make that crap up. She just isn't. And this is your opportunity for her to eventually see that you made a mistake, you're human, and you want to get this worked out so she has the least amount of stress/trauma, whatever, but that she gets the . . . feeling that "I love the man, the family. He made a mistake and someday as I'm older["]—because she's always gonna remember this—this didn't happen when she was 2 or 3 years old—they don't remember that stuff. She's always gonna remember this. At some point she will be able to accept, "Hey, this is what happened. We all make mistakes. He made a mistake." But you're gonna have to start by being*

upfront. And for you to sit here and say that "well, yep, she's telling the truth about this, but she's lying about that," . . . she's gonna have this report. She's gonna know exactly what you said, and whatever . . . message you want to send her that's . . . up to you. We can't force you. But if she's saying you touched her breasts—I wasn't there for the interview [of the complainant] but [Kolakowski, who has] done a lot of interviewing, said, "Bill, there's no question this happened and the stuff that I'm aware of he probably did"—we just need to know why. Was it alcohol? Was it—I don't know what your sex life has been at home, but all we want to know is why. Were you ever molested as a child?

[DEFENDANT]: No.

DETECTIVE HEFFRON: Help us out here.

[DEFENDANT]: You asked a lot of different questions right there. I don't know—I—I don't know what motivated me. I think I explained it, I was just trying to give her a peck. I don't know where this touching of the breast is coming from. [Emphasis added.]

In addition to other statements in the interview,[2] defendant made a pre-trial motion to exclude these emphasized statements. The trial court overruled defendant's objections, reasoning that the emphasized statements either gave context to defendant's statements or were "in the nature of the interrogation of the accused," and the questions and answers could be favorable to both parties.

At trial, a video recording of defendant's interview was played for the jury. Before the video was played,

[2] Defense counsel also moved to redact other portions of the interview. For purposes of this appeal, our analysis focuses only on those portions of the interview that were admitted over defense counsel's objections and were raised to this Court. Our limited grant order and resolution of this case should therefore not be construed to preclude defendant from raising additional objections on remand.

however, Detective Kolakowski testified regarding his experience with forensic interviews, stating that he had received special training in forensic interviewing techniques; that the technique requires the interviewer to inquire whether the child understands the difference between the truth and a lie and that older children, such as those around 11 years old, understand the difference between the two; that he had done "hundreds" of forensic interviews throughout his career; and that he had followed the forensic interview process when interviewing the complainant. The jury was then given a copy of the transcript, with the following oral instruction:

> You've been handed . . . what's going to be marked for appellate purposes as Exhibit 2-A. Again, the transcript is not evidence. It's the recording that's going to be played for you that's the evidence. . . . What you have to make your decision on is based on what . . . evidence that's admitted in court.

After the video was played, defense counsel moved for a mistrial, stating that he was essentially making a renewed motion to strike Detective Heffron's comments because, irrespective of Detective Kolakowski's comments regarding the complainant's credibility, Detective Heffron's statements were too prejudicial. The trial court denied defendant's motion. However, after an hour-long lunch recess, the judge gave the jury the following instruction in light of defendant's previous motion:

> [A]s relates to [the DVD], which before the lunch recess was played for you, there are many statements and questions by one or more law enforcement officers. These questions or statements, no matter how short or how long, are not evidence, and you must not consider them as such. Only the answers of [the defendant] are evidence. The questions or statements of the law enforcement officers are

> only provided to you to put into context the answers of [the defendant]. It is only the answers of [the defendant] that are evidence in this case.

In addition to the above testimony, an expert testified for each party, with the prosecution's expert stating that it is common for complainants to delay reporting their allegations, and the defense expert stating that delayed reporting can lead to incorrect recollections and that children are susceptible to suggestion by others, including their parents.

Defendant and his wife were the final witnesses. Defendant continued to deny having touched the complainant's breasts, inner thighs, stomach, or belt-line. Defendant's wife also testified, asserting that the complainant's testimony was flawed on the basis of calendars that she maintained to keep track of her family's schedules. From her records, she believed that the night in question occurred on a night that the complainant had a track meet. As a result, the complainant and her family could not have arrived at defendant's home until after the hockey play-off games that occurred on that date were over.

The jury found defendant guilty of two counts of second-degree criminal sexual conduct and one count of assault and battery, as a lesser-included offense of assault with the intent to commit criminal sexual conduct in the second degree.

Defendant appealed, arguing, in relevant part, that the trial court abused its discretion by failing to redact numerous statements by the detectives that vouched for the complainant's credibility. The Court of Appeals affirmed. The Court reasoned that the officers' statements regarding the complainant's credibility were properly admitted, explaining that any introductory statements by the detectives provided context for the

questions and defendant's statements in response.[3] We granted defendant's application for leave to appeal.[4]

II. STANDARD OF REVIEW

A trial court's decision to admit evidence "will not be disturbed absent an abuse of . . . discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). However, if an evidentiary error is a nonconstitutional, preserved error, then it "is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative." *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). An error is "outcome determinative if it undermined the reliability of the verdict" and, in making this determination, a court should "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id*. (quotation marks and citations omitted).

III. LEGAL BACKGROUND

It is "[t]he Anglo-Saxon tradition of criminal justice . . . [that] makes jurors the judges of the credibility

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[3] *People v Musser*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2012 (Docket No. 301675), pp 3-4.

[4] Specifically, this Court asked the parties to address:

> (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. [*People v Musser*, 493 Mich 860 (2012).]

of testimony offered by witnesses." *United States v Bailey*, 444 US 394, 414; 100 S Ct 624; 62 L Ed 2d 575 (1980). Because it is the province of the jury to determine whether "a particular witness spoke the truth or fabricated a cock-and-bull story," *id*. at 414-415, it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). See also, *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995).[5] Such comments have no probative value, *Buckey*, 424 Mich at 17, because "they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *Connecticut v Taft*, 306 Conn 749, 764; 51 A3d 988 (2012) (citation and quotation marks omitted). See also, *People v Row*, 135 Mich 505, 507; 98 NW 13 (1904) (explaining that opinion testimony regarding a complainant's veracity is not competent evidence). As a result, such statements are considered "superfluous" and are "inadmissible lay witness[] opinion on the believability of a [witness's] story" because the jury is "in just as good a position to evaluate the [witness's] testimony." *People v Smith*, 425 Mich 98, 109, 113; 387 NW2d 814 (1986).

This case, however, involves a twist on the traditional rule. Specifically, at issue is whether the rule barring testimony regarding the credibility of another person excludes out-of-court statements to the same effect that are contained in the recordings or transcripts of an interrogation. In such a case, the contents of the

[5] Although I continue to adhere to the views expressed in my dissent in *Peterson*, 450 Mich at 381-398 (CAVANAGH, J., dissenting), I recognize that *Peterson* is the current majority law, and its validity is not at issue in this case.

recording or transcript are *not* automatically admissible. Instead, our evidentiary rules are triggered, including the rules regarding hearsay.

Under Michigan's evidentiary rules, "hearsay" is an unsworn, out-of-court statement that is "offered in evidence to prove the truth of the matter asserted." MRE 801(c)[6]; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Under MRE 802, hearsay is not admissible unless it "falls under one of the hearsay exceptions set forth in the Michigan Rules of Evidence." *Stamper*, 480 Mich at 3.[7] If, however, the proponent of the evidence offers the statement for a purpose other than to prove the truth of the matter asserted, then the statement, by definition, is not hearsay. MRE 801(c).

In this case, only the admissibility of the detectives' statements is at issue. Specifically, the prosecution asserts that the detectives' statements were properly admitted because they were not offered for the truth of the matter asserted in violation of the prohibition on vouching. Instead, the prosecution asserts that the detectives' statements were offered solely to provide context for defendant's statements that the prosecution wished to admit as an admission by a party opponent under MRE 801(d)(2).[8] Defendant, however, asserts that these statements should have been redacted from the interrogation recording before it was presented to

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[6] MRE 801 defines "hearsay" to include an "oral or written assertion," other than one that is made by the declarant while testifying at trial, that is "offered in evidence to prove the truth of the matter asserted." MRE 801(a), (c).

[7] See also, *McDaniel*, 469 Mich at 412.

[8] MRE 801(d)(2)(A) provides in part: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . . ." See also, *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002) ("Admissions by a party are specifically excluded from hearsay . . . .").

the jury because the statements, in effect, improperly vouched for the complainant's credibility. Alternatively, defendant argues that the detectives' statements were irrelevant because they were unnecessary to provide context for defendant's statements. Thus, at issue is whether an interrogator's out-of-court statements that vouch for the credibility of another person must be redacted from the recording of the interrogation before it is presented to the jury when the prosecution purports to offer the interrogator's out-of-court statements, *not* for the truth of the matter asserted, but *only* to place the defendant's statements in context for the jury.[9] Specifically, this case asks this Court to consider whether the rule precluding a witness from commenting on another person's credibility at trial is triggered by an interrogator's statements that are offered to provide context to a defendant's statements, rather than offered to prove the truth of the matter asserted, or whether the interrogator's statements that actually provide context to a defendant's statements have some probative value, unlike statements commenting on the credibility of another person that are offered for their truth.

Although this Court has yet to expressly opine on this issue, other jurisdictions have come to divergent conclusions. Specifically, some jurisdictions have held that there is "no meaningful difference" between allow-

[9] It bears emphasizing that if the prosecution offers or uses an interrogator's statements that vouch for the credibility of another person to prove the truth of the matter asserted at trial, the interrogator's statements would be inadmissible under the rule that a witness cannot comment on the credibility of another person, even if the out-of-court statements could somehow fall within a hearsay exception. As noted above, such comments are not probative of the matter and, thus, are not relevant. See *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).

ing an officer to comment on another person's credibility while testifying at trial and allowing the officer to make the same comments on a tape recording in the context of an interrogation interview. See, e.g., *Washington v Jones*, 117 Wash App 89, 92; 68 P3d 1153 (2003). The logic behind this approach is that, in either case, the jury hears the police officer's opinion and "clothing the opinion in the garb of an interviewing technique does not help." *Id.* See also, *Washington v Demery*, 144 Wash 2d 753, 765; 30 P3d 1278 (2001) (Alexander, C.J., concurring); *id.* at 767 (Sanders, J., dissenting); *Kansas v Elnicki*, 279 Kan 47, 57; 105 P3d 1222 (2005) ("A jury is clearly prohibited from hearing such statements from the witness stand . . . and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics."); *Commonwealth v Kitchen*, 730 A2d 513, 521 (Pa Super, 1999) (explaining that accusing a defendant of lying during an interrogation is "akin to a prosecutor offering his or her opinion on the truth or falsity of the evidence presented by a criminal defendant" or his or her opinion regarding the guilt of the defendant, neither of which is admissible at trial). Accordingly, under this rationale, such statements must be redacted from a recording before it is submitted to a jury. *Id.* at 522.

Other jurisdictions, however, have held that " 'there is a difference between an investigating officer giving an opinion as testimony before a jury, and an investigating officer giving an opinion during the interrogation of a suspect.' " *North Carolina v Castaneda*, ___ NC App ___; 715 SE2d 290, 294 (2011), quoting *Odeh v State*, 36 Fla L Weekly D 1510; 82 So 3d 915, 920 (2011). Specifically, some courts hold that because the comments are an interrogation technique and are "not made for the purpose of expressing an opinion as to

[the] defendant's credibility or veracity at trial," *Castaneda*, 775 SE2d at 295, the statements are admissible but "only . . . to the extent that they provide context to a relevant answer by the [defendant]." *Id*., quoting *Idaho v Cordova*, 137 Idaho 635, 641; 51 P3d 449 (2002) (quotation marks omitted). See also, *Maine v Mannion*, 637 A2d 452, 456 (Me, 1994) (explaining that such statements "are admissible to prove context if they are relevant . . . and not excludable on the grounds of prejudice, confusion or waste of time"). But see, *Lanham v Commonwealth*, 171 SW3d 14, 27-29 (Ky, 2005) (without engaging in an exacting relevancy analysis, holding that admitting comments accusing a defendant of lying "is necessary to provide a context" for a defendant's answers during an interrogation, but limiting the holding to accusations that a defendant is not telling the truth).

IV. ANALYSIS

Considering the prohibition on vouching and the prevalence of requests to admit recorded interrogations into evidence to present a defendant's statements to the jury, courts have justifiably struggled with the issue presented in this case. See *Cordova*, 137 Idaho at 640 (noting that courts in other jurisdictions have struggled with this precise issue). Under the facts of this case, however, we find it unnecessary to adopt a bright-line rule for the automatic exclusion of out-of-court statements made in the context of an interrogation that comment on another person's credibility because the issue can be adequately addressed by our existing rules of evidence. Thus, at this juncture, we hold that where the proponent of the evidence offers an interrogator's out-of-court statements that comment on a person's credibility for the purpose of providing context to a defendant's statements, the interrogator's statements

are only admissible to the extent that the proponent of the evidence establishes that the interrogator's statements are relevant to their proffered purpose. See MRE 401. Even if relevant, the interrogator's statements may be excluded under MRE 403 and, upon request, must be restricted to their proper scope under MRE 105. Accordingly, to ensure a defendant's right to a fair trial, trial courts "must vigilantly weed out" otherwise inadmissible statements that are not necessary to accomplish their proffered purpose. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). To hold otherwise would allow interrogations laced with otherwise inadmissible content to be presented to the jury disguised as context. See *id*.[10]

A. OVERVIEW

This Court has long held that even if an out-of-court statement is not offered for the truth of the matter asserted, the statement is not automatically admissible because the "touchstone" of admissibility is "relevance." *Id*. at 388; *People v Wilkins*, 408 Mich 69, 72-73; 288 NW2d 583 (1980); MRE 402.[11] Thus, a mechanical recitation by a party that an interrogator's statements are necessary to provide "context" for a defendant's responses without explaining how the

[10] To the extent that the analysis provided in *People v Johnson*, 100 Mich App 594; 300 NW2d 332 (1980), could be viewed as inconsistent with this opinion because it did not address whether the interrogator's statements were relevant for its proffered purpose, it is overruled. As explained within this opinion, even if a statement is not offered for the truth of the matter asserted, it must nevertheless be relevant and otherwise admissible to be presented to the jury.

[11] Under MRE 402:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

statements relate to the recited purpose is insufficient to present the interrogator's statements to the jury; even if an out-of-court statement is not offered for the truth of the matter asserted, the proponent of the evidence must still establish that it is "relevant" under MRE 401.[12] *Wilkins*, 408 Mich at 72-73; *Crawford*, 458 Mich at 386 n 6, 387. See also, *In re Earle*, 355 Mich 596, 602; 95 NW2d 833 (1959) (explaining that if a statement is not offered for the truth of the matter asserted, "[i]t may or may not be received," depending on whether "it has any relevancy in the case; but if it is not received, this is in no way due to the hearsay rule") (citation and quotation marks omitted).

Determining whether a statement is relevant requires a trial court to carefully scrutinize whether the statement is both material—i.e., "offered to help prove a proposition which is . . . a matter in issue"—and probative—i.e., "tends to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." *Crawford*, 458 Mich at 388, 390 (citations and quotation marks omitted). Under these inquiries, if an interrogator's out-of-court statement is offered to provide context to a defendant's statement that is not "in issue," it follows that both the interrogator's and the defendant's statements are immaterial and, thus, not relevant. See *id*. at 389.[13] Likewise, the interrogator's out-of-court statements or questions have no pro-

[12] MRE 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[13] Indeed, it goes without saying that if an interrogator's out-of-court statement provokes a statement by the defendant that is irrelevant or

bative value if those statements or questions, when considered in relationship to a defendant's statements, do not actually provide context to the defendant's statements. See *id.* at 389-390. Accordingly, an interrogator's out-of-court statements must be redacted if that can be done without harming the probative value of a defendant's statements.[14]

A finding that an interrogator's out-of-court statement has some relevance to its proffered purpose does not necessarily mean that the statement may be presented to the jury, however. See, e.g., *People v Robinson*, 417 Mich 661, 664; 340 NW2d 631 (1983) ("Determination of relevancy . . . does not alone determine admissibility."); MRE 402 ("All relevant evidence is admissible, except as otherwise provided by . . . [the Michigan Rules of Evidence], or other rules adopted by the Supreme Court."). Specifically, under MRE 403, a trial court has a "historic responsibility" to "always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced before admitting such

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would otherwise be inadmissible at trial, no "context" is necessary: if the defendant's statement is inadmissible, the context surrounding it is likewise inadmissible.

[14] In some circumstances, it might be necessary to consider a specific sequence of questions and answers between an interrogator and a defendant. Portions of an interrogator's statements, when viewed together, *might* be relevant to provide context to a defendant's responses, even though, when viewed in isolation, a single statement of the interrogator, in relation to a single corresponding statement of the defendant, could seemingly be redacted without harming the probative value of a defendant's statement. This may occur in situations where the proponent of the evidence claims that a defendant's story evolved in response to a specific sequence of interrogation. Nevertheless, such a scenario would still be subject to a MRE 403 analysis and MRE 105. Because this scenario is not implicated under the facts of this case, however, we need not address this issue further.

evidence." *Robinson*, 417 Mich at 665, 666.[15] See also, *Stachowiak v Subczynski*, 411 Mich 459, 464-465; 307 NW2d 677 (1981). And "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. Consistent with these principles, a trial court must therefore evaluate the probative value of the out-of-court statements in providing context to a defendant's statements and the resulting prejudice to a defendant before the interrogator's out-of-court statements are presented to the jury.

In evaluating a statement's probative value against its prejudicial effect, a trial court should be particularly mindful that when a statement is not being offered for the truth of the matter asserted and would otherwise be inadmissible if a witness testified to the same at trial, there is a "danger that the jury might have difficulty limiting its consideration of the material to [its] proper purpose[]." *Stachowiak*, 411 Mich at 465. See also, *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995). Indeed, this Court has recognized that child-sexual-abuse cases present "special considerations" given "the reliability problems created by children's suggestibility." *Peterson*, 450 Mich at 371. Further, although in the context of trial testimony, this Court has condemned opinions related to the truthfulness of alleged child-sexual-abuse complainants even when the opinions are not directed at a specific complainant. This is because in cases hinging on credibility assessments,

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[15] MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

the risk goes beyond any direct reference to a specific complainant given that the jury is often "looking to 'hang its hat' on the testimony of witnesses it views as impartial." *Id*. at 376. Likewise, an out-of-court statement made by an investigating officer "may be given undue weight by the jury" where the determination of a defendant's guilt or innocence hinges on who the jury determines is more credible—the complainant or the defendant. *People v Prophet*, 101 Mich App 618, 624; 300 NW2d 652 (1980). Thus, even if an interrogator's statements are not offered for the truth of the matter asserted, courts must be mindful of the problems inherent in presenting the statements to the jury, especially in child-sexual-abuse cases. See *Peterson*, 450 Mich at 371.

Finally, if an interrogator's out-of-court statement is determined to be admissible for the purpose of providing context for a defendant's statements, this determination "does not mean that the judicial duty in admitting [the interrogator's statement] is circumscribed by [that] conclusion." *Wilkins*, 408 Mich at 73. Instead, under MRE 105,[16] if evidence is admissible for one purpose, but not admissible for another purpose, the court, upon request, "*shall restrict the evidence to its proper scope* . . . ." (Emphasis added.) Thus, because an interrogator's comments regarding a person's credibility are not admissible for the truth of the matter asserted, a trial court shall restrict the interrogator's statements to their proper scope—to actually provide context to a defendant's statement.

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[16] MRE 105 provides in full:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Limiting out-of-court statements that are not offered for the truth of the matter asserted to their proper scope is not a new concept in Michigan jurisprudence. Indeed, this Court has previously rejected the notion that a rote recitation that a statement is not offered for the truth of the matter asserted is sufficient to admit an out-of-court statement. For example, in *Wilkins*, a police officer was allowed to testify to the contents of an informant's tip on the basis that the testimony was merely providing a basis for the officer's subsequent action. This Court held that even if the testimony was relevant for a purpose other than the truth of the matter asserted, under MRE 105, the officer's testimony should have been restricted to simply provide that the police officer was responding to "a tip," which was sufficient to establish the reason the officer took subsequent action. *Wilkins*, 408 Mich at 73.

Likewise, in the context of police interrogations, requiring the interrogating officer to testify at trial and paraphrase the statements he or she made that provoked a relevant statement by a defendant may be necessary in some instances to protect a defendant's right to a fair trial from the resulting prejudice of allowing the jury to hear the interrogator's comments verbatim.

B. APPLICATION

Applying these principles to this case, we hold that the trial court abused its discretion by admitting all the detectives' statements to the jury. As it pertains to Detective Kolakowski's first statement—that "[k]ids have a hard time lying about this stuff . . . ."[17]—the statement was irrelevant to providing context to defendant's statements because, quite simply, there was no

[17] Detective Kolakowski stated, "Kids have a hard time lying about this stuff because they don't even want to talk about it, let alone they don't even want to talk about it to a mere fucking stranger."

statement from defendant for which the detective's statement provided context. Instead, Detective Kolakowski's statements only provided context to the response of Detective Heffron. Accordingly, Detective Kolakowski's statement had no probative value for its proffered purpose.

Regarding the second set of statements by Detective Heffron, we hold that the majority of the statements were not probative to actually provide context to defendant's statements because the majority of the detective's comments could be redacted without harming the probative value of defendant's responsive statement. Indeed, when viewed in context, only Detective Heffron's final statement to defendant was actually probative of the matter, and, thus, the previous statements should have been redacted as irrelevant.[18] As to Detective Heffron's remaining statement, the statement's probative value was not substantially outweighed by the danger of unfair prejudice to defendant, given the relatively innocuous nature of the detective's statement.

As to the final exchange, we again hold that the trial court abused its discretion by admitting the entirety of

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[18] Specifically, only the following italicized portion of Detective Heffron's statement would have been probative to provide context to defendant's statement:

> DETECTIVE HEFFRON: ~~You know there's a big difference when we interview 4, 5, 6 year olds and when they get up around 10, 11, 12, 13. There's a big difference. Four, five, six year old kids, they're easy to manipulate by parents, aunts, uncles—they're easy to manipulate. They're terrible actors. They're terrible. When kids start getting a little bit older they're better actors. They're —they're older, they're seeing more. She's 12. The big issue here is if she wanted to get you in trouble—she's smart enough, and she's only—and she's 12~~—*if, for whatever reason, she wanted to get you in trouble she would—she would—*
>
> [DEFENDANT]: That she would say that I fucked her?

Detective Heffron's statements. With the exception of Detective Heffron's final questions and comments, the lengthy narrative of Detective Heffron consisted of statements directed at defendant that were unconnected to any question and could have been easily redacted without harming the probative value of defendant's statement.[19] As to Detective Heffron's remaining

[19] When viewed in context, only the following, italicized portion of Detective Heffron's statements would have been probative to provide context to defendant's statement in response:

> DETECTIVE HEFFRON: ~~Absolutely. "He put his hand down my pants, his finger was in my vagina" all of this "his mouth was on my breast" — that's what they would do if they're gonna lie to get somebody in trouble, . . . an older kid like that. Little kids, they never've [sic] been exposed to that stuff. They don't know. But it's pretty credible when she tells us, "Hey, he touched . . . me here" and "he put his hand on my breasts" and . . . "his hand started going down my pants but he couldn't." That's pretty credible; that's pretty detailed. Again, if there's no reason for her to make this crap up, why would she say it? This is the last thing . . . she wanted to do was talk to a total stranger about something like this. Why? Why is she gonna put herself through that if it didn't happen? We can't find anything. Kids don't lie about this stuff. [T]hey lie about their homework being done; they lie about, "yep, I did the dishes" when they didn't . . . [T]hey lie about "yeah, we were in bed by 10:00." They don't lie about this stuff if maybe she's in trouble for something. This is not the kind of stuff that kids make up to try to get out of some trouble that they're in. That's why this is so disturbing. . . . And again, if she's talking about "his hand was on my breast," she's not gonna make that crap up. She just isn't. And this is your opportunity for her to eventually see that you made a mistake, you're human, and you want to get this worked out so she has the least amount of stress/trauma, whatever, but that she gets the . . . feeling that "I love the man, the family. He made a mistake and someday as I'm older—because she's always gonna remember this—this didn't happen when she was 2 or 3 years old—they don't remember that stuff. She's always gonna remember this. At some point she will be able to accept, "Hey, this is what happened. We all make mistakes. He made a mistake." But you're gonna have to start by being upfront. And for you to sit here and say that "well, yep, she's telling the truth about this, but she's lying about that," . . . she's gonna have this report. She's gonna know exactly what you said, and whatever . . . message you want to send her that's . . . up to you. We can't force you.

comments and questions,[20] we again hold that the statements' probative value was not substantially outweighed by the danger of unfair prejudice to defendant, given the nature of the questions asked.

Finally, even if there was some probative value to the statements that the trial court erroneously failed to redact, the minimal probative value of those statements would be substantially outweighed by the danger of unfair prejudice to defendant under the facts of this case. See MRE 403. This Court has stated that "courts should be particularly insistent in protecting innocent defendants in child sexual abuse cases" given "the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury." *Peterson*, 450 Mich at 371. As applied to this case, although Detective Kolakowski was not qualified as an expert, Detective Kolakowski's specialized training and experience with child complainants was presented to the jury immediately before the jury viewed the recording of the interrogation. Thus, not only was the jury aware that Detective Kolakowski had performed "hundreds" of

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But if she's saying you touched her breasts ~~—I wasn't there for the interview [of the complainant] but [Kolakowski, who has] done a lot of interviewing, said, "Bill, there's no question this happened and the stuff that I'm aware of he probably did"—~~*we just need to know why. Was it alcohol? Was it—I don't know what your sex life has been at home, but all we want to know is why. Were you ever molested as a child?*

[DEFENDANT]: No.

DETECTIVE HEFFRON: Help us out here.

[DEFENDANT]: You asked a lot of different questions right there. I don't know—I—I don't know what motivated me. I think I explained it, I was just trying to give her a peck. I don't know where this touching of the breast is coming from. [Emphasis added.]

[20] See footnote 19.

forensic interviews involving alleged child-sexual-assault victims, but Detective Kolakowski also informed the jury that a child of the same age as the complainant understands "the difference between the truth and a lie." Accordingly, Detective Kolakowski's trial testimony regarding his training and experience "gave [Detective Kolakowski] the same aura of superior knowledge that accompanies expert witnesses in other trials." *Cordova*, 137 Idaho at 641.[21] Further, the undue weight that jurors may be inclined to place on police officers' statements heightened the prejudicial effect of the detectives' frequent out-of-court statements regarding the credibility of child complainants generally and the veracity of the complainant, thus offering the jury the "much sought-after hook on which to hang its hat." *Peterson*, 450 Mich at 374 (citation and quotation marks omitted). Accordingly, even if the out-of-court statements that were not redacted had some probative value for their proffered purpose, the probative value was substantially outweighed by the danger of unfair prejudice to defendant.

Our conclusion that the trial court abused its discretion does not end the inquiry, however, because nonconstitutional, preserved evidentiary errors are not grounds for reversal unless they undermined the reliability of the verdict. *Krueger*, 466 Mich at 54. In this case, we conclude that they did.

The evidence offered against defendant was not overwhelming. Although the complainant's testimony did not need to be corroborated, MCL 750.520h, there were no third-party witnesses in this case. Further, the

[21] Indeed, Detective Heffron's out-of-court statements regarding Detective Kolakowski's expertise bolstered Detective Kolakowski's status as an expert, both within the context of the interrogation and his testimony at trial.

prosecution relied on testimonial evidence and defendant's statements during the interrogation, and a factual dispute existed between the complainant's testimony and defendant's version of the events: defendant did not deny touching the complainant, but denied touching the complainant in the manner that was alleged and denied that his conduct was for sexual gratification. Thus, under the facts of this case, assessing witness credibility was the pervasive issue for the jury. As a result, the jury may have looked to the detectives' repeated out-of-court statements regarding the complainant's credibility, given the lack of physical evidence against defendant and the aura of expertise surrounding Detective Kolakowski.

Further, the trial court's belated limiting instruction did not cure the error. In *Jenkins*, this Court recognized that " 'despite proper instructions to the jury, it is often difficult for them to distinguish between . . . substantive evidence' " and evidence that is offered for another purpose. *Jenkins*, 450 Mich at 261-262, quoting *United States v Morlang*, 531 F2d 183, 190 (CA 4, 1975). In *Jenkins*, the prosecution was allowed to improperly impeach a witness with a prior inconsistent statement by having an officer who took the statement read the entirety of the written memorandum of the witness's prior statement to the jury. Portions of the memorandum, however, contained prejudicial statements that were unnecessary for impeachment purposes. *Id*. at 260-262. Given the improper manner in which the prior statements were presented to the jury and the fact that the officer's testimony went beyond the proper scope of impeachment, *Jenkins* held that there was a risk that the jury accepted the contents of the memorandum as substantive evidence, and this risk was heightened by the trial court's failure to provide a limiting instruction at the time the improperly admitted statement was read to the jury. *Id.* at 260, 263.

In this case, the belated curative instruction likewise does not alter our conclusion that the errors undermined the reliability of the verdict. Indeed, before the recording was presented to the jury, the jury was expressly instructed that "the recording that's going to be played for you [is] the evidence" and that the jury would "have to make [its] decision" on the basis of the evidence that was admitted. It was not until after the recording was played and after an hour-long recess that the trial court instructed the jury that the detectives' statements in the recording could only be considered to provide context for defendant's statements. Thus, the jury viewed the recording with the unqualified instruction in mind that the recording was evidence only to later be informed that all of the recording's contents could not be considered as such. Cf. *People v Clark*, 340 Mich 411, 418; 65 NW2d 717 (1954) (stating that when conflicting instructions are given, a court presumes that the jury followed the erroneous instruction). Similar to *Jenkins*, the risk that the jury accepted the contents of the recording as substantive evidence was heightened by the lack of a limiting instruction before the improperly admitted statements were presented to the jury. Accordingly, although an appropriate limiting instruction may reduce prejudice to a defendant, the lack of a timely limiting instruction in this case reinforces our conclusion that an error requiring reversal occurred.

V. CONCLUSION

We hold that under the facts of this case, the trial court abused its discretion by failing to redact the majority of the detectives' out-of-court statements commenting on credibility from the recording that was played to the jury because they were irrelevant to their

offered purpose of actually providing context to defendant's statements. Moreover, we hold that the errors undermined the reliability of the verdict. Accordingly, we reverse the judgment of the Court of Appeals, vacate defendant's convictions under MCL 750.520c(1)(a) and MCL 750.81, and remand the case to the trial court for further proceedings consistent with this opinion.

In re BRADLEY ESTATE

Docket No. 145055. Argued March 6, 2013 (Calendar No. 8). Decided July 26, 2013.

Nancy Mick, as personal representative of the estate of Stephen Bradley, filed a contempt of court petition in the Kent County Probate Court against the Kent County Sheriff's Department. Mick had obtained an order from the probate court on August 12, 2004, requiring that her brother, Bradley, be taken into custody for a psychiatric evaluation. The sheriff's department failed to execute the pick-up order, and Bradley fatally shot himself on August 21, 2004. Mick originally filed a wrongful-death action against the sheriff's department in the Kent Circuit Court, which the circuit court dismissed on the basis of governmental immunity, MCL 691.1407. Mick then filed in the probate court a civil contempt petition that replicated the contents of her previous wrongful death complaint, asserting that the estate had suffered damages as a result of the sheriff's department's failure to execute the pick-up order, including but not limited to the damages set forth in the wrongful-death statute, MCL 600.2922. The sheriff's department moved for summary disposition, arguing that under MCL 691.1407 it was immune from Mick's claim because she was essentially asking for tort damages. The probate court, David M. Murkowski, J., denied the motion. The sheriff's department appealed that decision in the circuit court, which reversed. The circuit court, James R. Redford, J., concluded that Mick's claim for indemnification under MCL 600.1721 for losses caused by the contempt was barred by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., because the underlying cause of action was based in tort. The circuit court remanded the case to the probate court for entry of summary disposition in favor of the sheriff's department. Mick appealed by leave granted. The Court of Appeals, HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ., reversed, concluding that the GTLA did not apply. 296 Mich App 31 (2012). The Supreme Court granted the sheriff's department's application for leave to appeal to consider whether Mick's claim for civil contempt indemnification damages under MCL 600.1721 was barred by the GTLA. 493 Mich 866 (2012).

In an opinion by Justice KELLY, joined by Chief Justice YOUNG and Justices MARKMAN, ZAHRA, and VIVIANO, the Supreme Court *held*:

The phrase "tort liability" as used in MCL 691.1407(1) of the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages. MCL 600.1721 imposes tort liability because it authorizes an award of compensatory damages to remedy a noncontractual civil wrong. Thus, MCL 691.1407(1) of the GTLA provides governmental agencies with immunity from civil contempt petitions seeking compensatory damages under MCL 600.1721.

1. Under MCL 691.1407(1), a governmental agency is generally immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. A "tort" is an act that has long been understood in Michigan's common law as a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty for which a remedy may be obtained in the form of compensatory damages. As commonly understood, the word "liability" refers to the state or quality of being liable, and "liable" means to be legally responsible. Thus, "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages. It follows that "tort liability" is not limited to traditional tort claims. Rather, in determining the applicability of MCL 691.1407(1), courts must consider the entire claim and the focus must be on the nature of the liability rather than the type of action pleaded; the nature of the liability will often be reflected in the available remedy. Courts considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim. If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable. If the wrong is premised on the breach of a noncontractual duty, then the GTLA might apply to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA applies.

2. MCL 600.1721 states that if contemptuous conduct has caused an actual loss or injury to any person, the court shall order the defendant to pay that person a sum sufficient to indemnify the person. The elements necessary to establish entitlement to relief

under MCL 600.1721 are essentially the same elements necessary to establish a tort, i.e., a legal duty, breach of that duty, causation, and injury. The misconduct that might result in a finding of contempt involves the neglect or violation of a duty under MCL 600.1701 or the failure to perform an act or duty under MCL 600.1715. Thus, the misconduct is a noncontractual civil wrong. Because the first sentence of MCL 600.1721 authorizes a court to order a contemnor to indemnify the person whose losses were caused by the contemptuous conduct, the statute permits an award of damages to a private party as compensation for an injury caused by a noncontractual civil wrong. Accordingly, MCL 600.1721 contemplates what is, in essence, a tort suit for money damages, and a civil contempt petition seeking indemnification under the statute seeks to impose tort liability. It follows that a party who elects to pursue the statutory remedy available under MCL 600.1721 will be barred from obtaining relief against governmental agencies because those entities are entitled to immunity from tort liability under MCL 691.1407(1) of the GTLA. Courts are prohibited from exercising their contempt powers by punishing a governmental agency's contemptuous conduct through an award of indemnification damages under MCL 600.1721.

3. In this case, Mick sought compensatory damages for Bradley's death under MCL 600.1721. Thus, her petition sought to impose tort liability on a governmental agency. Had Mick sought to invoke the probate court's inherent contempt powers, i.e., to fine or imprison a contemnor, or had she otherwise established the applicability of an exception to governmental immunity, her claim might have survived summary disposition, but she did not. Consequently, because a civil contempt petition seeking indemnification damages under MCL 600.1721 seeks to impose tort liability, and a sheriff's department is immune from tort liability, Mick's claim was barred by governmental immunity under MCL 691.1407(1), and the sheriff's department was entitled to summary disposition under MCR 2.116(C)(7).

Judgment of the Court of Appeals reversed; case remanded to the probate court for entry of an order granting summary disposition in favor of the sheriff's department.

Justice CAVANAGH, dissenting, would have affirmed the result reached by the Court of Appeals. Justice CAVANAGH agreed with the majority that in determining whether an action imposes tort liability, the focus must be on the nature of the liability rather than the type of action pleaded. Contrary to the conclusion of the majority, a compensatory contempt sanction does not impose tort liability, primarily because that sanction is based on the contemp-

tuous act itself. A contemptuous act is an act of disobedience to the court's ordinary exercise of its duties. Contemptuous conduct is not synonymous with the breach of a traditional tort duty because liability arising from tortious conduct stems from a breach of one's duty to another, not the breach of an obligation owed to the court. While the purpose of the relief sought may be a relevant inquiry when determining whether a type of liability is tort liability for purposes of the GTLA, the nature of the remedy is not dispositive. Thus, a compensatory contempt sanction does not impose tort liability simply because one of the purposes it serves, like tort damages, is remedial.

Justice MCCORMACK, dissenting, disagreed with the majority's assertion that all noncontractual civil wrongs, including civil contempt, are torts, and would have affirmed the judgment of the Court of Appeals. Justice MCCORMACK agreed with the majority that "tort liability" refers to legal responsibility arising from a tort, but concluded that contempt of court is not a tort no matter what remedy for contempt is imposed, and would not have interpreted the GTLA as granting immunity to governmental agencies from contempt sanctions under MCL 600.1721. Civil contempt does not sound in tort, and civil contempt sanctions do not impose tort liability. Tort law imposes a duty to avoid harmful conduct deemed tortious. Contempt law imposes a duty to obey the court. The duties are fundamentally different, as are their origins and the purposes they serve. While tort liability may lead to relief in the form of compensatory damages, that is not the only remedy available for tortious conduct, and compensatory damages are not unique to tort law. Neither the language of the GTLA nor the language of the contempt statute, MCL 600.1701, provide any basis for concluding that governmental actors are not subject to all of the permissible sanctions for contempt.

CONTEMPT — GOVERNMENTAL IMMUNITY — RECOVERY OF DAMAGES — NONTORT CAUSES OF ACTION.

Under the governmental tort liability act (GTLA), MCL 691.1401, *et seq*., a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function; the phrase "tort liability" as used in MCL 691.1407(1) encompasses all legal responsibility for civil wrongs other than a breach of contract for which a remedy may be obtained in the form of compensatory damages; MCL 600.1721 states that if contemptuous conduct has caused an actual loss or injury to any person, the court shall order the defendant to pay that person a sum sufficient to indemnify the person; MCL 600.1721 imposes tort liability as that term is used in the GTLA

because it authorizes an award of compensatory damages to a private party to remedy a noncontractual civil wrong; under MCL 691.1407(1), governmental agencies are immune from civil contempt petitions seeking compensatory damages under MCL 600.1721.

Timothy T. Taylor for Nancy Mick.

Varnum LLP (by *Peter A. Smit*, *Adam J. Brody*, and *Gary J. Mouw*) for the Kent County Sheriff's Department.

Amici Curiae:

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Ballentine*) for the Michigan Municipal League, the Michigan Municipal League Liability and Property Pool, the Michigan Townships Association, and the Public Corporation Law Section of the State Bar of Michigan.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Aaron D. Lindstrom*, Assistant Solicitor General, for the Department of the Attorney General.

MARY BETH KELLY, J. In this case, we decide whether a civil contempt petition that seeks indemnification damages under MCL 600.1721 imposes "tort liability" within the meaning of MCL 691.1407(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Given the Legislature's use of the common-law term "tort," we hold that "tort liability" as used in MCL 691.1407(1) of the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages. We further hold that MCL 600.1721 imposes "tort liability" because it authorizes an award of indemnification, or compensatory, damages

to remedy a noncontractual civil wrong. Consequently, MCL 691.1407(1) of the GTLA provides governmental agencies with immunity from civil contempt petitions seeking indemnification damages under MCL 600.1721. Because the Court of Appeals reached a contrary conclusion, we reverse the judgment of the Court of Appeals and remand this case to the probate court for entry of an order granting summary disposition in favor of respondent.

I. FACTS AND PROCEDURAL HISTORY

In the summer of 2004, petitioner, Nancy Mick, became increasingly concerned about the mental health of her brother, Stephen Bradley. She noticed that Bradley had grown "more agitated and violent," and he had admitted to her that he was suicidal. Petitioner feared that if Bradley did not receive help "he could kill himself and his family." As a result, in August 2004, she petitioned the Kent County Probate Court for Bradley's hospitalization, averring that Bradley was a danger to himself and his family. She accompanied her petition with a supplemental petition for examination and hospitalization, requesting a court order directing a peace officer to take Bradley into protective custody.

The probate court granted the petitions that same day and issued an order requiring that Bradley submit to psychiatric examination and requiring his hospitalization. The order specified that a "peace officer shall take [Bradley] into protective custody and transport him . . . to [Cornerstone Community Mental Health or any community mental health contract facility]." Petitioner immediately submitted the order to respondent, the Kent County Sheriff's Department, for execution and provided additional details to the sergeant on duty

concerning how petitioner expected Bradley to react to being taken into custody and the fact that Bradley possessed several firearms.

Respondent, however, did not timely execute the probate court's order. In the days that followed, petitioner contacted respondent twice in regard to Bradley's situation, and each time respondent assured her that the pickup would take place as soon as possible. Ultimately, respondent never attempted to take Bradley into protective custody and, nine days after the probate court entered its order, Bradley committed suicide.

After Bradley's suicide, petitioner wrote to Kent County Sheriff Lawrence A. Stelma, requesting an internal investigation, which ultimately concluded that the failure to execute the order was "an obvious case of simple neglect in that this petition was not executed in the manner that mental health petitions normally are handled."[1] Stelma informed petitioner by letter of the investigation's findings, confirming that the order had not been executed and describing respondent's failure as "an unusual occurrence" that did "not reflect any policy or procedure on the part of the Sheriff's Department . . . ."

More than two years later, petitioner, acting as personal representative of Bradley's estate, filed a wrong-

[1] The investigation revealed that the sergeant who initially received the order could not execute it because she was on duty alone. She passed it onto the next sergeant who, in turn, assigned it to a deputy. The deputy, waylaid by other police business, passed the order to another officer who indicated that the order would be executed the following day. The order eventually came to rest at a police substation where it remained until the internal investigator found it on August 25, 2004. The investigation report indicated that "it appears as though [the officers] were all somewhat cognizant that the [order] was there; however, no one took initiative to either execute the [order] or access the computer to ascertain if the [order] had been served."

ful death suit against respondent and Stelma, alleging that they were grossly negligent in their failure to execute the probate court order and that their negligence was the proximate cause of Bradley's death. The circuit court dismissed the case on governmental immunity grounds, opining that respondent was not a legal entity that could be sued and that Stelma was individually immune from suit under the GTLA.

Petitioner did not appeal the circuit court's dismissal. Instead, she filed a petition for civil contempt in the probate court against respondent. The petition alleged that respondent's violation of the probate court's order constituted contempt of court, entitling her to indemnification damages pursuant to MCL 600.1721. The petition replicated the contents of petitioner's wrongful death complaint and sought damages "including, but not limited to, all of those damages set forth in the Michigan Wrongful Death Statute, MCL 600.2922, et seq."[2]

Respondent moved for summary disposition, arguing that it was immune from liability under MCL 691.1407(1) of the GTLA because petitioner sought to impose tort liability in the guise of a civil contempt petition.[3] The probate court denied respondent's motion reasoning that "[g]overnmental immunity does not

[2] Both the complaint and petition alleged that respondent "failed and refused to execute the Order issued by the Kent County Probate Court notwithstanding its mandate, delivery of the Order to [respondent], and the repeated inquiry regarding execution of the Order."

[3] Respondent also alleged that (1) petitioner failed to submit an affidavit from a person witnessing the contemptuous act as required by MCR 3.606(A), (2) respondent was not a legal entity capable of being sued, and (3) petitioner failed to show either a willful violation of the probate court order or the requisite causal link between the alleged contempt and Bradley's suicide as required by MCL 600.1701. These arguments are not before this Court.

insulate a contemnor from the contemnor's refusal or negligence to obey a court order." The probate court acknowledged an "overlap of remedies between a court['s] power of contempt and a compensation that may be argued under tort," but concluded that this overlap did not impede a court's *inherent* authority to punish contempt.

Respondent appealed the probate court's ruling to the circuit court, which reversed and remanded the case to the probate court for entry of an order granting summary disposition in favor of respondent. Relying on the definition of "tort liability" articulated in *Tate v Grand Rapids*,[4] the circuit court concluded that petitioner's civil contempt petition was based in tort because the petition sought damages under the wrongful death statute. The circuit court, therefore, held that petitioner's claim was barred by the GTLA. While cognizant of courts' inherent authority to punish contempt, the circuit court concluded that the scope of that inherent authority is limited to the power to punish by fine or imprisonment. Because petitioner did not invoke the probate court's inherent power to punish contempt by either fine or imprisonment, but instead sought indemnification damages pursuant to MCL 600.1721, the court did not consider its holding—that petitioner's claim is barred by the GTLA—as infringing on courts' inherent contempt powers.

The Court of Appeals granted petitioner's application for leave to appeal and, in a published opinion per curiam, reversed the circuit court's decision.[5] The Court of Appeals held that the GTLA does not immunize governmental agencies from "tort-like" damages

[4] *Tate v Grand Rapids*, 256 Mich App 656, 660; 671 NW2d 84 (2003).

[5] *In re Bradley Estate*, 296 Mich App 31; 815 NW2d 799 (2012).

sought pursuant to MCL 600.1721.[6] Relying on *Tate*[7] and *Ross v Consumers Power Co (On Rehearing)*,[8] the Court of Appeals opined that whether a "contempt claim can survive a governmental immunity challenge is controlled not by the nature of the damages sought, but by whether [the] contempt action is a cause of action that is separate and distinct from one that is grounded in tort liability."[9] The Court of Appeals explained:

> In accord with the *Ross* Court's holding that the GTLA will not bar recovery simply because the underlying facts could have also established a tort cause of action, we conclude that tort-like damages are recoverable in a contempt action assuming contempt can be proved. Thus, whether the GTLA implicates the viability of Mick's contempt action rests on whether Mick can successfully plead and establish a contempt cause of action. The nature of the damages being requested has no role in determining whether the action is barred by [the] GTLA. Consequently, the circuit court erred when it dismissed this case merely because the damages sought were similar to tort damages.[10]

We granted respondent's application for leave to appeal to consider whether "petitioner's claim for civil contempt indemnification damages under MCL 600.1721 is barred by the [GTLA]."[11]

II. STANDARD OF REVIEW

We review de novo a decision on a motion for summary disposition.[12] Under MCR 2.116(C)(7), summary

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[6] *Id*. at 38-39.

[7] *Tate*, 256 Mich App at 660-661.

[8] *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984).

[9] *In re Bradley Estate*, 296 Mich App at 38-39.

[10] *Id.* at 39 (citation omitted).

[11] *In re Bradley Estate*, 493 Mich 866 (2012).

[12] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

disposition is appropriate when a claim is barred by governmental immunity.[13] A party filing suit against a governmental agency bears the burden of pleading his or her claim in avoidance of governmental immunity.[14]

We also review de novo issues of statutory interpretation.[15] When construing a statute, we consider the statute's plain language and we enforce clear and unambiguous language as written.[16] While terms must be construed according to their plain and ordinary meaning, words and phrases "as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."[17] Moreover, when the Legislature chooses to employ a common- law term without indicating an intent to alter the common law, the term will be interpreted consistent with its common-law meaning.[18]

III. ANALYSIS

Since Michigan became a state in 1837, Michigan jurisprudence has recognized the preexisting common-law concept of sovereign immunity, which immunizes the "sovereign" state from all suits to which the state has not consented, including suits for tortious acts by the state.[19] This common-law concept of sovereign immunity has since been replaced in Michigan by the

[13] *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

[14] *Odom v Wayne Co*, 482 Mich 459, 478-79; 760 NW2d 217 (2008).

[15] *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011).

[16] *Id.* at 246-247.

[17] MCL 8.3a.

[18] *Stone v Williamson*, 482 Mich 144, 170; 753 NW2d 106 (2008) (opinion by CAVANAGH, J.).

[19] *Ross*, 420 Mich at 598.

GTLA and is codified by MCL 691.1407(1), which limits a governmental agency's exposure to tort liability.

Specifically, MCL 691.1407(1), which is at the center of this litigation, broadly provides that "a governmental agency is immune from *tort liability* if the governmental agency is engaged in the exercise or discharge of a governmental function."[20] Under the statute, *all* suits that seek to impose "tort liability" for an agency's discharge of a governmental function are barred by the GTLA, subject to several exceptions that the Legislature has expressly provided for in the GTLA and in other statutes authorizing suit against governmental agencies.[21] While conceding that none of these exceptions applies to the instant case, petitioner asserts that the immunity afforded by the GTLA is inapplicable because a civil contempt petition seeking indemnification damages does not seek to impose tort liability.

Whether a contempt order imposing indemnification damages imposes tort liability is not readily apparent; the GTLA does not define the phrase "tort liability" and our caselaw has not offered a definition of the phrase. Moreover, the contempt statutes under which petitioner brings suit include no express reference to the imposition of "tort liability." The civil contempt petition in the instant case is based on the general contempt statute of MCL 600.1701, a provision of the Revised Judicature Act (RJA), MCL 600.101 *et seq*., that identifies potentially punishable contemptuous conduct. This

[20] Emphasis added. Likewise, individual governmental officers and employees may be entitled to immunity from "tort liability." See MCL 691.1407(2) and (5).

[21] See *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002). The statutory exceptions contained in the GTLA are: (1) the highway exception, MCL 691.1402, (2) the motor vehicle exception, MCL 691.1405, (3) the public building exception, MCL 691.1406, (4) the governmental hospital exception, MCL 691.1407(4), (5) the proprietary function exception, MCL 691.1413, and (6) the sewage system event exception, MCL 691.1417.

provision, which is a codification of courts' power at common law to punish contemptuous conduct,[22] states in relevant part:

> The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any *neglect or violation of duty or misconduct* in all of the following cases:
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> * * *
>
> (c) All attorneys, counselors, clerks, registers, sheriffs, coroners, and all other persons in any manner elected or appointed to perform any judicial or ministerial services, for any misbehavior in their office or trust, or for any willful neglect or violation of duty, for disobedience of any process of the court, or any lawful order of the court, or any lawful order of a judge of the court or of any officer authorized to perform the duties of the judge.
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> * * *
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> (g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court.[23]

By its plain terms, MCL 600.1701 allows courts to exercise their inherent contempt powers for the purpose of either coercing a contemnor to comply with the court's order (civil contempt) or punishing a contemnor for contemptuous conduct (criminal contempt) by imposing a "fine or imprisonment, or both . . . ."[24]

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[22] *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14; 413 NW2d 392 (1987), citing Const 1963, art 6, § 1.

[23] MCL 600.1701 (emphasis added). See also MCL 600.1715(2) (providing punishment for contemptuous conduct consisting of "the omission to perform some act or duty . . . .").

[24] See also MCL 600.1715(1), which generally limits the fine for contempt to not more than $7,500 and the term of imprisonment to no more than 93 days.

In addition to the coercive and punitive sanctions permitted for civil and criminal contempt under MCL 600.1701, a court, in a civil contempt proceeding, may also order indemnification of those persons who have sustained losses as a result of contemptuous conduct under MCL 600.1721.[25] This statute, on which petitioner relies, provides that "[i]f the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him . . . ."[26]

The contemptuous misconduct referred to in these contempt statutes, however, does not clearly constitute tortious action such that petitioner's civil contempt petition would necessarily impose tort liability for purposes of the GTLA. Whether petitioner's claim is barred by the GTLA thus requires two related inquires. First, we must determine the meaning of the phrase "tort liability" as used in MCL 691.1407(1) of the GTLA; and, second, we must decide whether a civil contempt petition seeking indemnification damages under MCL 600.1721 seeks to impose tort liability, such that the GTLA would prohibit petitioner's claim.

A. TORT LIABILITY

As noted, the GTLA does not define the phrase "tort liability," nor has this Court previously determined the meaning of that phrase. The lower courts applied the definition of "tort liability" articulated by the Court of Appeals in *Tate*, a case involving a statute that imposes strict liability on dog owners for injuries resulting from

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[25] A contempt proceeding seeking indemnification damages is a civil contempt proceeding. *In re Contempt of Dougherty*, 429 Mich at 111 ("A proper civil contempt proceeding [may] seek[] . . . to compensate the complainant for actual loss.").

[26] MCL 600.1721.

dog bites.[27] In *Tate*, the plaintiff sought to avoid application of the GTLA by arguing that strict-liability actions fell outside the scope of tort liability.[28] In rejecting the plaintiff's argument, the Court of Appeals explained, "The GTLA unambiguously grants immunity from *all* tort liability, i.e., all civil wrongs for which legal responsibility is recognized, regardless of how the legal responsibility is determined, except as otherwise provided in the GTLA."[29]

We do not necessarily disagree with *Tate*'s general understanding of the phrase "tort liability." However, in our judgment, *Tate*'s definition is incomplete and fails to acknowledge the historical underpinnings of the word "tort" as that word has been used in our common law for more than a hundred years. Mainly, a "tort" is an act that has long been understood as a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty.[30] For example, English common-law courts have for centuries recognized a civil wrong as an infringement on private rights belonging to individuals and divided civil wrongs into two categories: those sounding in contract and those sounding in tort.[31]

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[27] *Tate*, 256 Mich App at 658.

[28] *Id.* at 659.

[29] *Id.* at 660. Consistent with this definition, the Court of Appeals explained that "strict liability is based on tort law and may result in tort liability, i.e., civil liability for wrongful conduct." *Id.*

[30] As Sir Edward Coke explained, "wrong or injury is in French aptly called *tort*; because injury and wrong is wrested or crooked, being contrary to that which is right and straight." I Coke, The First Part of the Institutes of the Laws of England (Butler's 1st American ed, 1853), p 158b.

[31] See *Sinclair v Brougham*, [1914] AC 398 (HL), 415 (1914) (Viscount Haldane, LC) ("[B]roadly speaking, so far as proceedings in personam are concerned, the common law of England really recognises (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort."); *id.* at 432 (Lord Dunedin) ("The

The Queen's Bench has acknowledged this division in a case involving a bailee's liability for injury to the plaintiff's horse, in which it concluded that the legal basis for the plaintiff's claim was a tort and that damages to compensate for the injury should be allowed. Lord Justice Smith explained:

> [I]f in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract.[32]

The Queen's Bench, then, recognized only two types of civil wrongs, those involving contractual wrongs and those involving the breach of some other legal duty, the latter of which is a tort and is remedied through an

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English common law has various actions which, under a classification which I understand to be really one of modern growth, are divided into actions in respect of contract and of tort."); *Bryant v Herbert*, 3 CPD 389, 390 (1878) (Bramwell, LJ) ("One may observe there is no middle term; the statute supposes all actions are founded either on contract or on tort. So that it is tort, if not contract, contract if not tort."). These English common-law cases are consistent with the understanding of tort espoused by Sir William Blackstone in his 1771 Commentaries, which make the same distinction:

> Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof: and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs . . . . Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words and the like. [3 Blackstone, Commentaries on the Laws of England (Jones ed., 1976), p *117.]

[32] *Turner v Stallibrass*, 1 QB 56, 58 (1898) (A.L. Smith, LJ). See also *id.* at 59 (Rigby, LJ) ("The rule is that, if the plaintiff, in order to shew [sic] a cause of action, must rely on a contract, the action is one founded on contract; otherwise it is one of tort.").

award of compensatory damages.[33]

Michigan common law, which has its roots in English common law, has likewise recognized this distinction between torts and contracts as the two types of civil wrongs.[34] For example, in *Churchill v Howe*,[35] this Court considered whether a debtor's liability was limited to the parties' contractual relations. In concluding that the creditor's allegations of fraud sounded in tort, we acknowledged the general principles that a tort requires a "wrong independent of a contract" and that "the distinguishing feature of a tort [is] that it consists in the violation of a right given or neglect of a duty imposed by law, and not by contract."[36] Stated differently, and as this Court has repeatedly recognized in the

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[33] As noted, this understanding of a tort is reflected in Sir William Blackstone's Commentaries. Aside from recognizing that only two types of civil wrongs exist, Blackstone's Commentaries also repeatedly confirm that tort actions involve a particular type of compensation—compensatory damages. See 3 Blackstone, p *138 (stating that "[t]he *satisfactory* remedy for this injury of false imprisonment" is that "the party shall recover damages for the injury he has received"); 3 Blackstone, pp **145-146 (stating that the proper remedy for the wrongful taking of goods is "the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion," and that the law in this regard "contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured; by giving him a satisfaction in damages"); 3 Blackstone, p *220 (stating that when a private person suffers damage by a public nuisance, the remedies by suit are "[b]y action *on the case* for damages; in which the party injured shall only recover satisfaction for the injury sustained; but cannot thereby remove the nuisance").

[34] As former Chief Justice of the Michigan Supreme Court THOMAS M. COOLEY recognized in Cooley, A Treatise on the Law of Torts (2d ed, 1888), p 2, "It is customary in the law to arrange the wrongs for which individuals may demand legal redress into two classes: the first embracing those which consist in a mere breach of contract, and the second those which arise independent of contract."

[35] *Churchill v Howe*, 186 Mich 107; 152 NW 989 (1915).

[36] *Id*. at 111, 114 (citation and quotation marks omitted).

nearly one hundred years since *Churchill*, when a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort.[37]

Our common law likewise incorporates the concept that a tort necessarily involves compensation to an injured party for the wrong committed by a tortfeasor.[38] As we explained in *Wilson v Bowen*,[39] a case involving an award of damages for malicious prosecution, "the purpose of an action of tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant; that *compensation* to the plaintiff is the purpose in view . . . ."

Given the foregoing, it is clear that our common law has defined "tort" to be a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of compensatory damages. Accordingly, because the word "tort" has "acquired a peculiar and appropriate meaning" in our common law, and because the Legislature is presumed to be aware of the

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[37] See, e.g., *O'Neill v James*, 138 Mich 567, 573; 101 NW 828 (1904) (quoting caselaw stating that a party who commits a wrong independent of contract "brings himself within the operation of a principle of the law of torts") (citation and quotation marks omitted); *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956) (approvingly quoting caselaw stating that as a general rule, to support a cause of action in tort, there "must be some breach of duty distinct from breach of contract") (citation and quotation marks omitted); *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 246-247; 531 NW2d 144 (1995) (holding that the duty not to retaliate against an employee for filing a workers' compensation claim arises independently from the employment contract and thus sounds in tort).

[38] *Stillson v Gibbs*, 53 Mich 280, 284; 18 NW 815 (1884) ("The purpose of an action for tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant."); *Kalembach v Michigan Cent R Co*, 87 Mich 509, 524; 49 NW 1082 (1891) (MCGRATH, J., dissenting) (recognizing that recovery for a tort requires "a wrong as well as damage").

[39] *Wilson v Bowen*, 64 Mich 133, 141; 31 NW 81 (1887).

common law when enacting legislation, we conclude that the term "tort" as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.[40]

Our analysis, however, requires more. MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim" nor to a "tort action," but to "tort *liability*." The term "tort," therefore, describes the type of liability from which a governmental agency is immune. As commonly understood, the word "liability," refers to liableness, i.e., "the state or quality of being liable."[41] To be "liable" means to be "legally responsible[.]"[42] Construing the term "liability" along with the term "tort," it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.[43]

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[40] MCL 8.3a; *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006) ("[C]ommon-law meanings are assumed to apply . . . in the absence of evidence to indicate contrary meaning.") (citation and quotation marks omitted). This definition is consistent with modern authorities' understanding of the term "tort" as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, [usually] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another." Black's Law Dictionary (9th ed); see also Prosser & Keeton, Torts (5th ed), § 1, p 2.

[41] *Random House Webster's College Dictionary* (2001). Similarly, Black's Law Dictionary (7th ed) defines "liability" as "[t]he quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment" and as "a financial or pecuniary obligation[.]"

[42] *Random House Webster's College Dictionary* (2001).

[43] Petitioner argues that this understanding of tort liability is overly inclusive, but offers no alternative definition for the term "tort." More-

In reaching this holding, we are cognizant of our decision in *Ross*, on which the Court of Appeals relied in concluding that "tort-like damages are recoverable in a contempt action" against a governmental entity.[44] Our opinion in *Ross* actually concerned nine cases, including *Rocco v Department of Mental Health*. In that case, the plaintiffs' decedent was murdered while he was a patient at a hospital administered by two state agencies. The plaintiffs filed a two-count complaint alleging both negligence and breach of an implied contract. We held that the GTLA barred the plaintiffs' negligence claim, but that the plaintiffs' second claim, breach of an implied contract, was not barred. The defendants had argued that the plaintiffs' contract claim should be dismissed because "most of the allegations contained in Counts I and II are identical . . . ."[45] In rejecting that argument, we stated:

> We recognize that plaintiffs have and will attempt to avoid [MCL 691.1407(1)] of the governmental immunity act by basing their causes of action on theories other than tort. Trial and appellate courts are routinely faced with the task of determining whether the essential elements of a particular cause of action have been properly pleaded and proved. If a plaintiff successfully pleads and establishes *a non-tort cause of action*, [MCL 691.1407(1)] will not bar recovery simply because the underlying facts could have also established a tort cause of action.[46]

Petitioner and the Court of Appeals interpret this passage from *Ross* to mean that the label of the action controls in determining whether an action imposes tort

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over, while our definition of "tort" is stated in broad terms, it is consistent with the common-law understanding of that term as adopted by our Legislature in MCL 691.1407(1).

[44] *In re Bradley Estate*, 296 Mich App at 39.

[45] *Ross*, 420 Mich at 647.

[46] *Id.* at 647-648 (emphasis added).

liability and that, if the claim is not a traditional tort, then the GTLA is inapplicable and "tort-like" damages are recoverable. *Ross*, however, made no such pronouncement and did not consider the meaning of "tort liability," which is the question that is now before this Court. Instead, consistent with our holding in this case, *Ross* merely recognized that the GTLA does not bar a properly pleaded contract claim.[47]

In addition, our holding clarifies that *Ross*'s pronouncement, that "non-tort cause[s] of action" are not barred by the GTLA, should not be interpreted as limiting the GTLA's application to only traditional tort claims.[48] The Legislature's express decision to use the word "liability" in describing the governmental immunity available under MCL 691.1407(1), rather than "action" or "claim," indicates that our focus must be on the *nature* of the liability rather than the type of action pleaded. For this reason, we decline to limit the GTLA's application to suits expressly pleaded as traditional tort claims, as petitioner would have us hold.[49] Further,

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[47] *Id*. at 647-648; *id*. at 693-694 (opinion by LEVIN, J.) ("The language of [MCL 691.1407(1)], however, speaks only to immunity from tort liability; it does not grant immunity from contract claims.").

[48] *Ross*, 420 Mich at 647-648.

[49] To follow petitioner's suggestion, which Justice MCCORMACK also appears to advocate, would exalt form over substance when, instead, we have long recognized that a party's choice of label for a cause of action is not dispositive and "the gravamen of [a] plaintiff's action is determined by considering the entire claim." *Maiden*, 461 Mich at 135. Moreover, we have held on numerous occasions that some causes of action that are not traditional torts nonetheless impose tort liability within the meaning of the GTLA. See, e.g., *Donajkowski v Alpena Power Co*, 460 Mich 243, 247; 596 NW2d 574 (1999) (sex discrimination in violation of the Civil Rights Act); *Phillips*, 448 Mich at 248-249 (retaliatory discharge in violation of Worker's Disability Compensation Act); *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 165; 809 NW2d 553 (2011) (statutory duties may give rise to tort claim); see also *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 275; 826 NW2d 519 (2012) (statutory

because the nature of the liability will often be reflected in the remedy available, we disagree with the Court of Appeals' statement that "[t]he nature of the damages being requested has no role in determining whether the action is barred by the GTLA."[50] Instead, because a tort, by definition, encompasses an award of compensatory damages, the nature of the damages is precisely relevant in determining whether the type of liability imposed is tort liability.[51] Accordingly, regardless of how a claim is labeled, courts must consider the entire claim, including the available damages, to determine the nature of the liability imposed.[52]

In summary, several principles emerge from our explication of the phrase "tort liability" that will guide

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"retaliation torts"); *4041-49 W Maple Condo Ass'n v Countrywide Home Loans, Inc*, 282 Mich App 452, 459; 768 NW2d 88 (2009) (failure to provide notice under foreclosure statute).

[50] *In re Bradley Estate*, 296 Mich App at 39.

[51] Indeed, to ignore the type of the damages sought would be to ignore the correlation between the wrong alleged and the available remedy. See *Nat'l Copper Co v Minnesota Mining Co*, 57 Mich 83, 93; 23 NW 781 (1885) ("[D]amage alone does not give a right of action; there must be a concurrence of wrong and damage."). As we have explained, tort damages traditionally take the form of compensatory damages. See, e.g., *Wilson*, 64 Mich at 141. Although other remedies might be available in some circumstances, " 'an action for damages is the essential remedy for a tort,' " and " 'in all such cases it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort.' " Prosser & Keeton, Torts (5th ed), § 1, p 2 n 6, quoting Salmond, Law of Torts (12th ed), p 9.

[52] Justice MCCORMACK pens an eloquent and engaging discussion of the sui generis nature of contempt, one that we do not necessarily disagree with regarding *contempt*. Where we do differ, however, is in our belief that this case presents a more nuanced issue, namely whether a petitioner can recast a wrongful death claim that is barred by the GTLA as a claim for civil contempt and obtain indemnification damages under MCL 600.1721, which are exactly the same as those damages sought under the wrongful death statute. We see the issue differently, but have not "confuse[d] legal categories" in the least.

courts charged with the task of determining whether a cause of action imposes tort liability for purposes of the GTLA. Courts considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim. If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable.[53] However, if the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable.[54]

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[53] In that instance, we emphasize that the plaintiff would be limited to the recovery of contract damages. If a plaintiff seeks the recovery of tort damages stemming from the breach of a contractual duty, then the plaintiff's claim would be insufficient as a matter of law under MCR 2.116(C)(8).

[54] This step of the analysis is fundamental to determining whether an action involving a noncontractual civil wrong seeks to impose tort liability. This is because, in some instances, a noncontractual civil wrong might exist, but instead of seeking compensation to remedy the harm, the plaintiff elects some other remedy, thus rendering governmental immunity inapplicable. For example, a plaintiff may ask a court to enforce his or her rights under the law. See *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007) (recognizing that governmental immunity barred a plaintiff's private cause of action seeking monetary damages for an alleged statutory violation, but noting that the plaintiff could enforce the statute by seeking declaratory or injunctive relief); *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152 n 5; 422 NW2d 205 (1988) (opinion by BRICKLEY, J.) ("Generally, we do not view actions seeking only equitable relief, such as abatement or injunction, as falling within the purview of governmental immunity."), overruled on other grounds by *Pohutski v City of Allen Park*, 465 Mich 675 (2002).

B. CIVIL CONTEMPT INDEMNIFICATION DAMAGES

The civil contempt petition in this case alleges that respondent's contemptuous misconduct, prohibited by MCL 600.1701, caused Bradley's suicide and seeks indemnification damages under MCL 600.1721. Because petitioner's civil contempt petition seeks indemnification under MCL 600.1721, we must construe the language of that provision to determine whether such petitions impose tort liability. The provision states:

> If the *alleged misconduct has caused an actual loss or injury* to any person the court shall order the defendant to pay such person a sufficient sum to *indemnify him*, in addition to the other penalties which are imposed upon the defendant. *The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury*.[55]

Although we have not previously considered whether this language imposes "tort liability," this Court has implicitly recognized that the elements necessary to establish entitlement to relief under this provision are essentially the same elements necessary to establish a tort, i.e., a legal duty, breach of that duty, causation, and injury. In *Holland v Weed*,[56] for example, we explained that the predecessor of MCL 600.1721

> authorizes this imposition [of indemnification damages] in place of a fine, and it is for the purpose of protecting the civil rights and remedies of the party, and to *compensate him for the injury or loss occasioned by the misconduct alleged*; and it is only when an actual loss or injury has been produced to the party by the misconduct alleged, and that is made to appear to the satisfaction of the court, and some sum sufficient to compensate the party or indemnify

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[55] MCL 600.1721 (emphasis added).

[56] *Holland v Weed*, 87 Mich 584, 587-588; 49 NW 877 (1891).

> him is adjudged, that the court can impose the costs and expenses to be paid by such party.[57]

Stated differently, the plain language of MCL 600.1721 requires a showing of contemptuous misconduct that caused the person seeking indemnification to suffer a loss or injury and, if these elements are established, requires the court to order the contemnor to pay "a sufficient sum to indemnify" the person for the loss.

A closer examination of the statutory language confirms that it contains all the elements of a tort claim in the guise of a contempt claim. Under the first sentence of the statute, the "alleged misconduct," which is a necessary element of any contempt claim, stems from the "neglect or violation of [a] duty" under MCL 600.1701 or the "omission to perform an act or duty" under MCL 600.1715. Thus, the "alleged misconduct" is synonymous with the legal duty and breach of that duty recognized in traditional tort law. Clearly, this misconduct, which arises from the relevant contempt statute—not a contractual relationship between the parties—is a noncontractual civil wrong.

Because the nature of the duty that gives rise to a civil contempt claim is clearly premised on a noncontractual civil wrong, we must further consider the nature of the liability imposed. The first sentence of MCL 600.1721 also requires that this misconduct "cause[]" the petitioner's "actual loss or injury," thus

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[57] Emphasis added. The statute was substantially similar when *Holland* was decided. It provided:

> If an actual loss or injury has been produced to any party, by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him, and to satisfy his costs and expenses, instead of imposing a fine upon such defendant; and in such case, the payment and acceptance of such sum shall be an absolute bar to any action by such aggrieved party, to recover damages for such injury or loss. [How Stat § 7277.]

paralleling the other two elements recognized in a traditional tort claim: causation and damages. Because the first sentence of MCL 600.1721 authorizes a court to order a contemnor to "indemnify" the petitioner for the loss caused by the contemptuous misconduct, the statute clearly sanctions legal responsibility, or liability, in the form of compensatory damages.[58] Plainly, the first sentence of MCL 600.1721 contemplates what is, in essence, a tort suit for money damages.[59]

Additional support for this conclusion is found in the second sentence of MCL 600.1721, which provides that "[t]he payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury." That is, the Legislature expressly recognized that a civil contempt claim seeking

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[58] "Indemnify" is commonly understood to mean "to compensate for damage or loss sustained, expense incurred[.]" *Random House Webster's College Dictionary* (2001). And we have previously characterized the relief provided under MCL 600.1721 as compensatory. See *In re Contempt of Dougherty*, 429 Mich at 98.

[59] Justice CAVANAGH posits that a civil contempt petition seeking indemnification damages under MCL 600.1721 does not impose tort liability because the liability imposed arises, not from the breach of a "tort duty," but from the breach of an "obligation owed to the court." The Legislature, however, did not use the phrase "tort *duty*" in MCL 691.1407(1), but instead used the phrase "tort *liability*" thereby invoking consideration of all noncontractual civil wrongs consistent with the common-law meaning of "tort." Moreover, while Justice CAVANAGH agrees that the purpose of the relief sought is relevant to determining whether tort liability exists, he ignores that MCL 600.1721 expressly permits an award of compensatory damages to "any person" who suffered an injury as a result of the contemptuous act and does not award indemnification damages to the court, which is the party owed a duty under Justice CAVANAGH's analysis. Stated otherwise, a civil contempt petition seeking indemnification damages under MCL 600.1721 does not seek to redress the harm a court may have suffered as a result of the contemptuous act; rather, such a petition seeks to compensate the person who suffered injury from that civil wrong, and therefore the petition is squarely within the meaning of "tort liability."

indemnification damages functions as a substitute for any underlying claim and, thus, bars monetary recovery that could have been achieved in a separate cause of action. As the Legislature acknowledged, the statutory remedy, then, is effectively a proxy for a tort claim.[60]

Given that the statutory language of MCL 600.1721 clearly permits the payment of compensatory damages to a petitioner for a noncontractual civil wrong, we thus hold that a civil contempt petition seeking indemnification damages under MCL 600.1721 seeks to impose "tort liability."[61] It follows

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[60] Justice MCCORMACK does not analyze the express statutory language of MCL 600.1721 and instead relies on a series of inferences to discern the meaning of the law. Specifically, Justice MCCORMACK reads MCL 600.1701(c) as an express indication that the Legislature intended to waive any claim that government contemnors are immune from liability for civil contempt indemnification damages. However, the express statutory language of MCL 600.1701 does not include "defendant," as that term is used in MCL 600.1721, among the listed state actors, and we would draw no such inference. Compare MCL 600.1721 and MCL 600.1701 with other statutes expressly waiving governmental immunity, including the Elliot-Larsen Civil Rights Act, MCL 37.2103(g), MCL 37.2201(a), and MCL 37.2202 (defining "employer" to expressly include state actors who are in turn liable for certain discriminatory conduct); and the Persons with Disabilities Civil Rights Act, MCL 37.1103(g), MCL 37.1201(b), and MCL 37.1202 (same). Nor do we view MCL 691.1407(6), as Justice MCCORMACK does, to inform the meaning of "tort liability" used in MCL 691.1407(1). MCL 691.1407(6), which grants immunity to guardian ad litems from "civil liability," is simply not implicated in this case. We also do not believe the Legislature's placement of the contempt statutes in the RJA has any relevance to the meaning of "tort liability."

[61] Contrary to our holding, petitioner asserts that her contempt petition cannot be classified as a tort because there is not "a hint anywhere" in Michigan jurisprudence suggesting that contempt is a tort. Our discussion in *Holland*, 87 Mich at 587-588, referred to earlier in this opinion, suggests otherwise. Moreover, petitioner makes this argument without any reference to the statutory language of MCL 600.1721, which as we have explained supports the conclusion that a civil contempt claim seeking indemnification damages imposes tort liability. In any case, we

that a party that elects to pursue the statutory remedy available under MCL 600.1721 will be barred from obtaining relief against governmental agencies because those entities are entitled to immunity from "tort liability" under MCL 691.1407(1) of the GTLA. The logical result of this conclusion is that courts are prohibited from exercising their contempt powers by punishing a governmental agency's contemptuous conduct through an award of indemnification damages under MCL 600.1721.

Our holding, however, should not be interpreted as constraining courts' inherent contempt powers. While our holding does constrain a court's *statutory* authority to order punishment in the form of compensation in a civil contempt proceeding against a governmental entity,[62] our holding does not infringe on those powers of contempt that are *inherent* in the judiciary, as recognized in our Constitution and codified by the Legislature.[63] Inherent in the judicial power is the power to prescribe *acts* that are punishable as contempt through

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are not alone in recognizing that a civil contempt claim asking for compensatory damages imposes tort liability. See, e.g., *Dodson v Dodson*, 380 Md 438, 453; 845 A2d 1194 (2004) ("This litigation, although labeled a civil contempt action, was in essence a tort suit for money damages . . . ."); *Parker v United States*, 153 F2d 66, 70 (CA 1, 1946) ("An order imposing a compensatory fine in a civil contempt proceeding is . . . somewhat analogous to a tort judgment for damages caused by wrongful conduct."); *Vuitton et Fils SA v Carousel Handbags*, 592 F2d 126, 130 (CA 2, 1979) (noting that imposition of a compensatory fine for civil contempt is analogous to a tort judgment for damages); *Thompson v Cleland*, 782 F2d 719, 722 (CA 7, 1986) (noting the same).

[62] The Legislature authorized the award of compensatory damages in the contempt context with the enactment of 1846 RS, ch 121, § 21, the original predecessor of MCL 600.1721.

[63] See Const 1963, art 6, § 1; *Langdon v Judges of Wayne Circuit Court*, 76 Mich 358, 367; 43 NW 310 (1889) ("The [contempt] statutes are in affirmation of the common-law power of courts to punish for contempts . . . .").

fine or imprisonment, or both.[64] This inherent judicial power to punish contempt, which is essential to the administration of the law, does not include the power to mete out certain punishments for contemptuous acts beyond those contempt powers inherent in the judiciary.[65] Clearly, the punishment the Legislature authorized in MCL 600.1721, compensation for contemptuous misconduct, is not encompassed by the judiciary's inherent power to punish contempt. Because our holding only involves the GTLA's application to civil contempt petitions that seek indemnification damages under MCL 600.1721, it does not infringe on courts' inherent power to punish contempt by fine or impris-

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[64] As this Court explained in *In re Huff*, 352 Mich 402, 415-416; 91 NW2d 613 (1958):

> There is inherent power in the courts, to the full extent that it existed in the courts of England at the common law, . . . to adjudge and punish for contempt . . . . Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it. [Citation omitted.]

[65] See *Nichols v Judge of Superior Court of Grand Rapids*, 130 Mich 187, 192-195; 89 NW 691 (1902) (indicating that the Legislature cannot determine what acts constitute contempt or constrain courts' power to punish those contemptuous acts, but that it may prescribe certain punishments); *Langdon*, 76 Mich at 367 (recognizing that the Legislature cannot curtail courts' contempt powers, but that it may "regulate[] the mode of proceeding and prescribe[] what punishment may be inflicted"). Justice MCCORMACK concedes that the Legislature can regulate the courts' contempt powers. As *Nichols* and *Langdon* reflect, this regulation includes the ability to prescribe certain punishments, like that in MCL 600.1721, as long as the regulation does not curtail courts' inherent power to punish contemptuous acts. As such, injection of separation of powers principles is misplaced. Likewise, the suggestion that our decision has "cede[d]" judicial power is overstated because Michigan courts have never had an inherent power to punish contempt through an award of compensatory damages.

onment, or both.[66] Moreover, our definition of "tort liability" does not encompass contempt proceedings that seek to invoke courts' inherent contempt powers; although those proceedings undoubtedly involve a noncontractual civil wrong, the sanction sought does not impose legal responsibility in the form of compensation for the harm done.[67]

C. APPLICATION

The civil contempt petition at issue here alleges that respondent negligently failed to execute the probate court's order, constituting contemptuous misconduct under MCL 600.1701. The petition alleges that this misconduct caused Bradley's suicide and seeks indemnification damages for his death under MCL 600.1721. Notably, the damages petitioner seeks in her contempt petition are exactly the same damages that petitioner sought under the wrongful death statute[68] in her previous lawsuit, which was dismissed on governmental immunity grounds. Indeed, the petition substantively replicated petitioner's prior complaint and sought dam-

[66] Having concluded that no Michigan court possesses *inherent* power to award compensatory damages relating to contempt, we need not address the parties' disagreement whether the probate court, the powers of which are controlled by the Legislature, lacks the inherent power to punish contempt through fine or imprisonment.

[67] By stating "[e]ven if Michigan did not recognize a wrongful death action, hypothetically, respondent here could still have been held in contempt," Justice MCCORMACK errs in insinuating that a Court's inherent contempt powers include the ability to award compensatory damages to a third party for loss or injury. The fact that the Legislature added the ability to impose tort liability to the Court's powers as a possible remedy for contempt does not resolve the issue whether that particular remedy may be used against governmental agencies in the face of the GTLA. If MCL 600.1721 did not exist, then Justice MCCORMACK's point would be valid.

[68] MCL 600.2922.

ages "including, but not limited to, all of those damages set forth in the Michigan Wrongful Death Statute." (Citation omitted.) Through her civil contempt petition, then, petitioner plainly seeks compensatory damages for Bradley's death. Thus, her civil contempt petition seeks to impose tort liability.[69]

Had petitioner sought to invoke the probate court's inherent contempt powers, i.e., to fine or imprison a contemnor, or had petitioner otherwise established the applicability of an exception to governmental immunity, then petitioner's claim might have survived summary disposition. However, petitioner's civil contempt petition did not invoke the court's inherent powers of contempt, and she concedes that none of the GTLA's exceptions are applicable. Consequently, because a civil contempt petition seeking indemnification damages under MCL 600.1721 seeks to impose tort liability, and respondent is immune from tort liability, petitioner's claim is barred by governmental immunity under MCL 691.1407(1). Respondent is therefore entitled to summary disposition under MCR 2.116(C)(7).

IV. CONCLUSION

Consistent with the Legislature's intent, our decision clarifies that the phrase "tort liability" as used in MCL 691.1407(1) encompasses all legal responsibility arising from noncontractual civil wrongs for which a remedy may be obtained in the form of compensatory damages. We further recognize that the plain language of MCL 600.1721 authorizes an award of indemnification damages to remedy a noncontractual civil wrong and, thus,

[69] We do not disagree with the concern that this Court must safeguard the power of the judicial branch, but note that this case did not involve the willful violation of a court order and the consequential offense to the issuing court, which is the very essence of contempt of court.

falls squarely within the meaning of "tort liability." Because MCL 691.1407(1) immunizes governmental agencies from tort liability, governmental entities are immune from civil contempt petitions seeking indemnification damages. Petitioner has pleaded such a claim here and because she has not otherwise established the applicability of an exception to the GTLA, respondent is entitled to immunity under MCL 691.1407(1). We reverse the judgment of the Court of Appeals and remand this case to the probate court for entry of an order granting summary disposition in favor of respondent.

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

CAVANAGH, J. (*dissenting*). At issue in this case is whether an order imposing a compensatory contempt sanction under MCL 600.1721[1] imposes "tort liability" for the purposes of MCL 691.1407(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The majority holds that the Legislature intended to grant governmental defendants immunity from such orders, reasoning that MCL 600.1721 has a compensatory purpose and that a petition for a compensatory contempt sanction under MCL 600.1721 is essentially a tort claim. Although the majority provides an insightful summary of the legal history of tort actions, the majority fails to provide an equally insightful explanation of the nature of civil contempt, which, in my view, leads

[1] MCL 600.1721 states:

> If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

the majority to its erroneous conclusion that an order imposing a compensatory contempt sanction imposes "tort liability" for the purposes of the GTLA. Rather, I would hold that a compensatory contempt sanction does not impose tort liability, primarily because that sanction is based on the contemptuous act itself. Thus, I respectfully dissent and would affirm the result reached by the Court of Appeals.

I. OVERVIEW OF CONTEMPT PROCEEDINGS

In *In re Contempt of Dougherty*, 429 Mich 81, 104-107; 413 NW2d 392 (1987), we considered whether "anticipatory contempt" was a proper use of the court's contempt power, holding that the future intent to violate a court order was not subject to the court's contempt power. That issue is not present in this case; however, *In re Contempt of Dougherty* is helpful because it provides an excellent analysis of the sui generis nature of contempt proceedings. *Id.* at 90-91. Specifically, *In re Contempt of Dougherty* recognized that "contempts are 'neither wholly civil nor altogether criminal . . . .' " *Id.* at 91, quoting *Gompers v Bucks Stove & Range Co*, 221 US 418, 441; 31 S Ct 492; 55 L Ed 797 (1911). Further, we explained that it is often necessary to characterize a contempt proceeding as criminal or civil and that the determining difference is the character and purpose of the punishment imposed on the contemnor. *Id.* at 92-93, quoting *Gompers*, 221 US at 441 (" 'If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.' ").

To aid courts in characterizing civil and criminal contempt proceedings, *In re Contempt of Dougherty* explained that the process is civil if the contemnor

refuses to do an act ordered by the court, whereas the process is criminal if the contemnor commits a forbidden act. *Id*. at 94-96, quoting *Gompers*, 221 US at 443, and *People ex rel Attorney General v Yarowsky*, 236 Mich 169, 171-172; 210 NW 246 (1926). The purpose of criminal contempt is to penalize and "operate[] *in terrorem* . . . to prevent a repetition of the offense in similar cases," and the purpose of civil contempt is to coerce the contemnor to comply with the court's order for the benefit of the opposing party. *In re Contempt of Dougherty*, 429 Mich at 95-96 (quotation marks and citations omitted). *In re Contempt of Dougherty* acknowledged, however, that "there are two types of civil contempt sanctions, coercive and compensatory." *Id*. at 97. The purpose of the compensatory fine in a civil contempt proceeding is to compensate the complainant. *Id*. at 98. The complainant's " 'right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.' " *Id*., quoting *United States v United Mine Workers of America*, 330 US 258, 303-304; 67 S Ct 677; 91 L Ed 884 (1947). *In re Contempt of Dougherty*, 429 Mich at 98, concluded that

> there are three sanctions which may be available to a court to remedy or redress contemptuous behavior: (1) criminal punishment to vindicate the court's authority; (2) coercion, to force compliance with the order; and (3) compensatory relief to the complainant.

II. A COMPENSATORY CONTEMPT SANCTION IS NOT "TORT LIABILITY"

I agree with the majority that a proper analysis of this case should begin by defining "tort liability" for the purposes of MCL 691.1407(1), and, next, it must be determined whether a compensatory sanction for civil contempt constitutes tort liability. Further, I appreciate the majority's thoughtful approach to providing a

common-law definition of "tort" as "a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of compensatory damages." *Ante* at 384. Most importantly, I agree with the majority that "our focus must be on the *nature* of the liability rather than the type of action pleaded," *ante* at 387, and the first focus should be "on the nature of the duty that gives rise to the claim," *ante* at 389.

Under MCL 600.1721, "any person" who suffers "actual loss or injury" caused by the defendant's "alleged misconduct" may file a petition or motion seeking remedial relief in the form of a compensatory contempt sanction. As the majority acknowledges, the reference in MCL 600.1721 to "alleged misconduct" illustrates that such a petition or motion is based on the general contempt statute, MCL 600.1701. Thus, without an act of contempt, there is no basis for liability under MCL 600.1721. At its core, a contemptuous act is an "act of disobedience" to the *court's* "ordinary exercise of *its* duties," and, "[w]ithout authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants." *Gompers*, 221 US at 450, citing *Bessette v W B Conkey Co*, 194 US 324; 24 S Ct 665; 48 L Ed 997 (1904). Despite the fact that a compensatory sanction based on civil contempt is *primarily* remedial in nature,[2] i.e., it "is for the purpose of protecting the civil rights and remedies of

[2] See *In re Contempt of Dougherty*, 429 Mich at 93 (noting that "a civil contempt proceeding may have a punitive, as well as remedial effect"); *Gompers*, 221 US at 443 ("It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But

the party, and to compensate him for the injury or loss by the misconduct alleged," *Holland v Weed*, 87 Mich 584, 587-588; 49 NW 877 (1891), the liability imposed nevertheless arises from the party's disobedience to a court order.

As a result, I disagree with the majority that the "alleged misconduct," which serves as the basis for liability under MCL 600.1721, is "synonymous" with a traditional tort duty and its breach. *Ante* at 391. This is because, generally stated, liability arising from tortious conduct stems from a breach of one's duty to another, not the breach of an obligation owed to the court.[3] Additionally, as Justice MCCORMACK astutely explains, there may be civil wrongs that are neither a tort nor a contract. See *post* at 407-408. Indeed, a "civil wrong" may be defined as "[a] violation of noncriminal law, *such as* a tort, a breach of contract or trust, a breach of statutory duty, or a defect in performing a public duty; the breach of a legal duty treated as the subject matter

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such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*.").

[3] Compare Black's Law Dictionary (9th ed), p 998 (defining "tortious liability" as "[l]iability that arises from the breach of a duty that (1) is fixed primarily by the law, (2) *is owed to persons* generally, and (3) when breached, is redressable by an action for unliquidated damages") (emphasis added), and *ante* at 385 n 40 (stating that a "tort" is a " 'breach of a duty that the law imposes on persons *who stand in particular relation to one another*' "), quoting Black's Law Dictionary (9th ed) (emphasis added), with *Gompers*, 221 US at 450 (explaining that a party subject to a court's order cannot "make himself a judge of the validity of orders" because a court must be enabled "to enforce its judgments and orders necessary to the due administration of law and *the protection of the rights of suitors*") (citation omitted) (emphasis added), and *In re Contempt of Rapanos*, 143 Mich App 483, 496; 372 NW2d 598 (1985) ("Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to suits and *to compel obedience to orders and decrees made to enforce those rights* and to administer the remedies to which the court has found the parties entitled.") (emphasis added).

of a civil proceeding." Black's Law Dictionary (9th ed), p 1751 (emphasis added). A petition or motion for a compensatory contempt sanction could be classified as a claim based on a civil wrong in that it is based on a breach of a legal duty owed to the court; however, I disagree with the majority that the fact that a noncontractual civil wrong is at issue means that tort liability is imposed. See *ante* at 391. Rather, I think that the nature of the legal duty is relevant. In other words, I do not think that simply because a civil legal duty *exists* and is not a contractual duty, that a breach of that duty necessarily imposes tort liability.

Because the "alleged misconduct" under MCL 600.1721 is distinguishable from tortious conduct, the compensatory quality of tort damages and of a contempt sanction imposed under MCL 600.1721 is the only potentially relevant similarity shared by the two types of liability.[4] While I agree with the majority that the purpose of the relief sought may be a relevant inquiry when determining whether a type of liability is tort liability for the purposes of the GTLA, the nature of the remedy sought should not be *dispositive* when

[4] In support of its conclusion that MCL 600.1721 imposes tort liability for the purposes of the GTLA, the majority also looks to the second sentence of MCL 600.1721, which states that "[t]he payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury." I agree that MCL 600.1721 bars an action for damages that are caused by the contemptuous conduct; however, I do not see how that fact supports the majority's holding that a compensatory contempt sanction imposes tort liability. The fact that a compensatory contempt sanction, referred to as a "sum" in the statute, bars a subsequent action at law does not mean that the Legislature likened the two forms of liability. Rather, in my view, the Legislature realized that a compensatory contempt sanction has a similar remedial purpose to tort liability and, thus, the Legislature decided to bar actions at law to avoid providing a windfall to a petitioner under MCL 600.1721.

analyzing a claim for purposes of MCL 691.1407(1).[5] Thus, I do not think that a compensatory contempt sanction imposes tort liability simply because it may serve a similar remedial purpose as tort damages.

I also think that, in certain circumstances, characterizing a compensatory contempt sanction as serving a compensatory purpose *to the exclusion of any other purpose* may oversimplify the nature of the contempt proceeding itself. See *Gompers*, 221 US at 443 (recognizing the "incidental effect[s]," i.e., the overlapping purposes, of civil and criminal contempt). Specifically, I think that when a party subject to a court order has the *present* obligation and ability to comply, the prospect of a compensatory sanction may work hand-in-hand with coercive monetary sanctions.[6] "When the purpose of the sanction is to make a party or person comply, the trial court, in exercising its discretion, must 'consider the

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[5] Like the majority, I disagree with the Court of Appeals to the extent that it held that the nature of the damages sought in an action has "no role in determining whether the action is barred by the GTLA." *In re Bradley Estate*, 296 Mich App 31, 39; 815 NW2d 799 (2012). But I agree with the Court of Appeals to the extent it explained that, when analyzing whether a compensatory contempt sanction falls within the scope of tort liability under MCL 691.1407(1), the inquiry depends on whether the "contempt action is a cause of action that is *separate and distinct* from one that is *grounded* in tort liability." *Id.* (emphasis added). Additionally, I do not find relevant the majority's statement that the GTLA grants immunity from "tort liability," while not expressly referring to a "tort duty." It goes without saying that in order for a tort or liability resulting from a tort to exist, a tort *duty* must exist; thus, in my view, the majority's analysis appears to rest on the fact that petitioner seeks remedial relief under MCL 600.1721.

[6] See *In re Contempt of Dougherty*, 429 Mich at 99 (stating that "a coercive sanction is proper where the contemnor, at the time of the contempt hearing, is under a present duty to comply with the order and is in *present violation* of the order"); *DeGeorge v Warheit,* 276 Mich App 587, 592; 741 NW2d 384 (2007) ("Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply.").

character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.' " *In re Moroun*, 295 Mich App 312, 337; 814 NW2d 319 (2012), quoting *In re Contempt of Dougherty,* 429 Mich at 98, quoting *United Mine Workers of America,* 330 US at 304 (quotation marks omitted). In my view, the compensatory contempt sanction, which is measured by the actual loss caused by the contemptuous conduct, serves a similar purpose as a coercive contempt sanction; the primary difference is that the former is retrospective, whereas the latter is prospective. A coercive contempt sanction attempts to *avoid* actual loss altogether by sanctioning present noncompliance, while a compensatory contempt sanction reimburses a petitioner's actual loss. Practically speaking, the possibility that the contumacious party may still be sanctioned after his or her ability to comply with the order has expired, will encourage the contumacious party to comply with the court order *before* his or her ability to do so has expired.[7]

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[7] As the majority notes, governmental defendants are not typically immune from equitable suits. See *ante* at 389 n 54. As a result, I question whether it may be an unforeseen consequence of the majority's holding to immunize governmental defendants from compensatory contempt sanctions when those defendants are *not* immune from the imposition of an equitable order. Indeed, the losses recovered under MCL 600.1721 typically arise from a violation of such an equitable order, not from a wrong that may be remedied with tort damages. Moreover, I think that the Legislature, through the enactment of MCL 600.1721, has recognized that it would be unjust to preclude the recovery of losses sustained simply because the contemnor is not under a present duty to comply with the court order. The majority asserts that because MCL 600.1721 allows "any person" to petition or move for a compensatory contempt sanction, the purpose of the statute is to compensate a private individual. That may be a purpose of the statute, but, in my view, the majority oversimplifies the context of when a petition or motion under MCL 600.1721 may be brought and ignores that any loss covered by the statute was sustained as

To conclude, I would hold that the contemptuous act itself is an integral part of imposing liability under MCL 600.1721, and the duty one owes to a court is distinguishable from a tort duty. While the common-law definition of "tort" is admittedly broad, holding that a compensatory contempt sanction amounts to "tort liability" unreasonably stretches the traditionally understood concept of a "tort" claim by not appreciating that a tort duty is not simply *any* noncontractual civil duty imposed by the law. Thus, I would conclude that the Legislature, when granting immunity from tort liability under the GTLA, did not intend that governmental defendants would be immune from compensatory contempt sanctions.

MCCORMACK, J. (*dissenting*). The majority holds that the governmental tort liability act's (GTLA)[1] grant of immunity to governmental agencies from "tort liability," as referred to in MCL 691.1407(1), applies to civil contempt. The majority's analysis rests entirely on two closely related propositions. First, the GTLA grants immunity from legal responsibility arising from a tort. I agree. Second, all noncontractual civil wrongs, including civil contempt, are torts. I respectfully disagree. Civil contempt does not sound in tort, and contempt sanctions of any kind simply do not impose tort liability. Furthermore, and not surprisingly, the GTLA does not provide any basis for concluding that our Legislature intended to grant immunity for contempt of court. Nor does the contempt statute, MCL 600.1701, provide any

a result of a violation of a court order. For that reason, I think that a motion or petition brought under MCL 600.1721 is simply too far removed from the common-law understanding of tort liability to conclude that the Legislature, when enacting the GTLA, thought of a compensatory contempt sanction as imposing tort liability.

[1] MCL 691.1401 *et seq*.

basis for concluding that governmental actors are not subject to all of its remedies. Because I believe that the majority confuses legal categories, and in light of the plain meaning of both the GTLA and the contempt statute, I respectfully dissent and would affirm the judgment of the Court of Appeals.

I. CIVIL LIABILITY

A. AN ABBREVIATED TAXONOMY OF "CIVIL WRONGS"

Very generally speaking, there are two categories of legal wrongs that may result in civil liability. One category encompasses acts that violate a *personal* right, which includes the common-law subjects of property, tort, contract, trust, and restitution. A second category encompasses acts not against the person, but rather against the *sovereign*, or acts against interests the sovereign deems worthy of protection. These acts are the subject of environmental law, securities law, and consumer law, to name a few. These examples are hardly exhaustive. But they suffice to show that the legal system imposes liability in a wide variety of contexts, either to address harms committed against citizens or, instead, to enforce rules imposed by the state or its subdivisions.

The majority begins its analysis by examining case-law and legal dictionaries in search of a definition of the term "tort." It ultimately articulates this one: "a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of compensatory damages."[2] But this definition offers little guidance, first because "civil wrong" is itself a term of art and,

[2] *Ante* at 384.

moreover, because, as noted in the previous paragraph, there are many noncontractual civil wrongs that are *not* torts.

The English legal tradition recognized courts of "law," the Court of Queen's Bench, and "equity," the Court of Chancery. Though complementary, the two operated separately and independently.[3] Our modern system has abolished these distinctions, but has adopted aspects of and rules from both.[4] Civil liability sounding in neither contract nor tort is not uncommon. Breach of trust, for example, has its roots in the rules of equity and the Court of Chancery, separate and distinct from both contract and tort.[5] A trustee relationship imposes fiduciary duties, the breach of which results in liability.[6] Though trust law can well be understood as a half sibling of contract law, it cannot be reduced to contract. A breach of trust stems not from the violation

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[3] The majority's historical analysis, attempting to illustrate that at common law all civil wrongs were either contract or tort, relies only on *in personam* actions brought in courts of law and thereby misses the larger point. See *ante* at 381-382 n 31, quoting *Sinclair v Brougham*, [1914] AC 398 (HL), 415 (1914) (Viscount Haldane, LC) ("[S]o far as proceedings *in personam* are concerned, the common law of England really recognizes . . . only actions of two classes, those founded on contract and those founded on tort.") (emphasis added). As a result, the majority's analysis misses an important point. Contempt is not a private wrong, but rather a wrong against the sovereign.

[4] See 1963 Const, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited."); MCL 600.223(4) (stating that this Court has the authority to promulgate and amend general rules governing practices and procedure in this Court and all other courts of record, including but not limited to the authority "to abolish, as far as practicable, distinctions between law and equity").

[5] See 1 Restatement Trusts, 3rd, Introductory Note, p 3; Seipp, *Trust and fiduciary duty in the early common law*, 91 BU L R 1011 (2011).

[6] See MCL 700.7901.

of a bargained-for-exchange, but rather from duties arising out of the special relationship of the parties. That is, it was not considered a tort, and at common law the only available remedy was in equity. Another example is provided by the law of restitution and unjust enrichment. It is based on principles of equity; it sounds in neither contract nor tort, yet it shares characteristics of both. Restitution recognizes the need for compensation in instances when the receipt and retention of a benefit by a person without payment made to the person providing that benefit would result in injustice.[7] Consider also easements by prescription. An action to establish a prescriptive easement certainly cannot be recognized as based in contract because permissive use destroys the claim.[8] Nor is it based in tort. Like actions to quiet title, actions for a prescriptive easement are equitable in nature.[9] State and governmental entities are immune from prescriptive easements not because of the broad language of the GTLA. Rather, that immunity is conferred by an exception to the statute of limitations for actions for recovery or possession of real property.[10]

Our legal system imposes liability in many other contexts as well, even apart from the criminal justice system. A familiar example would be civil infractions. A parking ticket results in a legal obligation to pay money. But a parking infraction is not a tort, a breach of contract, or a crime. It is simply a municipal ordinance

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[7] 1 Restatement of Restitution and Unjust Enrichment, 3d, § 1, p 3; Sherwin, *Restitution and equity: An analysis of the principle of unjust enrichment*, 79 Tex L R 2083 (2001).

[8] *Banach v Lawera*, 330 Mich 436, 440-442; 47 NW2d 679 (1951).

[9] *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007).

[10] See MCL 600.5821(1) and (2).

violation.[11] And perhaps the most essential power of any government—the power to tax—imposes legal obligations. Yet, again, tax liability does not sound in either tort or contract.[12] A comprehensive discussion of these two subjects is beyond the scope of this dissent. But both civil infractions and tax law impose civil liability in ways different from tort or contract. The obligations they impose serve to vindicate the interests of the sovereign. They do not serve to vindicate personal rights; they are not mechanisms for righting private wrongs or securing compliance to a mutual obligation.

B. THE NATURE OF TORTS

William Prosser once observed that "a really satisfactory definition of a tort is yet to be found. The numerous attempts which have been made to define the term have succeeded only in achieving language so broad that it includes other matters than torts, or else so narrow that it leaves out some torts themselves."[13] Fundamentally, a tort action protects a person's interest in a range

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[11] See MCL 600.8701 *et seq*.

[12] But consider the Internal Revenue Code's treatment of deductions for business expenses. 26 USC 162. The Code recognizes that "ordinary and necessary expenses" are, generally, deductible. 26 USC 162(a). These expenses include tort liabilities, if incurred in the ordinary course. See 26 USC 461(h)(2)(C) (discussing the timing these deductions). However, a "fine or similar penalty paid to a government for the violation of any law" is *not* deductible. 26 USC 162(f). The code treats tort liability distinctly from other civil penalties, recognizing the different policy rationales driving both. See *Tank Truck Rentals, Inc. v Comm'r of Internal Revenue*, 356 US 30; 78 S Ct 507; 2 L Ed 2d 562 (1958). This example underscores the important difference between civil wrongs against persons and those against the sovereign.

[13] Prosser & Keeton, Torts (5th ed), § 1, pp 1-2. The majority's definition of a tort—anything that cannot be classified as either breach of contract or a crime—falls within the first class of error Prosser describes.

of personal interests: physical security and autonomy;[14] emotional security and other intangible interests, such as privacy and reputation;[15] and personal economic security and opportunity.[16] While tort liability may lead to relief in the form of compensatory money damages, this is not the only remedy available for tortious conduct. A tortfeasor may be restrained by an injunction, and may be liable for restitution, punitive, or nominal damages.

Moreover, compensatory damages are not unique to tort law. Compensatory damages are a common remedy in actions based in contract, for example, as expectation or consequential damages. Or for an example closer to contempt, our Legislature has even provided for compensatory damages for victims of crime in the Crime Victim's Rights Act.[17] In short, tort liability does not hinge on an award of compensatory damages, and the availability of compensatory damages is not unique to tort law.

Rather, the sine qua non of a tort is the breach of a duty owed to a fellow citizen. And, although tort liability has been extended to some extent in recent decades with increased reliance on doctrines like public nui-

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[14] See *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201 (1940) (civil assault and battery); *Giddings v Rogalewski*, 192 Mich 319, 326; 158 NW 951 (1916) (civil trespass).

[15] See *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985) (discussing, without deciding, whether intentional infliction of emotional distress is a viable claim in Michigan); *Pallas v Crowley, Milner & Co*, 322 Mich 411, 416; 33 NW2d 911 (1948) (right of privacy); *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005) (defamantion).

[16] See *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012) (tortious interference with a business expectancy); *Good Housekeeping Shop v Smitter*, 254 Mich 592, 596-597; 236 NW 872 (1931) (unfair competition and common-law trademark).

[17] MCL 780.751 *et seq*.

sance, classic tort liability is rooted in the common-law duties all citizens owe to one another.[18]

C. CONTEMPT OF COURT

Contempt of court is altogether different. It stems from a violation of an obligation owed not to any person, but to the court itself. Contempt does not serve to protect private rights; it serves to protect the power of the courts. Contempt has been described as a "power of self-defense," intended to sanction "those who interfere with the orderly conduct of [court] business or disobey orders necessary to the conduct of that business . . . ."[19] This purpose—to protect the power of the judiciary—is evidenced not only by modern cases, but also by contempt's historical roots. It comes as no surprise that contempt of court is not discussed in *any* leading tort treatise, nor is it discussed within the comprehensive framework of tort law by the Restatement, two observations which further reveal the majority's error.[20] The common law did *not* consider contempt a tort, and the Queen's Bench would not have understood it as such. Rather, contempt of court was viewed at common law as

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[18] See 2 Dobbs, The Law of Torts (2d ed), § 251, p 1 ("No defendant is liable for negligence unless he is under a legal duty to use care."); see also *Elbert v City of Saginaw*, 363 Mich 463, 475; 109 NW2d 879 (1961) (stating that when there is no legal duty, there can be no actionable negligence, and that "the *sine qua non* of negligence law [is] the requirement (a 'duty') that people in an ordered society must conform to a certain standard of conduct in their relations one with another").

[19] *Young v United States ex rel Vuitton et Fils SA*, 481 US 787, 820-821; 107 S Ct 2124; 95 L Ed 2d 740 (1987) (Scalia, J., concurring); see also *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995) (stating that contempt is a "wilful act, omission or statement that tends to . . . impede the functioning of a court").

[20] See, e.g., Dobbs, The Law of Torts (2d ed); Prosser & Keeton, Torts (5th ed); Restatement Torts, 2d; Restatement Torts, 3d.

criminal in nature.[21] While modern cases distinguish civil contempt,[22] and though indemnification damages in a contempt proceeding may resemble tort damages in certain respects, labeling contempt a tort is to ignore fundamental differences between the two.

Implicit in the majority's analysis is that all legal wrong fits neatly into one of three categories: criminal, contractual, or tortious. The law is not so neat. Modern Michigan cases have recognized contempt proceedings as "quasi-criminal" in nature.[23] Nor is Michigan alone. The United States Supreme Court has described contempt proceedings as "*sui generis*—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions."[24] They "are neither wholly civil nor altogether criminal."[25] Rather, an act of contempt "may partake of the characteristics of both."[26]

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[21] In Blackstone's Commentaries on the Laws of England, contempt of court is discussed as a *public* wrong, or crime. See 4 Blackstone, Commentaries on the Laws of England (Jones ed., 1976), pp **286-287 (discussing contempt as a crime and unique in that it could be punished by summary conviction, without trial by jury).

[22] See *Gompers v Bucks Stove & Range Co*, 221 US 418, 441; 31 S Ct 492; 55 L Ed 797 (1911).

[23] *Porter v Porter*, 285 Mich App 450, 456; 776 NW2d 377 (2009), citing *In re Contempt of Dougherty*, 429 Mich 81, 90; 413 NW2d 392 (1987).

[24] *Myers v United States*, 264 US 95, 103; 44 S Ct 272; 68 L Ed 577 (1924). Other cases have cast off the qualifier "quasi" altogether. See *Gompers v United States*, 233 US 604, 610; 34 S Ct 693; 58 L Ed 1115 (1914) ("If [acts of contempt] are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in the English speech.").

[25] *Gompers*, 221 US at 441.

[26] *Id*. (citation and quotation marks omitted).

As this discussion demonstrates, courts have often struggled to classify contempt as anything but *sui generis*. While modern cases label contempt as either "civil" or "criminal," this distinction does not lead to the conclusion that civil contempt is a tort. The distinction between criminal and civil contempt has not always been clear,[27] but the dividing line has focused on the nature of the punishment or sanction.[28] But no matter the label, even "if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority."[29] Though different labels may be applied, at its core a contempt action is fundamental to a court's power to effectuate its orders.[30]

D. A TORT BY ANY OTHER NAME?

A more apt comparison for contempt of court can be found not in tort law, but instead in the various legal sanctions provided by our court rules. Like the contempt power, these sanctions serve to enforce the orderliness of court proceedings. Sometimes, courts may impose the equivalent of compensatory damages for a violation of the court rules, such as when a party who files vexatious pleadings or makes vexatious discovery demands is sanctioned by having to pay the other party's costs. But these are not tort damages, nor are they unavailable against municipal litigants under the GTLA.

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[27] For a thorough historical analysis, consider Dudley, Jr., *Getting beyond the civil/criminal distinction: A new approach to the regulation of indirect contempt*s, 79 Va L R 1025 (1993).

[28] *Gompers*, 221 US at 441; see also *In re Contempt of Dougherty*, 429 Mich at 91-93, discussing *Gompers*, 221 US 418.

[29] *Gompers*, 221 US at 443.

[30] An important distinction in criminal contempt is the right to trial by jury before the sanction may be imposed. *Bloom v Illinois*, 391 US 194, 209; 88 S Ct 1477; 20 L Ed 2d 522 (1968).

The majority cites several cases in which courts have drawn analogies between civil contempt and tort in support of its conclusion that civil contempt is a tort.[31] These cases do not support the majority's conclusion; they suggest only that a civil contempt petition is *analogous* to a tort claim. But the majority offers these cases in support of the separate proposition that civil contempt *is* a tort.[32] Analogies are by definition comparable, but not interchangeable. They are related, but they are not equivalent. The majority is correct that one analogous feature of these two distinct civil wrongs is that both can result in compensatory liability. But the similarity ends there. Tort law imposes a duty to avoid harmful conduct deemed tortious. Contempt law imposes a duty to obey the court. These duties are fundamentally different, as are their origins, and the purposes they serve.

Even assuming, purely for argument's sake, that a similarity to tort were sufficient to subject civil contempt to the same immunity rules as tort, I believe that the Legislature has foreclosed that immunity here. For while I agree with the majority that contempt sanctions are not among the five statutory exceptions to the

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[31] *Ante* at 394 n 61, citing *Dodson v Dodson*, 380 Md 438, 453; 845 A2d 1194 (2004); *Parker v United States*, 153 F2d 66, 70 (CA 1, 1946); *Vuitton et Fils SA v Carousel Handbags*, 592 F2d 126, 130 (CA 2, 1979); *Thompson v Cleland*, 782 F2d 719, 722 (CA 7, 1986).

[32] In particular, the majority insists that petitioner's contempt of court claim in this case simply "recast[s]" her immunity-barred wrongful death action. This misses the core point. Neither a contempt of court petition nor a wrongful death suit is a disguise for the other. They are separate legal theories, serving separate purposes, predicated on different wrongs. That, under the facts of this case, both may lead to a similar remedy does not make them the same. Even if Michigan did not recognize a wrongful death action, hypothetically, respondent here could still have been held in contempt for failing to carry out a lawful court order if petitioner could prove the elements of contempt.

GTLA's grant of immunity, the GTLA does not apply in cases in which a separate statute gives rise to direct evidence that the Legislature intended to waive the state's immunity to liability.[33] The contempt statute specifically includes "[a]ll attorneys, counselors, clerks, registers, *sheriffs*, coroners, and all other persons in any manner elected or appointed to perform any judicial or ministerial services"[34] as those subject to the court's contempt power. By specifically including these governmental actors as among those who may be deemed contemnors, the Legislature has waived any claim that they are immune from contempt liability. Further, the contempt statute does not distinguish among those parties to which its various sanctions, including indemnification damages, apply.

II. STATUTORY INTENT

I believe the majority's premise that contempt is a tort leads it to gloss over the relevant statutory texts too quickly. The express language of both the GTLA and the contempt statute undermines the majority's conclusion that the GTLA is intended to grant governmental

[33] The majority's discussion of waiver is incomplete. It correctly notes the five statutory GTLA exceptions, but does not meaningfully address the other areas in which the Legislature has waived immunity. "[T]here are other areas outside the GTLA where the Legislature has allowed specific actions against the government to stand, such as the Civil Rights Act." *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002), citing MCL 37.2103(g), MCL 37.2202(a), and *Manning v City of Hazel Park*, 202 Mich App 685, 699; 509 NW2d 874 (1993) (recognizing that governmental immunity is not a defense to claims brought under the Civil Rights Act because the act specifically includes the state and its political subdivisions and their agents as employers covered by the act. See also the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*. (specifically including the state and its political subdivisions as persons subject to the provisions of the act at MCL 37.1103(g)).

[34] MCL 600.1701(c) (emphasis added).

agencies immunity from compensatory contempt sanctions. The GTLA does not refer to contempt explicitly or implicitly, and, likewise, the contempt statute does not refer to governmental immunity in any way. Given that contempt remedies are not generally understood to be "tort" damages, surely the Legislature would have made its intentions clear if it had sought to include contempt remedies in the immunity statute. As previously noted, certain governmental actors *are* specifically included as within the scope of the contempt statute,[35] establishing that governmental actors *can* be held in contempt. Further, the compensatory remedy of the contempt statute does not limit against whom indemnification damages apply.[36]

The GTLA itself demonstrates that the Legislature knew how to use different language when it intended to grant immunity beyond tort liability. MCL 691.1407(1), which the majority relies on, states that "a governmental agency is immune from *tort* liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[37] In MCL 691.1407(6), however, the GTLA does not use the term "tort liability," but instead states that "[a] guardian ad litem is immune from *civil* liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem."[38] Because "liability for an injury to a person or damage to property" encompasses tort liability, the Legislature's use of the term "civil liability" in § 1407(6) suggests a broader scope of immunity than that found in § 1407(1).

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[35] *Id*.

[36] See MCL 600.1721.

[37] Emphasis added.

[38] Emphasis added.

When the Legislature uses different words in the same statute, they should be assigned different meanings whenever possible.[39]

The codification of the contempt power underscores the same conclusion. The Legislature did not use the word "tort" to describe the conduct it prohibits in the contempt statute. It did not use the word "tort" to describe the available sanctions. And there is more support: The Legislature did not include contempt in chapter 29 of the Revised Judicature Act, "Provisions Concerning Specific Actions,"[40] a chapter codifying miscellaneous tort actions including malpractice,[41] defamation,[42] and damage or waste to land.[43] Rather, contempt is given its own chapter, in keeping with its unique nature.[44]

Further, refusing to apply the GTLA here will not negatively impact the functioning of governmental agencies because governmental actors, I believe, generally avoid behavior "directly tending to interrupt [court] proceedings,"[45] do not habitually engage in "willful neglect or violation of duty,"[46] and generally refrain from "disobeying any lawful order, decree, or process of the court."[47] Even given the egregious facts of this case, respondent vigorously contests whether a

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[39] See 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 46:6, p 252 ("The use of different terms within similar statutes generally implies that different meanings were intended.").

[40] MCL 600.2901 *et seq*.

[41] MCL 600.2912.

[42] MCL 600.2911.

[43] MCL 600.2919.

[44] MCL 600.1701 *et seq*.

[45] MCL 600.1701(a) and (b).

[46] MCL 600.1701(c).

[47] MCL 600.1701(g).

contempt finding was proper. Respondent argues that there was no willful violation of the probate court order and, assuming there was, that indemnification damages were nevertheless improper because there was no causal link between the contempt and Bradley's suicide.[48] These would be issues worthy of consideration on remand if my position prevailed and they provide additional hurdles that might prove fatal to petitioner's claim for indemnification damages.

III. THE INHERENT POWER OF THE JUDICIARY

Finally, the majority's analysis concludes that the GTLA's immunity grant to contemnors is not an infringement on the court's inherent contempt power because the GTLA only applies to the contempt remedies provided by the Revised Judicature Act,[49] but not to the judiciary's "inherent contempt power," which the majority concludes is limited to coercive fines and imprisonment. While my analysis does not rest on this distinction, I believe the majority fails to satisfactorily explain why any particular remedy, and indemnification damages in particular, is somehow outside the Court's inherent contempt power, except, perhaps, because this sanction is codified in the Revised Judicature Act.[50] That codification would render the remedy not part of the court's inherent power is inconsistent with both this Court's past pronouncement that contempt statutes are "merely declaratory of what the law was before

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[48] Indemnification damages under MCL 600.1721 require a causal link: "If the alleged misconduct has *caused* an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant." (Emphasis added.)

[49] MCL 600.1715 and MCL 600.1721.

[50] See MCL 600.1721. But also codified are coercive civil contempt and criminal contempt. MCL 600.1715.

its passage,"[51] and, as the majority concedes,[52] with the fact that indemnification damages have been recognized by Michigan contempt statutes dating back well before adoption of the 1963 Constitution.[53] And while it has been recognized that the Legislature can regulate the court's exercise of the contempt power, that regulation cannot abridge or, crucially, curtail the power.[54] An intrusion of that nature into the courts' inherent powers would violate the separation-of-powers principle.[55] But the majority fails to acknowledge this principle, or explain how the removal of an entire class of sanctions is merely regulatory and not instead a curtailment.[56] If, counterfactually, the GTLA expressly

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[51] *In re Chadwick*, 109 Mich 588, 600; 67 NW 1071 (1896) (citation and quotation marks omitted); see also *In re Huff*, 352 Mich 402, 415; 91 NW2d 613 (1958) ("There is inherent power in the courts . . . independent of, as well as by reason of statute, which is merely declaratory and in affirmation thereof, to adjudge and punish for contempt . . . .").

[52] *Ante* at 394 n 62.

[53] See 1846 RS, ch 121, § 21, the original predecessor of MCL 600.1721.

[54] *In re Chadwick*, 109 Mich at 599-600.

[55] *Id.* at 600 (stating that if the Legislature could curtail the courts' jurisdiction to hear contempt cases "it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people") (citation and quotation marks omitted).

[56] The power to curtail the judiciary's inherent contempt power is with this Court, not the Legislature. 1963 Const, art 6, § 4 ("The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court."). The majority relies on *Langdon v Judges of Wayne Circuit Court*, 76 Mich 358, 367; 43 NW 310 (1889), for the proposition that the GTLA merely " 'regulate[s] the mode of proceeding and prescribe[s] what punishment may be inflicted.' " *Ante* at 395 n 65. *Langdon*, however, addressed only the question of whether the circuit court had jurisdiction, as granted by statute, to hold the defendant in criminal contempt. *Id.* at 374 ("The

prohibited indemnification damages as a remedy for contempt of court, that restriction would be, at the least, constitutionally questionable. The very fact that legislative restrictions on judicial powers raise constitutional questions is another reason not to interpret the GTLA as having done so. It is well established that courts should construe acts of the Legislature to avoid constitutional questions whenever possible.[57]

IV. CONCLUSION

I agree with the majority's basic premise that "tort liability" refers to "legal responsibility arising from a tort."[58] Because I conclude that contempt *of court* is not a tort, no matter what remedy for contempt is imposed, I would not interpret the GTLA as granting immunity to governmental agencies from contempt sanctions under MCL 600.1721. Whether petitioner here can demonstrate that respondent's conduct was a legal cause of Stephen Bradley's death, whether his death constitutes an "actual loss or injury" to petitioner within the

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assignments of error do not raise any question of irregularity in the proceedings, but solely the question of jurisdiction, and this is the only question we are called upon to decide."). Whether removal of an entire category of available contempt sanctions is regulatory was simply not a question before the *Langdon* Court. The majority's reliance on *Nichols v Judge of Superior Court of Grand Rapids*, 130 Mich 187; 89 NW 691 (1902), is similarly misplaced. See *ante* at 395 n 65. The *Nichols* Court did not pronounce that the Legislature had broad power to prescribe contempt punishments. Rather, the *Nichols* Court warned that this Court's past jurisprudence, including *Langdon*, "must not be understood as assenting to the proposition that the legislature, under the guise of regulation, may destroy a constitutional power of the courts." *Nichols*, 130 Mich at 193 (citation and quotation marks omitted).

[57] See *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011) ("[C]ourts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.") (citation and quotation marks omitted).

[58] *Ante* at 385.

meaning of MCL 600.1721, or, as a threshold matter, whether a finding of contempt here was proper, are issues not before us.

The practical import of this case is probably limited, given that civil contempt is fairly rare and that the facts of a case giving rise to the possibility of indemnification damages for civil contempt are rarer still. But the underlying principles are important. As a matter of good doctrinal bookkeeping, civil contempt is not the same as tort, and civil contempt penalties are not the same as tort liability. Although the majority is correct that, as it happens, petitioner seeks indemnification under the contempt statute after having been denied a claim for wrongful death, the majority's holding will also apply to future cases in which, unlike here, a governmental actor's contemptuous conduct has no obvious tort analogue simply because the sanction can be viewed as compensatory.

But even beyond getting the basic legal categories here correct, this Court should be hesitant to cede the judiciary's power to impose exceptional remedies in those exceptional cases in which they may be warranted for failure to heed judicial orders. This Court should, instead, safeguard the power of the judicial branch. No other branch will.

I would affirm the Court of Appeals and remand this case to the probate court for further proceedings.

HARDAWAY v WAYNE COUNTY

Docket No. 146646. Decided July 26, 2013.

Hurticene Hardaway brought an action in the Wayne Circuit Court against Wayne County, seeking a declaratory judgment and claiming breach of contract and promissory estoppel in connection with the denial of additional lifetime retirement benefits granted to certain classes of former employees under Wayne County Commission Resolution No. 94-903. Plaintiff had been appointed and served as a principal attorney in defendant's office of corporation counsel, a position that was not subject to confirmation by the Wayne County Commission. The court, Michael F. Sapala, J., concluded that because it used the language "an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter," the portion of the resolution at issue covered appointees who were (1) confirmed by the county commission and (2) not members of a board or commission. Because the county commission had not confirmed plaintiff and she did not otherwise qualify for additional benefits under the resolution, the court granted summary disposition in defendant's favor. Plaintiff appealed. The Court of Appeals, JANSEN, P.J., and WILDER and K. F. KELLY, JJ., reversed, concluding that the resolution was ambiguous because the phrase was equally susceptible of more than one meaning. Applying the last antecedent rule, the Court of Appeals determined that the modifying and restrictive clause "who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" applied only to the immediately preceding phrase, "other than a member of a board or commission," and thus interpreted the resolution as providing benefits to any appointee, whether confirmed or not, as long as that appointee was not confirmed by the county commission to membership of a board or commission. 298 Mich App 282 (2012). Defendant sought leave to appeal.

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

The language of the resolution was not ambiguous and must be applied as written.

1. If the language of a resolution is certain and unambiguous, courts must apply it as written. The resolution's language was not ambiguous. The Wayne County Charter requires that the county commission confirm all members of boards and commissions. Thus, the Court of Appeals' construction took what is grammatically an essential clause and effectively rendered it a nonessential clause, collapsing the phrase at issue to read "an appointee other than a member of a board or commission." The reading that the circuit court adopted did not suffer in this respect.

2. There were additional indications that the Court of Appeals' construction should be disfavored. All the specific covered positions listed in the resolution were high-level administrative positions, and it thus made sense that the proper reading of the provision concerning appointees at issue in this case would limit its application to only individuals appointed to positions so significant that they require county commission confirmation. Moreover, defendant had never interpreted the language in question as providing benefits to appointees who were not confirmed by the county commission.

3. The last antecedent rule should not be applied if something in the statute (or in this case, resolution) requires a different interpretation than the interpretation that would result from applying the rule. Because the Wayne County Charter requires that the county commission confirm all members of boards and commissions, the Court of Appeals' construction would render the confirmation requirement redundant. Moreover, the last antecedent rule does not mandate a construction based on the shortest antecedent that is grammatically feasible; when applying the last antecedent rule, a court should first consider what the logical metes and bounds of the "last" antecedent are. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.

Reversed; case remanded to the circuit court for reinstatement of order granting summary disposition in defendant's favor.

Justice CAVANAGH concurred in the result only.

Hurticene Hardaway *in propria persona*.

Dickinson Wright PLLC (by *Francis R. Ortiz* and *K. Scott Hamilton*) and *Bruce A. Campbell*, Assistant Corporation Counsel, for Wayne County.

PER CURIAM. We reverse the judgment of the Court of Appeals because it improperly applied the last antecedent rule. We reinstate the opinion and order of the Wayne Circuit Court that granted summary disposition in favor of defendant.

The facts of this case are not in dispute. In 1994 plaintiff, Hurticene Hardaway, was appointed to the position of "principal attorney" in the Office of Corporation Counsel for defendant, Wayne County. Importantly, her appointment did *not* require confirmation by the Wayne County Commission. Plaintiff served in her position for approximately 13 years. After her employment ended in 2003, plaintiff submitted to the Wayne County Director of Human Resources three successive requests for additional life and health insurance benefits. Defendant denied her request. Plaintiff brought the instant suit, seeking a declaratory judgment and claiming breach of contract and promissory estoppel.

Plaintiff argues she is entitled to additional benefits under Resolution No. 94-903, adopted by the Wayne County Commission in 1994. The resolution provides in pertinent part:

> 2. If a person is separated from the County after January 1, 1994, with at least a total of eight years of County service, and has served as an elected Executive Officer, the Deputy Executive Officer, or an Assistant Executive Officer of the County, or as a County Commissioner, or as an appointed department head or deputy department head, or *an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter*, or as an appointed Chief of Staff for an elected official or legislative body pursuant to an organizational plan, or the appointed head of one of the support divisions of the County Commission, *that person shall be entitled to the same insurance and health care benefits . . . as a retiree from the Defined Benefit Plan 1.* [Emphasis added.]

The circuit court granted summary disposition for defendant. The circuit court interpreted the phrase "an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" as covering an appointee who was (1) confirmed by the county commission and (2) not a member of a board or commission. Because plaintiff, a principal attorney, was not confirmed by the county commission, and because she did not otherwise qualify for additional benefits under the resolution, the circuit court determined that plaintiff was not entitled to the "same insurance and health care benefits . . . as a retiree from the Defined Benefit Plan 1."

The Court of Appeals reversed in a published opinion.[1] The Court found the resolution ambiguous because the phrase "who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" is equally susceptible of more than one meaning.[2] According to the Court of Appeals panel, the phrase could be interpreted as the circuit court read it—as providing benefits to an appointee who was confirmed by the county commission but was not a member of a board or commission—but it could also be interpreted as providing benefits to *any* appointee, whether confirmed or not, as long as that appointee was not confirmed by the commission to membership of a board or commission. Under the latter interpretation (the "any appointee" construction), plaintiff would be entitled to additional benefits as an appointee who was not a member of a board or commission.

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[1] *Hardaway v Wayne Co*, 298 Mich App 282; 827 NW2d 401 (2012).

[2] *Id*. at 288; see also *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

The Court of Appeals resolved this alleged ambiguity by resorting to the last antecedent rule, a rule of statutory construction that provides that "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation."[3] Applying the last antecedent rule to the resolution, the Court of Appeals determined that the modifying and restrictive clause—"who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter"—applied only to the immediately preceding phrase: "other than a member of a board or commission." Thus, the Court of Appeals determined that the last antecedent rule favored the "any appointee" construction. We disagree and reverse.

If the language of the resolution is certain and unambiguous, courts must apply the resolution as written.[4] Here, the resolution's language is not ambiguous.[5] Under the "any appointee" construction, the clause "who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" modifies the phrase "other than a member of a board or commission." But the Wayne County Charter already requires that *all* members of boards and commissions be confirmed by the county commission.[6] Thus, the "any appointee" construction takes what is grammatically an essential clause—"who is confirmed . . ."—and

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[3] *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002).

[4] See *Turner v Auto Club Ins Assn*, 448 Mich 22, 27; 528 NW2d 681 (1995).

[5] See *Lansing Mayor*, 470 Mich at 166.

[6] Section 4.385 of the Wayne County Charter provides, in relevant part, that "members of boards and commissions . . . shall be appointed by the [chief executive officer] with the approval of a majority of [county commissioners] serving."

effectively renders it a nonessential clause. In other words, under the "any appointee" construction, the phrase at issue collapses to "an appointee other than a member of a board or commission." The alternative reading of the statute that the circuit court adopted does not suffer in this respect.

There are additional indications that the "any appointee" construction should be disfavored. To begin with, all the specific covered positions listed in the resolution are high-level administrative positions. It thus makes sense that the proper reading of the provision concerning appointees at issue here would limit its application to only individuals appointed to positions so significant that they require county commission confirmation. Further, defendant, on whose behalf the resolution was drafted and enacted and which has applied the resolution for nearly 20 years, has never interpreted the language in question as providing benefits to appointees who were not confirmed by the county commission.[7]

Finally, it bears emphasizing that the last antecedent rule should not be applied blindly. As we have warned before, the last antecedent rule should not be applied if "something in the statute requires a different interpretation" than the one that would result from applying the rule.[8] As explained, because the Wayne County Charter requires *all* members of boards and commissions to be confirmed, the "any appointee" construction

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[7] While we recognize that defendant's interpretation of the resolution is not binding on this Court, defendant's 20-year construction of the resolution should be given at least "respectful consideration" and should not be overruled without "cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008) (quotation marks and citation omitted).

[8] *Stanton*, 466 Mich at 616; see also *Duffy v Dep't of Natural Resources*, 490 Mich 198, 221; 805 NW2d 399 (2011).

would render the confirmation requirement redundant.[9] Moreover, the last antecedent rule does not mandate a construction based on the shortest antecedent that is grammatically feasible; when applying the last antecedent rule, a court should first consider what are the logical metes and bounds of the "last" antecedent.[10]

In light of these reasons, we hold that the language "an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to Section 3.115(4) of the Wayne County Charter" extends additional insurance and healthcare benefits only to appointees who were (1) confirmed by the county commission and (2) not members of a board or commission. Accordingly, the Court of Appeals erred by reversing the circuit court's grant of summary disposition in favor of defendant on plaintiff's declaratory judgment claim. In lieu of granting defendant's application for leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for reinstatement of its order granting summary disposition in favor of defendant.

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

CAVANAGH, J., concurred in the result only.

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[9] See *Duffy*, 490 Mich at 215.

[10] See 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47.33, pp 487-489 ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last *word, phrase, or clause* that can be made an antecedent *without impairing the meaning of the sentence*.' ") (emphasis added; citation omitted).

PEOPLE v HARDY

PEOPLE v GLENN

Docket Nos. 144327 and 144979. Argued May 8, 2013 (Calendar Nos. 2 and 3). Decided July 29, 2013.

Donald Michael Hardy was convicted in the Oakland Circuit Court following his plea of guilty to one count of carjacking, MCL 750.529a, and was sentenced by the circuit court, Michael D. Warren, Jr., J., to 12 to 50 years' imprisonment. When scoring the sentencing guidelines, the circuit court, assessed 50 points for offense variable (OV) 7 (aggravated physical abuse), MCL 777.37, accepting the prosecution's argument that Hardy's act of displaying a shotgun during the carjacking, coupled with pointing it at the victim and "racking" it, constituted conduct designed to substantially increase the fear and anxiety the victim suffered during the offense; defense counsel agreed to the score assessed. Hardy filed a motion for resentencing, challenging the OV scoring and claiming ineffective assistance of counsel, which the circuit denied. Hardy filed a delayed application for leave to appeal in the Court of Appeals, SHAPIRO, P.J., and SAWYER and HOEKSTRA, JJ., which the majority denied for lack of merit on the grounds presented; SHAPIRO, P.J., would have remanded for resentencing on the basis that OV 7 was not properly scored. Unpublished order of the Court of Appeals, entered November 18, 2011 (Docket No. 306106). The Supreme Court granted Hardy's application for leave to appeal. 491 Mich 934 (2012).

Devon DeCarlos Glenn, Jr. was convicted in the Jackson Circuit Court following his pleas of guilty to armed robbery, MCL 750.529, and felonious assault, MCL 750.82, and was sentenced by the circuit court, John G. McBain, J., to 15 to 30 years' imprisonment for the armed robbery conviction and 18 to 48 months' imprisonment for the felonious assault conviction. When scoring the sentencing guidelines, the circuit court assessed 50 points for OV 7 over defense counsel's objection, concluding that Glenn's actions when robbing a gas station convenience store of striking the employees with the butt of his weapon was intended to make the employees afraid and to move faster, which constituted conduct designed to substantially increase the fear and anxiety the victims suffered during the offense. The

Court of Appeals, BECKERING, P.J., and OWENS and SHAPIRO, JJ., vacated defendant's sentence and remanded for resentencing, concluding that although Glenn's conduct used more violence than was strictly necessary to complete an armed robbery, it was not egregious enough in relation to the other conduct listed in MCL 777.37(1)(a) to justify the assessment of 50 points for OV 7. 295 Mich App 529, 536 (2012). The Supreme Court granted the prosecution's application for leave to appeal. 491 Mich 934 (2012).

In an opinion by Justice VIVIANO, joined by Chief Justice YOUNG and Justices MARKMAN, KELLY, ZAHRA, and MCCORMACK, the Supreme Court *held*:

Fifty points are properly assessed under OV 7, in part, for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount. The relevant questions are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and if so (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount.

1. On appeal, a circuit court's sentencing guidelines' factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the determined facts are adequate to satisfy the scoring conditions prescribed by statute is a question of statutory interpretation that is reviewed de novo.

2. A trial court may assess 50 points under OV 7, MCL 777.37(1)(a), if a victim was "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." A defendant's conduct does not have to be similarly egregious to "sadism, torture, or excessive brutality" for OV 7 to be scored at 50 points. Rather, the second "or" in the MCL 777.37(1)(a) phrase, indicates that the "conduct designed" language is an independent clause that has a meaning independent of the first three actions that justify an assessment of 50 points for OV 7. Fifty points are properly assessed for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount. Absent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables. The relevant questions are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and if so (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount. The circuit court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue and consider: (1) the severity of the crime, (2) the elements of the offense, and (3) the different

ways in which those elements can be satisfied. The court must then determine the fear or anxiety associated with the minimum conduct necessary to commit the offense and compare it with the actual record evidence of the crime and how it was committed to determine whether the defendant's conduct went beyond the minimum necessary to commit the crime and whether it was more probable than not that such conduct was intended to increase the victim's fear or anxiety by a considerable amount.

3. The circuit court did not err by assessing 50 points for OV 7 in *Hardy*. A preponderance of the evidence shows that Hardy's action of "racking" the shotgun while pointing it at the victim, when merely displaying the weapon or pointing it at the victim was sufficient to complete the crime, was designed to substantially increase the fear of his victim beyond the usual level that accompanies a carjacking, to the point where he feared imminent death. Hardy's trial counsel was not ineffective for failing to object to the scoring of OV 7 because such a motion would have been meritless.

4. The circuit did not err by assessing 50 points for OV 7 in *Glenn* and the Court of Appeals erred by vacating Glenn's sentence on this basis. Glenn's conduct of threatening the employees with what appeared to be a sawed-off shotgun and using it to strike them in the head in the course of an armed robbery went beyond that which was necessary to commit the crime, and the conduct was designed to increase the fear of his victims by a considerable amount.

Hardy affirmed.

In *Glenn*, Court of Appeals decision reversed and case remanded to the circuit court for reinstatement of the judgment of sentence.

Justice MCCORMACK, concurring, joined the majority opinion in full, but wrote separately to encourage the Legislature to amend MCL 777.37, OV 7, to define or more clearly articulate its intent when it included the "conduct designed" language in this offense variable. The potential for subjectivity in scoring OV 7 is likely to cause disparate sentencing outcomes for defendants, which is contrary to the goal of uniformity set by the Legislature when the guidelines were adopted.

Justice CAVANAGH, concurring in part and dissenting in part, agreed with the majority's clarification of the standard of review for sentencing guidelines scoring issues. He disagreed with the majority's interpretation of OV 7 and would have held that the "conduct designed" language of OV 7 must be interpreted in light of the other three categories under which OV 7 can be scored and thus must be of the same class as sadism, torture, and excessive brutality. In reaching

its decision, the majority ignored the legislative history of OV 7, and failed to consider both the entirety of the statute and the statutory scheme of all offense variables, MCL 777.31 *et seq*.

1. SENTENCES — OFFENSE VARIABLE 7 — CONDUCT SUBSTANTIALLY INCREASING VICTIM'S FEAR AND ANXIETY.

A trial court may assess 50 points under offense variable (OV) 7, MCL 777.37(1)(a), if a victim was "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense;" a defendant's conduct does not have to be similarly egregious to "sadism, torture, or excessive brutality;" OV 7 may be scored 50 points for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount and such conduct does not have to be similar to that which constitutes sadism, torture, or excessive brutality under MCL 777.37(1)(a) and (3); when assessing points a court must consider (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and if so (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount.

2. SENTENCES — SENTENCING GUIDELINES — STANDARDS OF REVIEW.

On appeal, a circuit court's sentencing guidelines' factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the determined facts are adequate to satisfy the scoring conditions prescribed by statute is a question of statutory interpretation that is reviewed de novo.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, and *Kathryn G. Barnes*, for the people in *People v Hardy*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrtoenboer*, Chief Appellate Attorney, for the people in *People v Glenn*.

Ronald D. Ambrose for defendant Donald Michael Hardy.

Linda D. Ashford, P.C. (by *Linda D. Ashford*), for defendant Devon DeCarlos Glenn, Jr.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Mark G. Sands*, Assistant Attorney General, for the Attorney General.

James L. Howard for David Scott Farnen.

VIVIANO, J. In these consolidated cases, we consider the proper assessment of points under offense variable (OV) 7 (aggravated physical abuse).[1] Specifically, our focus is on what type of conduct under OV 7 constitutes "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."[2] In both cases, the circuit courts concluded that the defendants' respective conduct supported assessing 50 points for OV 7 pursuant to MCL 777.37(1)(a). We conclude that the plain meaning of the phrase "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" encompasses both defendant Hardy's act of racking a shotgun during a carjacking and defendant Glenn's violent behavior during an armed robbery. Accordingly, we affirm the circuit court's scoring decision in *Hardy*. In *Glenn*, we reverse the judgment of the Court of Appeals and remand the case to the circuit court for reinstatement of defendant Glenn's July 22, 2010 judgment of sentence.

I. FACTS AND PROCEDURAL HISTORY

A. *PEOPLE v HARDY*

In July 2010, defendant Hardy and an accomplice approached a man, who had just exited his car. Hardy

[1] MCL 777.37.

[2] MCL 777.37(1)(a).

pointed a shotgun at the man, racked it,[3] and demanded that the man give him everything he had. The man grabbed the barrel of the shotgun and tried to wrench it out of Hardy's grasp, but Hardy overpowered him, and Hardy and his accomplice drove off in the man's vehicle. Police arrested both men a few hours later.

Hardy pleaded guilty to one count of carjacking.[4] At sentencing, the prosecutor argued that the circuit court should assess 50 points for OV 7 because Hardy had not only displayed a shotgun, but had also pointed it at the victim and racked it. The prosecutor claimed that the act of racking a shotgun was "conduct designed only to threaten the victim with immediate violent death." Defense counsel agreed to the scoring, stating, "I cannot argue with that, your Honor." Accordingly, the circuit court assessed 50 points for OV 7 and sentenced Hardy to 12 to 50 years' imprisonment.

Hardy filed a motion for resentencing, challenging the OV 7 scoring and claiming that defense counsel had been constitutionally ineffective for consenting to it. The circuit court denied the motion, concluding that the 50-point score under OV 7 was proper and that defense counsel was not constitutionally ineffective. After Hardy filed a delayed application for leave to appeal in the Court of Appeals, a majority of the panel denied leave for lack of merit in the grounds presented.[5] However, the dissenting judge would have remanded for resentencing on the ground that the circuit court incorrectly scored OV 7.

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[3] To "rack" a shotgun is to pull the slide of the weapon along the forestock, then push it back to its original position. See *United States Army Technical Manual* 9-1005-338-13&P, "Mossberg 12-Gauge Shotgun Model 500/590," 0004 00-2 (2005).

[4] MCL 750.529a.

[5] *People v Hardy*, unpublished order of the Court of Appeals, entered November 18, 2011 (Docket No. 306106).

We granted leave to consider whether the circuit court erroneously assessed 50 points for OV 7 because Hardy racked the shotgun during the carjacking and whether defense counsel was ineffective for waiving this issue.[6]

B. *PEOPLE v GLENN*

In August 2009, defendant Glenn and an accomplice entered a gas station convenience store. He carried what two store employees later described as a "sawed-off shotgun."[7] Glenn ordered one of the employees to approach the front counter. As the employee did so, Glenn struck him in the back of the head with the butt of the weapon. The blow was so forceful that it knocked him to the ground. Glenn then forced both employees behind the counter and demanded money, which Glenn grabbed out of the cash register and safe. He hit the second employee in the side of the head with the butt of his weapon before fleeing with his accomplice in a waiting getaway car. Soon afterward, police stopped the getaway car and arrested Glenn. Neither employee suffered any injuries.

Glenn pleaded guilty to one count of armed robbery[8] and one count of assault with a dangerous weapon.[9] At sentencing, the prosecutor argued that striking the employees with the weapon was designed to "get them to move faster, to be afraid," and that this was sufficient

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[6] *People v Hardy*, 491 Mich 934 (2012).

[7] In fact, the weapon was an "airsoft" gun that was designed to look like a real firearm. Airsoft guns shoot plastic pellets, rather than live ammunition. *An-Hung Yao v Indiana*, 975 NE2d 1273, 1275, n 1 (Ind, 2012).

[8] MCL 750.529.

[9] MCL 750.82. This latter charge resulted from Glenn pointing his airsoft gun at an off-duty corrections officer who had pursued Glenn as he fled the gas station.

to assess 50 points for OV 7 because it involved "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The circuit court agreed with the prosecutor and assessed 50 points for OV 7 over defense counsel's objection. The circuit court then sentenced defendant to 15 to 30 years' imprisonment for the armed robbery and 18 to 48 months' imprisonment for the felonious assault.[10]

In a published opinion, the Court of Appeals vacated defendant's sentence and remanded for resentencing.[11] The Court acknowledged that Glenn, by striking the employees, used more violence than was "strictly necessary" to complete an armed robbery.[12] But the Court of Appeals concluded that the circuit court erred because OV 7 was only "meant to be scored in particularly egregious cases involving torture, brutality, or similar conduct designed to *substantially* increase the victim's fear, not in every case in which some fear-producing action beyond the bare minimum necessary to commit the crime was undertaken."[13]

We granted leave to appeal to consider whether the circuit court erroneously assessed 50 points for OV 7 because Glenn committed "assaultive acts beyond those necessary to commit the offense."[14]

II. STANDARD OF REVIEW

We take this opportunity to clarify the applicable standards of review for a sentencing guidelines scoring

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[10] The Court of Appeals incorrectly stated that Glenn's armed robbery sentence was 18 to 30 years in prison. *People v Glenn*, 295 Mich App 529, 530; 814 NW2d 686 (2012).

[11] *Id.* at 536.

[12] *Id.*

[13] *Id.*

[14] *People v Glenn*, 491 Mich 934 (2012).

issue. In *Glenn*, the Court of Appeals stated that an appellate court "reviews a trial court's scoring of the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[15] This is an imprecise statement of applicable law.

As we have explained before, the abuse of discretion standard formerly predominated in sentencing review.[16] But when the Legislature enacted the sentencing guidelines in 1998, it prescribed detailed instructions for imposing sentences, thereby reducing the circumstances under which a judge could exercise discretion during sentencing.[17] Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.[18] Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.[19]

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[15] *Glenn*, 295 Mich App at 532.

[16] *People v Babcock*, 469 Mich 247, 253-254; 666 NW2d 231 (2003).

[17] *Id.* at 255. Now, under the sentencing guidelines, the abuse of discretion standard only applies when an appellate court reviews a circuit court's conclusion that there was a "substantial and compelling reason" to depart from the guidelines. *Id.* at 265.

[18] *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Several recent Court of Appeals decisions have stated that "[s]coring decisions for which there is any evidence in support will be upheld." See, e.g., *People v Carrigan*, 297 Mich App 513, 514; 824 NW2d 283 (2012); *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This statement is incorrect. The "any evidence" standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines.

[19] *People v Babcock*, 469 Mich at 253 (2003).

In these cases, we review for clear error the factual findings that the defendants' conduct was designed to substantially increase the fear and anxiety of their victims. We review de novo whether these acts were sufficient to assess 50 points for OV 7.

III. ANALYSIS

A. INTERPRETING MCL 777.37 (OV 7)

As we have stated before, our goal in interpreting a statute "is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written."[20]

MCL 777.37 governs OV 7. MCL 777.37(1) provides, in full:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 50 points
>
> (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 0 points

A trial court can properly assess 50 points under OV 7 if it finds that a defendant's conduct falls under one of

[20] *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (quotation marks and citations omitted).

the four categories of conduct listed in subsection (1)(a). No party contends that any of the first three categories (sadism, torture, or excessive brutality) applies in these cases. Thus, our focus is on the fourth category—whether defendants engaged in "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."[21]

Other than "sadism,"[22] the statute does not define the individual terms used in the listed categories, so we presume that the Legislature intended for the words to have their ordinary meaning.[23] Thus, we turn to the dictionary for guidance in interpreting the terms used in the phrase: "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."[24]

The phrase begins with the words "conduct designed." "Designed" means "to intend for a definite purpose."[25] Thus, the word "designed" requires courts to evaluate the intent motivating the defendant's conduct.[26] Next, we come to the words "substantially increase." "Substantial" means "of ample or considerable amount, quantity, size, etc."[27] To "increase" means "to

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[21] MCL 777.37(1)(a).

[22] MCL 777.37(3).

[23] MCL 8.3a.

[24] *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006).

[25] *Random House Webster's College Dictionary* (2001).

[26] As in other areas of criminal law, "[i]ntent generally may be inferred from the facts and circumstances of a case." *In re People v Jory*, 443 Mich 403, 419; 505 NW2d 228 (1993). For this reason, a defendant does not have to verbalize his intentions for a judge to find that the defendant's conduct was designed to elevate a victim's fear or anxiety. Rather, a court can infer intent indirectly by examining the circumstantial evidence in the record that was proven by a preponderance of the evidence.

[27] *Random House Webster's College Dictionary* (2001).

make greater, as in number, size, strength, or quality; augment."[28] Applying these definitions to the relevant text, we conclude that it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount.[29]

In *Glenn*, the Court of Appeals erred by ignoring the Legislature's second use of the word "or" in the provision at issue. MCL 777.37(1)(a), reads: "[a] victim was treated with sadism, torture, ***or*** excessive brutality ***or*** conduct designed to substantially increase the fear and anxiety a victim suffered[.]"[30] "Or" is a word "used to indicate a disunion, a separation, an alternative."[31] While the first "or" may be interpreted as linking the first three categories in a common series, the second "or" separates the last OV 7 category from the series that precedes it. Thus, the use of "or" before the phrase "conduct designed" shows that this phrase is an independent clause that has an independent meaning. The Court of Appeals in *Glenn* therefore erred by interpreting the statute in a manner inconsistent with its plain meaning.

The Court of Appeals also erred in *Glenn* to the extent it concluded that "circumstances inherently present in the crime must be discounted for purposes of

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[28] *Id.*

[29] We note that by the statute's own terms, the focus is on the intended effect of the conduct, not its actual effect on the victim. Accord *People v Kegler*, 268 Mich App 187, 191; 706 NW2d 744 (2005) ("Points are assessed where 'a victim *was treated with* . . . torture, or excessive brutality or conduct designed to increase' a victim's fear and anxiety. The statute does not require, for instance, that 'a victim *experienced* . . . torture, or excessive brutality or conduct designed to increase' fear and anxiety.") (emphasis added).

[30] Emphasis added.

[31] *Mich Pub Serv Co v City of Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949).

scoring an OV."[32] To the contrary, absent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables. The sentencing guidelines explicitly direct courts to disregard certain conduct inherent in a crime when scoring OVs 1, 3, 8, 11, and 13.[33] In all other cases, "the Sentencing Guidelines allow a factor that is an element of the crime charged to also be considered when computing an offense variable score."[34] It was error for the Court of Appeals to state or imply otherwise in *Glenn*.

However, we agree with the Court of Appeals that "[a]ll . . . crimes against a person involve the infliction of a certain amount of fear and anxiety."[35] Since the "conduct designed" category only applies when a defendant's conduct was designed to substantially *increase* fear, to assess points for OV 7 under this category, a court must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of

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[32] *Glenn*, 295 Mich App at 535. The Court of Appeals relied on *People v Hunt*, 290 Mich App 317; 326; 810 NW2d 588 (2010), for this proposition. In *Hunt*, the Court of Appeals reviewed a defendant's OV 7 score for his actions during a series of kidnappings and assaults, and it correctly noted that "unlike OV 1, OV 2, and OV 3, OV 7 does not state that '[i]n multiple offender cases, if 1 offender is assessed points for [the applicable behavior or result], all offenders shall be assessed the same number of points.' " *Id*. Likewise, the court also noted in *Hunt* that, MCL 777.38(2)(b) provides that, "[t]ransportation to a place of greater danger is appropriately scored under OV 8, but must be given a score of zero points when, as here, the sentencing offense is kidnapping." *Id.* But these observations do not establish the rule that the Court of Appeals stated in *Glenn* because they are properly understood as exceptions to the general rule that such conduct may be considered. *People v Gibson*, 219 Mich App 530, 534; 557 NW2d 141 (1996).

[33] MCL 777.31(2)(e); MCL 777.33(2)(d); MCL 777.38(2)(b); MCL 777.41(2)(c); MCL 777.43(2)(e).

[34] *Gibson*, 219 Mich App at 534.

[35] *Glenn*, 295 Mich App at 536.

crime or crimes at issue. To make this determination, a court should consider the severity of the crime,[36] the elements of the offense, and the different ways in which those elements can be satisfied. Then the court should determine, to the extent practicable, the fear or anxiety associated with the minimum conduct necessary to commit the offense.[37] Finally, the court should closely examine the pertinent record evidence, including how the crime was actually committed by the defendant. As noted above, evidence which satisfies an element of an offense need not be disregarded solely for that reason. Instead, all relevant evidence should be closely examined to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount.

In summary, we conclude that a defendant's conduct does not have to be "similarly egregious" to "sadism, torture, or excessive brutality" for OV 7 to be scored at 50 points, and that, absent an express statutory prohibition, courts may consider circumstances inherently present in the crime when scoring OV 7. The relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the

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[36] OV 7 is scored for all offenses classified as "crimes against a person." MCL 777.22(1). This category of felonies encompasses a broad spectrum of crimes ranging from those that may cause little or no fear and anxiety to a victim during the offense, to those crimes that, by their very nature, tend to cause a great deal of fear and anxiety to a victim during the offense.

[37] We acknowledge that courts cannot calculate this "fear baseline" with mathematical certainty. However, such precision is not required because it merely serves as a benchmark against which to measure the intended increase in fear associated with defendant's conduct.

offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount.[38]

B. APPLICATION TO *HARDY*

Evidence in the record, including Hardy's own plea colloquy, established that he pointed a shotgun at the victim and then racked it. The purpose of racking a shotgun is to pull a new round of ammunition from the magazine tube and slide it into the firing chamber.[39] Racking the weapon makes it ready to fire.[40]

We first consider whether racking the shotgun went beyond the minimum conduct necessary to commit a carjacking. A carjacking occurs "in the course of committing a larceny of a motor vehicle[.]"[41] While doing so, a defendant must use (1) "force or violence," (2) "the threat of force or violence," or (3) put "in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle."[42] Hardy threatened his

[38] One purpose of the sentencing guidelines is to facilitate proportionate sentences. *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003). Justice CAVANAGH believes that our holding today "would result in disproportionate sentencing" because our interpretation of the "conduct designed" category does not require the same level of "very egregious" conduct as the other OV 7 categories to assess 50 points. *Post* at 454. We respectfully disagree. Our holding today does not conflict with the guidelines' goal of proportionality because it is for the Legislature, not this Court, to decide what types of conduct warrant similar scoring under MCL 777.37.

[39] *United States Army Technical Manual* 9-1005-338-13&P, "Mossberg 12-Gauge Shotgun Model 500/590," 0004 00-2 (2005). This action would also extract and eject a spent casing if the weapon has already been fired. *Id.*

[40] *Id.* at 0005 00-1 – 00-2.

[41] MCL 750.529a(1).

[42] *Id.*

victim with violence by pointing the shotgun at him and racking it, even though merely displaying the weapon or pointing it at the victim would have been enough to issue a threat. Because Hardy took the extra step of racking the shotgun, the circuit court correctly assessed 50 points for OV 7 as long as this conduct was designed to substantially increase the victim's fear beyond the usual level that accompanies a carjacking.

Hardy argues that he racked the shotgun solely for the purpose of getting his victim to comply, not to substantially increase his victim's fear. But racking a shotgun under these circumstances only urges compliance if doing so makes the victim fear imminent, violent death if he or she does not comply. Hence, even if Hardy's ultimate goal was to provoke compliant behavior, a preponderance of the evidence shows that his conduct was designed to substantially increase the fear of his victim beyond the usual level that accompanies a carjacking, to the point where the victim feared imminent death.

Because Hardy took the extra step of racking the shotgun, and because he did so to make his victim fear that a violent death was imminent, not just possible, the circuit court properly assessed 50 points for OV 7.

"Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion."[43] Because the circuit court properly scored OV 7, any objection to the court's assessment of points would have been meritless. As a result, Hardy's counsel did not provide ineffective assistance by failing to object to the scoring.

C. APPLICATION TO *GLENN*

Turning to Glenn's case, we begin again by consid-

[43] *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

ering whether he went beyond the minimum conduct necessary to commit an armed robbery.[44] To commit this crime, a defendant must engage "in conduct proscribed under [MCL 750.530,]" Michigan's robbery statute, which criminalizes using "force or violence against any person who is present" at a larceny or assaulting or putting "the person in fear[,]" "in the course of committing a larceny."[45] To commit an armed robbery, the defendant must also either (1) possess " a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon," or (2) represent "orally or otherwise that he or she is in possession of a dangerous weapon[.]"[46] To rob the convenience store, Glenn could have simply put the victims in fear by orally representing that he had a weapon. Instead, he chose to threaten the victims with what appeared to be a sawed-off shotgun, and then used it to strike two different victims in the head. Hence, Glenn's conduct went beyond that necessary to commit an armed robbery.

We next consider whether this conduct was designed to increase the fear or anxiety of the victims by a considerable amount. By striking the employees in the head, knocking one to the ground, and forcing both of them behind the store counter, Glenn demonstrated to his victims that he was willing to follow through on his threat to harm them, and he placed them in a place of

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[44] The sentencing court based its OV 7 scoring exclusively on Glenn's conduct during the armed robbery, not on his conduct during the subsequent felonious assault. In addition, the prosecutor does not argue that the conduct underlying the felonious-assault conviction merited OV 7 scoring. Accordingly, we do not consider whether that conduct could have formed an independent basis for scoring OV 7 in Glenn's case.

[45] MCL 750.529; MCL 750.530.

[46] MCL 750.529.

increased vulnerability, where escape was almost impossible. It is more probable than not that Glenn, like Hardy, engaged in this conduct to frighten his victims into compliance. We can infer this from the fact that Glenn assaulted the employees while making monetary demands. His conduct was designed to elevate his victims' fear from the concern that accompanies an unrealized threat (the fear that a criminal will become violent), to the concern that accompanies actualized violence (the fear that an attacker's blows will cause injury or death). This constitutes a considerable amount of additional fear.

Because Glenn's conduct went beyond that necessary to effectuate an armed robbery, and because he intended for his conduct to increase the fear of his victims by a considerable amount, the Court of Appeals erred by holding that the circuit court incorrectly assessed 50 points for OV 7.

IV. CONCLUSION

We hold that because a preponderance of the evidence established that Hardy racked a shotgun to increase the fear of his victim by a considerable amount, the circuit court properly assessed 50 points for OV 7 by finding that Hardy's conduct of racking a shotgun while pointing it at the victim constituted "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Accordingly, we affirm the circuit court's assessment of 50 points for OV 7 in *Hardy*.

We further hold that because a preponderance of the evidence established that Glenn struck two victims with the butt of what appeared to be a sawed-off shotgun, knocked one victim to the ground, and forced both victims behind a store counter to make them fear imminent, serious injury or death, the circuit court appropriately

assessed 50 points for OV 7. In *Glenn*, we reverse the Court of Appeals and remand the case to the circuit court for reinstatement of the judgment of sentence.

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

MCCORMACK, J. (*concurring*). I join Justice VIVIANO's opinion in full because I believe that it goes as far as it can to provide the best possible guidance for trial courts charged with applying the statutory language at issue in this case. I write separately to encourage the Legislature to amend MCL 777.37, offense variable (OV) 7, to define, or more clearly articulate its intent in including, the language "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."

The Legislature adopted the sentencing guidelines to promote uniformity in sentencing.[1] However, in my view, the potential for subjectivity inherent in the "conduct designed" language is likely to cause disparate outcomes for criminal defendants in this state even with the guiding principles today's decision provides. Such a result is troubling. Given that scoring OV 7 is an all-or-nothing proposition—zero points versus 50 points—and that a 50-point increase in a defendant's OV score is likely to result in a significant increase in a defendant's minimum sentence, the need for clarity and consistency in its scoring is paramount if courts are to administer justice. As the Legislature appears poised to revisit the sentencing guidelines in the near future,[2] I believe that these cases illustrate that OV 7 is an excellent example of one area

[1] *People v Smith*, 482 Mich 292, 312; 754 NW2d 284 (2008).

[2] See, e.g., Gary Heinlein, *New Michigan Prison Sentencing Guidelines Under Review*, Detroit News <http://www.detroitnews.com/article/20130708/METRO06/307080011> (accessed July 17, 2013).

that could benefit from further scrutiny and hopefully, further elucidation.

We are charged with interpreting the law as it exists, however, and I believe that Justice VIVIANO's opinion faithfully does so with as much clarity as the statutory language permits. I therefore join the majority opinion in its entirety.

CAVANAGH, J. *(concurring in part, dissenting in part)*. I concur with the majority that the proper standard of review under the sentencing guidelines is that the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

I respectfully dissent from the majority's interpretation of offense variable (OV) 7, MCL 777.37, however, because I believe that the majority errs by holding that the phrase "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" must be interpreted without reference to the other three categories under which OV 7 can be scored: sadism, torture, and excessive brutality. In reaching its conclusion, the majority ignores the history of OV 7 and fails to consider not only the entirety of MCL 777.37, but also the statutory scheme of all offense variables, MCL 777.31 *et seq*. Contrary to the majority position, I would hold that the "conduct designed" category of OV 7 should be interpreted in light of the other three categories within the statute, and thus must be of the same class as sadism, torture, and excessive brutality.

I. SENTENCING GUIDELINES GENERALLY

The current sentencing guidelines, MCL 777.1 *et seq*., were enacted in 1998. The purpose of the sentenc-

ing guidelines is to facilitate proportionate sentencing. *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008). The sentencing guidelines take into account the severity of a criminal offense along with the offender's criminal history and thereby determine an appropriate proportionate sentencing range. *Id*. The minimum sentence is scored on grids categorized by the offense class as found in MCL 777.11 *et seq*. See MCL 777.21. Each grid is comprised of OV score ranges and prior record variable (PRV) level ranges. See MCL 777.61 *et seq*. The OV score is calculated by adding all the scores of all the applicable OVs. MCL 777.21(a). The upper-most range on each of the several charts is "100+ points," and, therefore, any OV score of 100 points or above results in the same sentencing guidelines range. Stated differently, once an offender reaches 100 OV points, additional OV points have no direct effect on the length of the offender's sentence under the statutorily set guidelines.

II. HISTORY OF OV 7

As originally enacted in 1998, MCL 777.37 (OV 7) stated:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with *terrorism*, sadism, torture, or excessive brutality ..... .50 points
>
> (b) No victim was treated with terrorism, sadism, torture, or excessive brutality ..... 0 points
>
> (2) As used in this section:
>
> *(a) 'Terrorism' means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.*

(b) 'Sadism' means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification. [Emphasis added.]

In April 2002, MCL 777.37 was amended to its current version to state:

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was treated with sadism, torture, or excessive brutality *or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense* ..... 50 points

(b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 0 points

(2) Count each person who was placed in danger of injury or loss of life as a victim.

(3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification. [Emphasis added.]

Notably, before the 2002 amendment, the word "terrorism" was defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense"—the exact language of the current "conduct designed" category in the amended version of OV 7. Concurrent with the 2002 amendment to OV 7, a new offense variable was created, OV 20, MCL 777.49a, which directs scoring for an act of terrorism. It is important to recognize that OV 20 incorporates a different definition for "act of terrorism" than that which existed for "terrorism" in the preamendment version of

OV 7. Under OV 20, an "act of terrorism" is defined by referring to the definition set forth in the Michigan Anti-Terrorism Act, MCL 750.543b, which was also enacted in 2002.[1]

The enactment of MCL 750.543b, the amendment of OV 7, and the enactment of OV 20 were part of comprehensive changes made by the Legislature in response to the September 11, 2001, attacks. 2002 PA 113, 137; see also, Woodside & Gershel, *The USA Patriot Act and Michigan's Anti-Terrorism Laws: New Anti-Terrorism Laws Make Sweeping Changes*, 82 Mich B J 20 (2003) (describing the key components of both Michigan and Federal legislation passed in response to 9/11); 2B Gillespie, Michigan Criminal Law & Procedure (2d ed), § 38A:1, pp 521-528 (summarizing the antiterrorist legislation passed by Michigan in response to 9/11). The changes also reflect a conceptual shift in the meaning of "terrorism." Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, 29 BC Int'l & Comp L Rev 23, 30 (2006) (explaining that "terrorism," traditionally a term of political stigmatization, is evolving into a complex legal term); see also Hardy & Williams, *What is "Terrorism"?: Assessing Domestic Legal Definitions*, 16

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[1] An act of terrorism is defined under MCL 750.543b as follows:

> (a) "Act of terrorism" means a willful and deliberate act that is all of the following:
>
> (*i*) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
>
> (*ii*) An act that the person knows or has reason to know is dangerous to human life.
>
> (*iii*) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

UCLA J Int'l L & Foreign Aff 77, 155 (2011) (explaining that various international bodies have developed their respective definitions of "terrorism").

III. STATUTORY ANALYSIS OF OV 7

To begin with, I agree with the majority that the phrase "conduct designed" in OV 7 "requires courts to evaluate the intent motivating the defendant's conduct." *Ante* at 440. Indeed, the fact that the "conduct designed" category focuses on a defendant's intent, whereas sadism, torture, and excessive brutality concern the *nature* of a defendant's conduct, is what gives the "conduct designed" category meaning independent of the other three categories in OV 7. Thus, my primary disagreement with the majority lies with its interpretation of the phrase "substantially increase the fear and anxiety a victim suffered during the offense."

While it is true that our rules of statutory construction dictate that the "conduct designed" category be interpreted as an "independent clause that has an independent meaning," *ante* at 441, that rule is not violated by allowing the sadism, torture, and excessive brutality categories to educate our understanding of the conduct designed category. As explained previously, the fact that the conduct designed categories focus on the defendant's *intent* ensures that it has meaning independent of the other three categories, which consider the *nature* of the defendant's conduct.

Moreover, we have long recognized that "[a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context," and we have accordingly held that "[i]n seeking meaning, words and clauses will not be divorced from those which precede and those which follow." *G C Timmis & Co v Guardian Alarm Co*,

468 Mich 416, 421; 662 NW2d 710 (2003) (citation and quotation marks omitted). The importance of this rule in these cases cannot be overstated. If the "conduct designed" language is considered without reference to the other conduct listed in OV 7, the "conduct designed" category could be interpreted to include conduct that differs substantially from sadism, torture, and excessive brutality and thereby permit scoring points under OV 7 on the basis of widely divergent conduct. In my view, this cannot be the proper interpretation of OV 7 because that approach would result in disproportionate sentencing, contrary to one of the principal motivating factors behind the enactment of the legislative sentencing guidelines—where sadism, torture, and excessive brutality all speak of very egregious conduct, the majority's interpretation of the "conduct designed" category does not require nearly as egregious conduct by a defendant. Therefore, in order for all four categories to have independent meaning while also ensuring that OV 7 does not result in disproportionate sentences, the "conduct designed" category must be interpreted to be of the same class as sadism, torture, and excessive brutality.

The majority argues that this is not the proper interpretation of OV 7 because of the presence of a second "or" in MCL 777.37(1)(a).[2] Specifically, the majority explains that "or" is a word "used to indicate a disunion, a separation, an alternative" and thus interprets the second "or" in MCL 777.37(1)(a) to evidence the Legislature's intent to "separate[] the last OV 7 category from the series that precedes it." *Ante* at 441.

[2] MCL 777.37(1)(a) states in relevant part: "[a] victim was treated with sadism, torture, or excessive brutality *or* conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Emphasis added.

Yet when considering the historical development of OV 7 already discussed in part II, the majority's heavy reliance on the second "or" in OV 7 to entirely divorce the "conduct designed" category from the other three categories of conduct listed in OV 7 is even more questionable.

Although I agree with the majority that it is the Legislature's role to determine "what types of conduct warrant similar scoring under MCL 777.37," *ante* at 444 n 38, in my view, the history of OV 7 evidences the Legislature's intent in crafting the current version of MCL 777.37. As previously explained, the addition of OV 20 was part of Michigan's antiterrorism efforts. Adding an offense variable dedicated to addressing terrorist activity necessitated the removal of the word "terrorism" in OV 7, which addresses conduct of a wholly different character than OV 20. The Legislature, responding to the shifting legal definition of terrorism, simply replaced the word "terrorism" with what had been the definition of terrorism under the preamendment version of OV 7. The amendment, therefore, was necessary to accommodate changes in the law outside of OV 7 and manifests the Legislature's intent to maintain OV 7's preamendment meaning in light of the changing definition of "terrorism" and the addition of OV 20. Accordingly, in my view, the Legislature did not intend to change the meaning of OV 7 and, thus, the preamendment version of OV 7 is highly instructive in determining the proper interpretation of the current version of the statute.

Notably, the preamendment version of OV 7 provided a comma-delineated list separated by a single "or," which even the majority admits should be interpreted to link the categories in a common series. See *G C Timmis*, 468 Mich at 421-422, (noting that "words grouped in a

list should be given related meaning") (quotation marks and citation omitted), citing *Beecham v United States*, 511 US 368, 371; 114 S Ct 1669; 128 L Ed 2d 383 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Terrorism, which was statutorily given the same meaning as the current "conduct designed" category, was included in the aforementioned list with the other three categories, and, thus, it was intended to be given a related meaning. Accordingly, because sadism, torture, and excessive brutality all speak of egregious conduct, I believe that the "conduct designed" category also speaks of similarly egregious conduct. Although I recognize that when amending OV 7 the Legislature inserted an additional "or," I believe that the addition of the second "or" should be given little weight in this situation. Cf. *People v Harrison*, 194 Mich 363, 370; 160 NW 623 (1916).[3] Therefore, the "conduct designed" category should be given related meaning to the other three categories in the current version of OV 7.

Additionally, the majority fails to interpret OV 7 in light of the legislative scheme of the sentencing guidelines as a whole. MCL 777.1 *et seq*. First, conspicuously absent from the majority's analysis is any consideration of the fact that OV 7 requires the scoring of 50 points on

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[3] *Harrison*, 194 Mich at 370, held that

> "[e]very change of phraseology . . . does not indicate a change of substance and intent. . . . A mere change in the words of a revision will not be deemed a change in the law unless it appears that such was the intention. The intent to change the law must be evident and certain; there must be such substantial change as to import such intention, or it must otherwise, be manifest from other guides of interpretation, or the difference of phraseology will not be deemed expressive of a different intention." [Quoting 2 Lewis Sutherland on Statutory Construction (2d ed), § 401.]

an all-or-nothing basis. Second, I believe that it is relevant that the only other offense variables that have a point value as high as 50 points require either a killing or multiple sexual penetrations during the commission of a crime. See OV 3, MCL 777.33; OV 6, MCL 777.36; OV 9, MCL 777.39; OV 11, MCL 777.41; OV 13, MCL 777.43. Third, none of the other four offense variables that score on an all-or-nothing basis (as opposed to a scale depending on the severity of a defendant's conduct) are scored similarly to the 50 points assessed for OV 7. In fact, the potential for 50 points under OV 7 is three times higher than any other all-or-nothing offense variable. See, e.g., OV 4, MCL 777.34; OV 5, MCL 777.35; OV 8, MCL 777.38; and OV 14, MCL 777.44. In my view, these aspects of the sentencing guidelines bolster the conclusion that the majority errs in this case.

As previously explained, offense variables are scored in ranges that extend from 0 to 100 points; thus, scoring 50 points under OV 7 alone places a defendant halfway to the maximum possible point total under the offense variables. Accordingly, to maintain the principle of proportionality upon which the sentencing guidelines are based, only particularly heinous conduct should justify scoring points under OV 7, which is evidenced by the fact that the only other conduct that commands such a score is homicide and multiple sexual penetrations. There can be little doubt that sadism, torture, and extreme brutality are heinous acts that the Legislature determined warrant the heavy toll of an all-or-nothing score of 50 points under OV 7. The fact that the first three OV 7 categories require a defendant's conduct to be extreme, intense, or ruthless[4] comports with

[4] See MCL 777.37(3), defining "sadism" in part as "conduct that subjects a victim to *extreme* or prolonged pain . . . ." (Emphasis added).

the high point value and inflexible nature of OV 7. Therefore, by applying the "conduct designed" category so liberally that it is not of a similar class as sadism, torture, and excessive brutality, the majority's analysis ignores the statutory language and history of OV 7, and raises grave concerns regarding the proportionality of sentencing, as Justice MCCORMACK notes in her concurring opinion.

On the other hand, the majority reasonably argues that the bar for scoring the "conduct designed" category cannot be so high that the category loses all meaning in comparison to the other categories. Accordingly, the majority's conclusion that OV 7 requires "conduct that was intended to make a victim's fear or anxiety greater by a considerable amount," *ante*, at 441, appears facially reasonable, given that the phrase "considerable amount" is derived from a dictionary definition of the word "substantially." However, given the majority's refusal to consider how the other categories of conduct in OV 7 influence the meaning of the "conduct designed" category, the phrase "considerable amount" is of little assistance because it is rather vague in concept and too broad in application.

Instead, I would hold that the amendatory history of OV 7 evidences a legislative intent that the "conduct designed" category include only conduct that is of the same class as the other three categories of conduct listed in OV 7. Working from that premise, I would further hold that a defendant should only be assessed points under the "conduct designed" category of OV 7 if a preponderance of the evidence shows that the defen-

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See also *Merriam-Webster's Collegiate Dictionary* (11th ed) (2011), defining "torture" as "the infliction of *intense* pain . . . to punish, coerce, or afford sadistic pleasure," and "brutal" as "grossly *ruthless* or unfeeling." (Emphasis added).

dant *intended* to substantially increase the victim's fear and anxiety. Finally, I would hold that only conduct that is intended to generate extreme or intense fear and anxiety beyond the fear and anxiety that is necessary to commit the crime at issue satisfies the "substantially increase" language in OV 7 because only extreme or intense fear and anxiety falls within the same class as sadism, torture, and extreme brutality.

IV. APPLICATION

A. APPLICATION TO *HARDY*

In *Hardy*, defendant first pointed a shotgun at the victim while committing a carjacking. When the victim failed to immediately comply with defendant's orders, defendant racked the shotgun. Thus, the question is whether racking the shotgun was intended to subject the victim to extreme or intense fear and anxiety.

As the majority explains, to commit a carjacking, a defendant must use (1) "force or violence," (2) "the threat of force or violence," or (3) put the victim "in fear." MCL 750.529a(1). Thus, the crime of carjacking itself entails the use of force, a threat of force, or the installation of fear in the victim. Defendant accomplished this by threatening the victim with violence by pointing the shotgun at the victim and then racking the shotgun.

Although it is true that "merely displaying the weapon or pointing it at the victim would have been enough to issue a threat," *ante* at 445, the question is whether the singular act of racking the shotgun was sufficient to instill *extreme* or *intense* fear *beyond the fear and anxiety that is necessary to commit the carjacking*. Admittedly, racking a shotgun is intended to increase the victim's fear, given that the act gives the

impression that the gun is ready to fire. However, I cannot reasonably conclude that a person who is staring down the barrel of a shotgun feels any more comfort than a person who is staring down the barrel of a shotgun that was racked in their presence. Such a view of these situations assumes that the shotgun in the first situation was not racked at some time before the defendant pointed it at the victim. This is not a logical assumption because any person who finds himself or herself on the wrong end of a shotgun is likely to assume that the gun is ready to fire and therefore "fear imminent, violent death," *ante* at 445, regardless of whether he or she observed the defendant rack the shotgun.

Accordingly, although racking a shotgun while in the victim's presence is certainly deplorable conduct, I believe that in the context of a carjacking racking a shotgun is only minimally more fear-inducing than pointing a shotgun at a victim at close range. Therefore, defendant's conduct was not intended to "substantially increase" the victim's fear because it was not sufficient to instill *extreme* or *intense* fear *beyond the fear and anxiety that is necessary to commit the carjacking*.[5] Therefore, I would hold that the trial court clearly erred by assessing 50 points under OV 7 in *Hardy*.

B. APPLICATION TO *GLENN*

In *Glenn*, defendant struck both employees on the head with what appeared to be a sawed-off shotgun in

[5] For an example of conduct that would satisfy the "conduct designed" category under OV 7, consider the conduct in *People v Mattoon*, 271 Mich App 275, 276-278; 721 NW2d 269 (2006), where the defendant, who was convicted of kidnapping, felonious assault, and possession of a firearm during the commission of a felony, held his girlfriend at gunpoint for over 9 hours, repeatedly threatened to kill her, removed bullets from the gun and told her that they had her name on them, and told her to think about what it would be like when her son came home to yellow tape around the house.

the course of committing an armed robbery. When defendant struck the second employee on the head, defendant had already obtained the money and both employees were wholly compliant. Striking the second employee once defendant had already effectuated the crime evidenced that defendant was not merely threatening physical harm, but was in fact willing to physically harm the employees despite their compliance. This additional use of force during the robbery was entirely unnecessary for the crime's successful commission and was thus intended to "substantially increase" the victims' fear and anxiety by subjecting them to intense or extreme fear and anxiety beyond what was necessary to commit the offense. Therefore, I agree with the majority that the trial court did not clearly err when assessing 50 points under OV 7 in *Glenn*.

V. CONCLUSION

I disagree with the majority because it errs by holding that the phrase "conduct designed to substantially increase the fear and anxiety of the victim" must be interpreted independently and without reference to the other three categories under which OV 7 can be scored. In doing so, the majority fails to consider the "conduct designed" category in light of the entirety of the OV 7 statute, the sentencing guidelines statutory scheme, and the history of the OV 7 statute. Instead, I would hold that to be properly scored under OV 7, "conduct designed to substantially increase the fear and anxiety of the victim" must rise to the same class as sadism, torture and excessive brutality, and that the defendant's conduct must have been intended to cause a victim intense or extreme fear and anxiety beyond the fear and anxiety that is necessary to commit the crime at issue.

HARRIS v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 144579. Argued March 6, 2013 (Calendar No. 7). Decided July 29, 2013. Rehearing denied, 495 Mich ___.

Brent Harris filed an action in the Oakland Circuit Court against Auto Club Insurance Association (ACIA), seeking to recover a duplicate payment for medical expenses incurred as the result of a motorcycle-motor vehicle accident, which had been paid directly to providers by his health insurer, Blue Cross Blue Shield of Michigan (BCBSM). Harris asserted that ACIA was required to pay him directly the same amounts paid by BCBSM to any healthcare provider for the medical expenses. ACIA filed a third-party complaint against BCBSM and Harris filed an amended complaint naming BCBSM as a defendant. The circuit court, Rudy J. Nichols, J., granted summary disposition in favor of BCBSM and ACIA, concluding that because ACIA's policy was uncoordinated, ACIA was the primary insurer, and that the BCBSM certificate coordinated benefits with the no-fault policy. Relying on the health insurance contract language, the circuit court determined that BCBSM was not required to pay for care and services for which Harris did not have to pay or for which he would not have been charged if he did not have coverage. Harris appealed, challenging only the circuit court's order dismissing his claims against BCBSM. In a split decision, the Court of Appeals, O'CONNELL, P.J., and DONOFRIO, J., (MURRAY, J., concurring in part and dissenting in part), reversed the circuit court order, concluding that the BCBSM certificate did not coordinate with ACIA's no-fault policy. It further determined that Harris had incurred expenses when he sought treatment for his injuries that arose from the motor vehicle accident and that once he became liable for those expenses, BCBSM was in turn liable to cover those expenses regardless of the fact that ACIA had paid those bills as PIP benefits. Unpublished opinion per curiam of the Court of Appeals, issued December 27, 2011 (Docket No. 300256). The Supreme Court granted BCBSM's application for leave to appeal to determine whether Harris was entitled to receive a double recovery from both ACIA and BCBSM of medical expenses arising from a motorcycle accident involving a motor vehicle. 491 Mich 933 (2012).

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

An individual injured in a motorcycle-automobile accident who receives personal protection insurance (PIP) benefits by statute under MCL 500.3114(5)(a) of the no-fault act, MCL 500.3101 *et seq*., does not legally have to pay the medical expenses incurred as a result of the accident; rather, the no-fault insurer that is legally assigned under MCL 500.3114(5) is responsible. If an insured's health insurance policy provides that it is not liable for medical expenses that the insured does not legally have to pay, the insured may not receive double recovery from the health insurer for those medical expenses paid as PIP benefits by the legally designated no-fault insurer under MCL 500.3114(5).

Under certain circumstances, an insured who has elected an uncoordinated no-fault policy may obtain double recovery from both the insured's no-fault insurer and the health insurer for medical expenses arising from the same accident. Generally, an insured may procure insurance policies that are uncoordinated with other policies to allow for such double recovery. Under MCL 500.3114(5)(a), with regard to order of priority, a person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle, must first claim PIP benefits from the insurer of the owner or registrant of the motor vehicle involved in the accident. In this case, the Court of Appeals erred by concluding that Harris was entitled to double recovery. Under MCL 500.3114(5)(a), Harris was not obligated to pay his medical expenses because, as a matter of law, ACIA was liable for Harris's PIP benefits. ACIA was liable regardless of when the expenses were incurred and BCBSM's certificate that stated it would not cover those services for which Harris legally did not have to pay precluded Harris from receiving double recovery for those medical expenses.

Reversed in part, trial court judgment reinstated.

Justice CAVANAGH, dissenting, would have affirmed the Court of Appeals' conclusion that Harris legally had to pay the medical expenses at the time he received care and services for injuries resulting from his accident and could thus seek duplicate recovery of those expenses from BCBSM.

INSURANCE — NO-FAULT — PIP BENEFITS — MOTORCYCLE-AUTOMOBILE ACCIDENT — MEDICAL EXPENSES — DOUBLE RECOVERY.

An individual injured in a motorcycle-automobile accident who receives personal protection insurance (PIP) benefits under

MCL 500.3114(5)(a) of the no-fault act, MCL 500.3101 *et seq*., does not legally have to pay the medical expenses incurred as a result of the accident; the no-fault insurer that is legally assigned by statute is responsible for those medical expenses; if an insured's health insurance policy provides that it is not liable for medical expenses that the insured does not legally have to pay, the insured may not receive double recovery from the health insurer for those medical expenses paid as PIP benefits by the legally designated no-fault insurer (MCL 500.3114[5]).

Anselmi & Mierzejewski, P.C. (by *Kurt A. Anselmi*), for Brent Harris.

Hom, Killeen, Siefer, Arene & Hoehn (by *Elaine I. Harding*) and *John A. Lydick*, for Auto Club Insurance Association.

Bodman PLC (by *James J. Walsh, Jonathon A. Young,* and *Thomas J. Rheaume, Jr.*) and *Robert A. Phillips*, for Blue Cross Blue Shield of Michigan.

PER CURIAM. The significant question in this case is whether a person claiming personal protection insurance (PIP) benefits under MCL 500.3114(5)(a) for injuries arising from a motor vehicle accident may also recover an award for those same injuries under a health insurance policy that contains a provision titled, "Care and Services That Are Not Payable," which provides, "[w]e do not pay for the following care and services: Those for which you legally do not have to pay or for which you would not have been charged if you did not have coverage under this certificate." The Court of Appeals majority in this case held that because plaintiff Brent Harris, for purposes of the no-fault act, incurred expenses on receiving treatment,[1] he could seek a

[1] MCL 500.3107(1)(a) provides that "personal protection insurance benefits are payable for . . . [a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and

duplicate award from his health insurer, third-party defendant Blue Cross Blue Shield of Michigan (BCBSM), because these were services for which Harris legally had to pay.[2] We conclude that, regardless of when Harris incurred expenses arising from the motor vehicle accident, he simply did not legally have to pay these expenses. When Harris sought treatment for his injuries under MCL 500.3114(5)(a), the legally assigned insurer, defendant Auto Club Insurance Association (ACIA), became liable for all of Harris's PIP expenses. Because BCBSM's policy plainly provides that BCBSM is not liable for expenses that Harris does not legally have to pay, Harris cannot collect expenses from both ACIA and BCBSM. Accordingly, we reverse in part the December 27, 2011 judgment of the Court of Appeals and reinstate the judgment of the Oakland Circuit Court.

I. FACTS AND PROCEEDINGS

On July 11, 2008, Harris was injured when he was struck by a motor vehicle while operating a motorcycle. Harris had a health insurance policy, referred to as a Professional Services Group Benefit Certificate (the policy or the certificate), with BCBSM. The owner of the motor vehicle that struck Harris was insured under a no-fault insurance policy issued by ACIA. Under the no-fault act, MCL 500.3101 *et seq*., the statutory definition of motor vehicle expressly "does not include a motorcycle."[3] However, MCL 500.3114 provides in relevant part:

> (5) A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the

accommodations for an injured person's care, recovery, or rehabilitation."

[2] *Harris v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2011 (Docket No. 300256), p 4.

[3] MCL 500.3101(2)(e).

> involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

Accordingly, if Harris claimed PIP benefits, ACIA would be responsible for paying those benefits, despite the fact Harris did not purchase a no-fault insurance policy from ACIA.

Following his accident, Harris sought insurance coverage for his medical bills from both ACIA and BCBSM. Harris expected BCBSM to pay the bills submitted by his medical care providers and expected ACIA to send a check directly to him in the same amount as the BCBSM payments. BCBSM initially paid $19,801.75 in benefits, but then retracted those payments and denied coverage, relying on provisions in its policy that stated BCBSM would not pay for medical care and services for which benefits are paid by another plan. In light of BCBSM's denial of coverage, ACIA paid all Harris's medical bills, including those bill payments retracted by BCBSM. ACIA has paid in excess of $85,000.

Harris then filed this lawsuit naming ACIA as the only defendant. Harris alleged that ACIA was required to pay him directly the same amounts paid by BCBSM to any healthcare provider for medical expenses arising from the motor vehicle accident. ACIA subsequently filed a third-party complaint against BCBSM. Harris then filed an amended complaint naming BCBSM as a defendant.

BCBSM and Harris filed motions for summary disposition. ACIA opposed the motions. The circuit court determined that because ACIA's policy was uncoordi-

nated,[4] ACIA was the primary insurer. The court also opined that the BCBSM certificate coordinated benefits with the no-fault policy. The court emphasized that the BCBSM certificate included a "Coordination of Benefits" provision. The court additionally relied on the "Physician and Other Professional Provider Services That Are Not Payable" and "Care and Services That Are Not Payable" provisions in concluding that BCBSM does not pay for care and services for which the insured legally does not have to pay or for which the insured would not have been charged if the insured did not have coverage. The court held that ACIA was primarily responsible for the payment of Harris's medical expenses. Accordingly, the court denied Harris's motion for summary disposition, but granted BCBSM's motion, resulting in the dismissal of all the claims asserted against BCBSM by Harris and ACIA. The court also granted summary disposition in favor of ACIA against Harris.

Harris appealed, challenging only the circuit court's order dismissing his claims against BCBSM. ACIA did not appeal the circuit court's order dismissing its third-party claims against BCBSM. A split panel of the Court of Appeals reversed the circuit court's order to the extent that it granted summary disposition to BCBSM.[5] The majority characterized the dispute as "whether the BCBSM certificate coordinates with the no-fault policy."[6] The majority rejected BCBSM's reliance on several provisions in the certificate that the circuit court relied on to preclude coverage.[7]

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[4] An uncoordinated policy means that an insurer pays benefits regardless of other insurance the insured may have. *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 747; 514 NW2d 150 (1994).

[5] *Harris*, unpub op at 2.

[6] *Id*. at 1.

[7] *Id*. at 2-4.

The majority expressly addressed the provision of the BCBSM certificate titled, "Care and Services That Are Not Payable,"[8] which as previously stated, provides: "We do not pay for the following care and services: Those for which you legally do not have to pay or for which you would not have been charged if you did not have coverage under this certificate." Rather than applying the language of this provision, however, the majority looked to the Court of Appeals' decisions in *Shanafelt v Allstate Ins Co* and *Bombalski v Auto Club Ins Ass'n*.[9] In those cases, the panels "examined the meaning of the term 'incurred' in MCL 500.3107(1) and considered the no-fault insurer's contention that the plaintiff did not 'incur[]' expenses that were paid by the health insurer."[10] As noted by the majority, *Shanafelt* explained that "[t]he primary definition of the word 'incur' is 'to become liable for.' "[11] In applying this definition, *Shanafelt* reasoned that

> [o]bviously, [the] plaintiff became liable for her medical expenses when she accepted medical treatment. The fact that plaintiff had contracted with a health insurance company to compensate her for her medical expenses, or to pay directly the health care provider on her behalf, does not alter the fact that she was obligated to pay those expenses.[12]

Relying on this reasoning, the majority concluded that Harris had incurred expenses when he sought treatment for his injuries that arose from the motor vehicle

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[8] *Id*. at 3-4.

[9] *Id*. at 2-3, citing *Shanafelt v Allstate Ins Co*, 217 Mich App 625; 552 NW2d 671 (1996) and *Bombalski v Auto Club Ins Ass'n*, 247 Mich App 536; 637 NW2d 251 (2001).

[10] *Harris*, unpub op at 3.

[11] *Id*. at 3-4, quoting *Shanafelt*, 217 Mich App at 638.

[12] *Shanafelt*, 217 Mich App at 542-543.

accident, and that once he became liable for those expenses, BCBSM was in turn liable to cover those expenses.[13] The majority concluded in part that the circuit court "erred in determining that the BCBSM certificate coordinated with the no-fault policy."[14]

The majority also addressed BCBSM's contention that *Shanafelt* and *Bombalski* were inapposite because they addressed the no-fault act while the instant case turns on the language of BCBSM's certificate.[15] The majority rejected this claim because the term "incurred" is synonymous with the phrase, "legally obligated to pay."[16] The majority opined that the rationale of *Shanafelt* and *Bombalski* was nonetheless applicable.[17] That is, "that a party receiving services has a legal obligation to pay for them when rendered and incurs the expense even if the expense is paid by an insurer, is applicable here, although the phrase and context are different."[18]

Judge MURRAY partially dissented.[19] Judge MURRAY found controlling the provision in the certificate, titled "Care and Services That Are Not Payable." Judge MURRAY noted that this provision was stated in the present tense, and that "whether we look to the

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[13] *Harris*, unpub op at 4.

[14] *Id*. at 6.

[15] *Id*. at 4.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] Judge MURRAY concurred in the majority's decision to affirm the circuit court's order denying Harris's motion for summary disposition, as well as the dismissal of ACIA, but dissented from the majority's decision to reverse the order granting BCBSM's motion for summary disposition. *Harris*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2012 (Docket No. 300256), p 1 (MURRAY, J., concurring in part and dissenting in part).

factual situation at the time the complaint was filed or when plaintiff submitted his demand upon BCBSM, we know that plaintiff did not legally have to pay anything."[20]

We granted BCBSM's application for leave to appeal, instructing that "[t]he parties shall include among the issues to be briefed whether [Harris] is entitled to a double recovery from both [ACIA] and [BCBSM] of medical expenses arising from a motorcycle accident involving a motor vehicle."[21]

II. STANDARD OF REVIEW

This Court reviews a circuit court's decision on a motion for summary judgment de novo.[22] We also review de novo the proper interpretation of a contract.[23]

III. ANALYSIS

In *Smith v Physicians Health Plan, Inc*,[24] this Court acknowledged that an insured who had elected an uncoordinated no-fault policy may, under certain circumstances, be able to obtain a double recovery from both the no-fault insurer and the health insurer for medical expenses arising from the same accident. "It is when both the no-fault automobile insurance and the health insurance are uncoordinated policies that multiple recovery is possible for the insured."[25] Thus, for

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[20] *Id*. (MURRAY, J., concurring in part and dissenting in part).

[21] *Harris v Auto Club Ins Ass'n*, 491 Mich 933 (2012).

[22] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[23] *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

[24] *Smith v Physicians Plan, Inc*, 444 Mich 743, 752; 747; 514 NW2d 150 (1994).

[25] *Id*. at 752, citing *Haefele v Meijer, Inc*, 165 Mich App 485; 418 NW2d 900 (1987).

example, in *Shanafelt*,[26] the Court of Appeals permitted an insured who had an uncoordinated no-fault policy, and was allegedly injured in a motor vehicle accident, to collect the costs of her PIP benefits from her no-fault insurer despite the fact that the insured's health insurer had already covered the expense.[27]

However, in this case, Harris's claim is fundamentally at odds with those cases. Unlike the claimant in *Shanafelt*, and other cases in which a double recovery of insurance benefits was awarded, Harris is not claiming benefits under a no-fault insurance policy that he or anyone else procured. Harris is neither a third-party beneficiary[28] nor a subrogee[29] of the no-fault policy

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[26] *Shanafelt*, 217 Mich App 625.

[27] Harris also relies on *Bombalski*, but this reliance is misplaced. Admittedly, the facts of *Bombalski* are very similar to the instant case. However, the court in *Bombalski* did not address whether the insured was entitled to a double recovery because the parties agreed that he was. Indeed, "the parties did not dispute [the] plaintiff[-insured]'s entitlement to uncoordinated personal protection benefits from defendant in addition to the coverage provided by BCBSM." *Id*. at 539. Rather, "the only issue in [*Bombalski*] involved [the] [p]laintiff[-insured]'s claim for reimbursement of medical benefits and the rate of that reimbursement." *Id*. That is not the case here.

[28] MCL 600.1405, "Rights of third party beneficiaries," provides in part that:

> [a]ny person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

There is no allegation in this case that the no-fault insurance policy contained any promise to benefit Harris.

[29] A subrogee is defined as "[o]ne who is substituted for another in having a right, duty, or claim." Black's Law Dictionary (9th ed). However,

issued to the person that struck him and thus he is not eligible to receive benefits under that policy. Rather, Harris's right to PIP benefits arises solely by statute. As previously noted, MCL 500.3114 provides in relevant part:

> (5) A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

The Court of Appeals majority erred when it concluded that Harris was covered by the uncoordinated no-fault insurance policy held by the motor vehicle driver involved in the accident. Harris is entitled to PIP coverage because MCL 500.3114(5)(a) designates ACIA as the responsible insurer. This conclusion is consistent with our holding in *Smith*, where we concluded that an insured must pay a premium to obtain insurance policies that provide for double recovery.[30] Harris has simply not shown that he paid the necessary premiums to receive a double recovery.

Under MCL 500.3114(5)(a), Harris was not obligated to pay his medical expenses because, as a matter of law, ACIA was liable for Harris's PIP expenses. This dispo-

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subrogation is based on equitable principles that are not present in this case because Harris has a statutory remedy. *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 132; 485 NW2d 695 (1992).

[30] *Smith*, 444 Mich at 760. We also note that denying Harris double recovery is in accord with the no-fault act's stated objectives to maintain availability of insurance at affordable rates and cost-effective health care, neither of which are promoted when decisions about health care are influenced by the potential of a matching cash grant. *Id*. at 757.

sition is generally consistent with Judge MURRAY's partial dissenting opinion, except that it focused almost entirely on the present tense of the phrase "for which you legally do not have to pay," to determine the applicability of MCL 500.3114(5)(a). Judge MURRAY considered only whether Harris had potential liability "at the time the complaint was filed or when [he] submitted his demand upon BCBSM."[31] We conclude, however, that ACIA was liable regardless of when Harris first received treatment, when Harris filed a complaint against BCBSM or when Harris submitted his demand to BCBSM. Consequently, the provision of the BCBSM certificate titled "Care and Services That Are Not Payable," is directly applicable when Harris claimed PIP benefits under MCL 500.3114(5)(a). Regardless of when Harris sought treatment for his injuries, those services are "[t]hose for which [Harris] legally [did] not have to pay . . . ." Accordingly, Harris is not entitled to a double recovery. We reverse in part the December 27, 2011 judgment of the Court of Appeals and reinstate the judgment of the Oakland Circuit Court.

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

CAVANAGH, J. (*dissenting*). I do not join the majority opinion because, in my view, the Court of Appeals did not err by concluding that the applicable language of Blue Cross Blue Shield of Michigan's (BCBSM) certificate at issue in this case does not exclude coverage from BCBSM. Specifically, I do not believe that the Court of Appeals majority erred by reasoning that Harris legally had to pay his medical expenses at the time he received

[31] *Harris*, unpub op at 1 (MURRAY, J. concurring in part and dissenting in part).

care and services and, thus, is not precluded from recovering medical expenses from BCBSM. *Harris v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2011 (Docket No. 300256), pp 3-4. Accordingly, I would affirm the judgment of the Court of Appeals.

GRANGE INSURANCE COMPANY OF MICHIGAN v LAWRENCE

AUTOMOBILE CLUB INSURANCE ASSOCIATION v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket Nos. 145206, 143808. Argued April 11, 2013 (Calendar No. 1). Decided July 29, 2013.

Grange Insurance Company of Michigan brought an action in the Muskegon Circuit Court, seeking a declaratory judgment regarding its responsibility under a no-fault insurance policy issued to Edward Lawrence to reimburse Farm Bureau General Insurance Company of Michigan for personal protection insurance (PIP) benefits it had paid following the death of Josalyn Lawrence, a minor, as the result of an automobile accident. The accident occurred while Josalyn's mother, Laura Rosinski, was driving a vehicle insured by Farm Bureau. Josalyn's father, Edward Lawrence, and Rosinski were divorced at the time of the accident and shared joint legal custody of the child, although Rosinski had primary physical custody. Edward Lawrence was the named insured on an automobile insurance policy issued by Grange. Farm Bureau sought partial reimbursement of the PIP benefits paid, arguing that Grange was in the same order of priority under MCL 500.3115(2), because Josalyn was domiciled in both parents' homes under MCL 500.3114(1). Farm Bureau filed a counterclaim and both insurers filed motions for summary disposition. The circuit court, Timothy G. Hicks, J., granted Farm Bureau summary disposition, finding that Josalyn had two domiciles at the time of her death. Grange appealed. The Court of Appeals, BECKERING, P.J., and OWENS, and RONAYNE KRAUSE, JJ., affirmed the circuit court's order, concluding that Josalyn resided and was domiciled with both parents. The Court of Appeals also held that Grange's policy was invalid because it required a court adjudication of custody to be conclusive for determining a child's "principal residence," which would improperly limit Grange's obligation where the no-fault act does not. 296 Mich App 319 (2012). The Supreme Court granted Grange's application for leave to appeal in Docket No. 145206 to determine whether the minor child of divorced parents can have two domiciles for the purpose of determining coverage under MCL 500.3114(1) of Michigan's no-fault act,

whether a custody order affects the determination of domicile and whether an insurance policy provision giving preclusive effect to a court-ordered custody arrangement is enforceable. 493 Mich 851 (2012).

Automobile Club Insurance Association (ACIA) brought an action in the Ingham Circuit Court, seeking a determination regarding its duty under a no-fault insurance policy for PIP benefits paid by State Farm Mutual Automobile Insurance Company following the death of Sarah Campanelli, a minor, as the result of an automobile accident. At the time of the accident, Sarah's parents, Francis Campanelli and Tina Taylor, were divorced and shared joint legal custody of Sarah, but Campanelli had physical custody, with Taylor allowed reasonable visitation. Soon after the divorce, the family court modified the original judgment of divorce, permitting Campanelli to move and to change Sarah's domicile to Tennessee. When the accident occurred eleven years later, Sarah was staying in Michigan to attend school after a summer visit with her mother. Sarah was fatally injured while a passenger in a car driven by a friend that was insured by State Farm. ACIA, as the insurer of Terry Gravelle, Sarah's uncle and in whose household she resided while in Michigan, paid Sarah's medical bills during the period before her death. ACIA claimed that State Farm was the responsible insurer pursuant to MCL 500.3114(4), arguing that Sarah was not domiciled in Michigan and that ACIA was therefore not responsible for Sarah's PIP benefits under MCL 500.3114(1). State Farm denied liability and both parties filed cross-motions for summary disposition. The circuit court, Joyce Draganchuk, J., granted State Farm summary disposition and ruled that ACIA was responsible for Sarah's PIP benefits, finding that the facts demonstrated that Sarah resided and was domiciled in Michigan in part because there was a lack of evidence of a clear intent to return to Tennessee. ACIA appealed. The Court of Appeals, MARKEY, P.J., and WILDER, and STEPHENS, JJ., reversed, concluding that there was a question of fact as to Sarah's domicile. The Court of Appeals also rejected ACIA's argument that the judgment of divorce and subsequent modification conclusively established Sarah's domicile for purposes of insurance coverage. Unpublished opinion per curiam of the Court of Appeals, issued June 21, 2011 (Docket No. 294324). The Supreme Court heard oral argument on ACIA's application for leave to appeal in Docket No. 143808 to determine whether the judgment of divorce, as amended, conclusively established Sarah's legal residence and domicile in Tennessee or whether she had the capacity to acquire a different legal residence or domicile of choice. 491 Mich 875 (2012).

In an opinion by Justice KELLY, joined by Chief Justice YOUNG, and Justices CAVANAGH and VIVIANO, the Supreme Court *held*:

Consistent with the common law, a child of divorced parents has only one domicile at any given point in time. A family court custody order establishes a child's domicile by operation of law and determines the child's domicile for all purposes, including the no-fault act.

1. Under MCL 500.3114(4)(1), PIP benefits are paid for accidental bodily injury arising out of a motor vehicle accident to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household. As used in the no-fault act, the term "domiciled" is a technical word that is construed according to its peculiar and appropriate meaning. MCL 500.3114(1) incorporates the common-law definition of domicile, which means that place where a person has his fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. While a person may have more than one residence, he may have only one domicile at any point during his or her life. Generally, a domicile is determined by reviewing the person's intent as related to the residence, as well as considering all the facts and circumstances taken together. When deciding to whom insurers would be liable for the payment of PIP benefits, MCL 500.3114(1), there is no evidence that the Legislature intended to deviate from the common-law definition of "domicile" and use of the word evinces an intent to incorporate all common-law legal concepts related to the term. Accordingly, a child, whose parents are divorced and who has more than one legal residence, may have only a single domicile at any one point in time that continues until the child acquires a different one. The holding is consistent with *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477; 274 NW2d 373 (1979), which recognized that the Legislature has sometimes given the term "residence" the equivalent meaning of "domicile"; however, for purposes of the no-fault act, the term "domicile" is not the equivalent of "residence." In *Grange* the Court of Appeals erred by interpreting *Workman* to mean that domicile is the equivalent of residence and that a minor child can be "domiciled" for purposes of MCL 500.3114(1) in multiple residences.

2. The common law recognizes three means of acquiring a domicile: (1) domicile of origin or of nativity, which is established when a person is born; (2) domicile of choice, which occurs when a person replaces his current domicile by choosing another; and (3) domicile by operation of law, which occurs when a person with a legal disability lacks the capacity to acquire a domicile of choice and one is established by operation of law. An unemancipated child, unlike a competent adult, lacks the legal capacity to acquire

a domicile of choice and, therefore, a child's domicile is determined by reference to the domicile of his or her parents. While intent is critical for determining the domicile of an adult, a child's intent is irrelevant and the *Workman* factors that are considered to inform an adult's intent to change his domicile are not applicable when determining a child's domicile. Rather, when a child is born, the child's domicile of origin is that of his or her father and remains the same until a new domicile is acquired through the actions of the child's parents or until that point in time when the minor can acquire a domicile of choice through emancipation or by reaching the age of majority.

3. The common law recognizes that following the divorce of a child's parents and entry of a custody order, the child's domicile is established by operation of law consistent with the terms of the custody order and is determinative of the child's domicile for all purposes, including the no-fault act. This holding is also consistent with the Child Custody Act, MCL 722.21 *et seq*., itself, which entrusts courts with making custody determinations in a child's best interests. In these situations, the terms of the custody order are therefore determinative of a minor child's domicile. In accordance with the common law, which focuses primarily on location in a determination of domicile, the relevant consideration is which parent has physical custody under the terms of the order. For example, a child's domicile is with the parent who is granted primary or sole physical custody under the terms of the custody order, regardless of whether the parents share joint legal custody.

4. The Child Custody Act is consistent with the common-law rule that a person may have only one domicile at any given point in time and there is no express indication that the Legislature intended a different result. That parents are legally bound by the terms of a custody order and, therefore, lack the legal capacity to independently change the child's domicile mandates the conclusion that a child's domicile is established by the court as a matter of law.

5. In *Grange*, the lower courts erred by denying Grange summary disposition. Josalyn was domiciled with Rosinski at the time of her accident because the 2005 judgment of divorce granted Rosinski primary physical custody and the order had never been modified pursuant to the provisions of the Child Custody Act; in addition, Josalyn had not reached the age of majority or become emancipated such that she could acquire a different domicile of her own choosing. The lower courts erred by concluding that Josalyn was domiciled with both parents, erred by failing to recognize the legal effect of the family court order, and erred by applying the

Workman factors that are inapplicable to a minor child whose domicile is set by operation of law. Because Josalyn was not domiciled with Lawrence, his insurer, Grange, was not required to reimburse Farm Bureau under MCL 500.3115(2) for the PIP benefits it paid.

6. In *ACIA*, the lower courts erred by denying ACIA summary disposition. The 1995 judgment of divorce granted Taylor and Campanelli joint legal custody. It granted Campanelli primary physical custody and expressly established Sarah's domicile in Michigan. The judgment was later modified in 1996 by court order changing Sarah's domicile to Tennessee where Campanelli retained primary physical custody. Although Sarah was residing in Michigan with her mother at the time of the accident, her domicile remained in Tennessee as established by the 1996 order. ACIA, the insurer of the Michigan household in which Sarah resided, was not liable for PIP benefits under MCL 500.3114(1).

Grange reversed and remanded to the circuit court for entry of summary disposition in favor of Grange.

ACIA reversed and remanded to the circuit court for entry of summary disposition in favor of ACIA.

Justice ZAHRA, joined by Justices MARKMAN and MCCORMACK, concurred in the result reached by the majority in both *Grange* and *ACIA*. He agreed with the majority that any person, including a minor child, can have only one domicile at any given time and that *Workman* does not stand for the proposition that "domicile" is the equivalent of "residence" for purposes of the no-fault act. He disagreed, however, with the rule the majority adopted for determining the domicile of a child with two legal residences under the Child Custody Act. The majority's holding that the domicile of a child with two legal residences is determined by a family court order establishing physical custody of that child: (1) improperly assumes that a physical custody order is the same as a domicile determination as a matter of law, (2) allows a family court order awarding joint physical custody to establish an alternating domicile system, which is inconsistent with the rule that a person may have only one domicile, and (3) impinges on an insurer's ability to accurately assess its risks when entering into insurance agreements and places an unreasonable burden on insurers to inquire about and interpret family court custody orders. Justice ZAHRA would have held that family court custody orders establish a presumption of domicile that may be rebutted when the child's actual living arrangements are so clearly inconsistent with the family court's custody order that it is reasonable to conclude that the parents have expressly or impliedly reached an agreement regarding the child's domicile. To rebut this presump-

tion, Justice ZAHRA would have required courts to consider the factors traditionally used to assess domicile to determine the domicile of minor children.

1. INSURANCE — NO-FAULT — WORDS AND PHRASES — DOMICILE — RESIDENCE.

Consistent with the common law, a child whose parents are divorced and who has more than one legal residence, may have only a single domicile at any one point in time that continues until the child acquires a different one; when a child is born, the child's domicile of origin is that of his or her father and remains the same until a new domicile is acquired through the actions of the child's parents or until that point in time when the minor can acquire a domicile of choice through emancipation or by reaching the age of majority; the terms "domicile" and "residence" are not the same for purposes of the no-fault act, MCL 500.3101 *et seq*.

2. INSURANCE — NO-FAULT — DOMICILE — OPERATION OF LAW — CUSTODY ORDER.

Following the divorce of a child's parents and entry of a custody order pursuant to the Child Custody Act, MCL 722.21 *et seq*., the child's domicile is established by operation of law consistent with the terms of the custody order and is determinative of the child's domicile for purposes of the no-fault act; a child's domicile is with the parent who is granted physical custody under the terms of the custody order.

Bremer & Nelson LLP (by *Ann M. Byrne*) for Grange Insurance Company of Michigan.

Ward Law, PC (by *Michael D. Ward*), for Farm Bureau General Insurance Company of Michigan.

Hom, Killeen, Siefer, Arene & Hoehn (by *Craig J. Pollard*) and *John A. Lydick*, for Automobile Club Insurance Association.

Bensinger, Cotant & Menkes, P.C. (by *Dale L. Arndt*), for State Farm Mutual Automobile Insurance Company.

Amicus Curiae:

Judith A. Curtis, *Anne Argiroff*, and *Rebecca Shiemke* for the State Bar of Michigan, Family Law Section.

MARY BETH KELLY, J. These cases present two related issues under Michigan's no-fault act:[1] (1) whether a child of divorced parents who has a legal residence in both parents' homes and who is injured in an automobile accident can be "domiciled" in more than one household within the meaning of MCL 500.3114(1); and (2) whether a family court order establishing the custody of minor children is conclusive evidence of a child's domicile for purposes of determining coverage under MCL 500.3114(1). We hold, consistent with traditional definitions of the term "domicile" under the common law and as that term is used in MCL 500.3114(1), that a child of divorced parents has only one domicile at any given point in time. Further, in the event that the child's parents are divorced and a family court has entered an order relating to custody, we hold, consistent with the common law of domicile as it pertains to minors and the legally binding nature of custody orders, that the child's domicile is established by operation of law and that the custody order is thus determinative of the child's domicile for all purposes, including the no-fault act.

In both *Grange* and *ACIA*, the respective judgment of divorce and custody order conclusively established the minor children's domiciles. Accordingly, we reverse the judgment of the Court of Appeals in *Grange*, which erroneously held that a minor of divorced parents can have two domiciles, and we remand to the circuit court for entry of summary disposition in favor of Grange Insurance Company. In *ACIA*, we reverse the judgment of the Court of Appeals, which erred by concluding that a question of fact existed regarding the child's domicile, and we remand to the circuit court for entry of summary disposition in favor of ACIA.

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[1] MCL 500.3101, *et seq.*

I. FACTS AND PROCEDURAL HISTORY

A. *GRANGE v LAWRENCE*

Edward Lawrence and Laura Rosinski were married in 1997 and had two daughters, Katelyn and Josalyn, the latter of whom is the deceased insured in this case. Lawrence and Rosinski divorced in 2005; Rosinski remained in the marital home and Lawrence moved into his parents' home, both located in Muskegon, Michigan. The judgment of divorce granted Lawrence and Rosinski joint legal custody of Josalyn and Katelyn, but Rosinski was given "primary physical custody" of the girls. The judgment of divorce provided Lawrence with frequent parenting time, including alternating weekends, Wednesday evenings, alternating holidays, liberal phone contact, and liberal parenting time when Rosinski was unavailable. The judgment of divorce further provided:

> A parent whose custody or parenting time of a child is governed by this order, shall not change the legal residence of the child except in compliance with [MCL 722.31], which prohibits moving a child out of the State of Michigan or greater than 100 miles from the non-custodial parent without a court order. The party awarded custody must notify the Friend of the Court, in writing, immediately, when the minor child is moved to another address.

On September 24, 2009, eight-year-old Josalyn was a passenger in a car owned and driven by Rosinski when another driver ignored a stop sign and hit Rosinski's vehicle, resulting in fatal injuries to Josalyn. Rosinski and Lawrence were appointed as joint personal representatives of Josalyn's estate.[2]

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[2] At the time of the accident, the 2005 judgment of divorce was still in effect. However, Lawrence had moved into a two-bedroom apartment, while Rosinski continued to reside in the former marital home.

After the accident, Rosinski and Lawrence submitted claims for personal injury protection (PIP) insurance benefits to their respective insurers. Rosinski was the named insured on an automobile insurance policy provided by Farm Bureau General Insurance Company of Michigan (Farm Bureau); Lawrence was the named insured on an automobile insurance policy provided by Grange Insurance Company (Grange). Farm Bureau insured the car that was involved in the accident and Grange did not insure any vehicle involved in the accident. With regard to Rosinski's claim, Farm Bureau paid more than $30,000 in PIP benefits for Josalyn's injuries and death; Grange denied Lawrence's claim for PIP benefits.

Subsequently, Farm Bureau asserted that Grange was in the same order of priority for the payment of PIP benefits because, in its view, Josalyn was "domiciled" in both parents' homes pursuant to MCL 500.3114(1); Farm Bureau thus sought from Grange partial reimbursement of benefits pursuant to MCL 500.3115(2). Grange denied the claim and filed a complaint for declaratory relief, seeking a declaration that Josalyn was domiciled with Rosinski, not Lawrence, at the time of the accident. Grange asserted that it was not required to reimburse Farm Bureau for any of the PIP benefits that Farm Bureau had paid because Josalyn was not "domiciled" with Lawrence at the time of the accident as required by MCL 500.3114(1), and Michigan law does not recognize dual domiciles. Grange further asserted that it was not obligated to pay PIP benefits for Josalyn's injuries because Josalyn was not a named insured under its policy.[3]

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[3] The pertinent portion of Grange's policy provided PIP "benefits to or for an **insured** who sustains bodily injury . . . caused by an accident." The Grange policy defined "insured" to include "**You** or any **family member** injured in an **auto accident**." The Grange policy further defined "family member" as:

Farm Bureau filed a counterclaim seeking a declaratory judgment that Josalyn was domiciled with each of her parents at the time of the accident and that Farm Bureau was entitled to partial reimbursement of the PIP benefits it had paid. Farm Bureau also argued that the Grange policy conflicted with the no-fault act by excluding Josalyn as an insured through its automatic attribution of domicile to the residence of the custodial parent.

Both insurance companies filed motions for summary disposition pursuant to MCR 2.116(C)(10) and the circuit court granted summary disposition to Farm Bureau. Applying the factors that are traditionally used to determine domicile under the no-fault act as set forth in *Workman v Detroit Automobile Inter-Insurance Exchange*[4] and *Dairyland Insurance Co v Auto-Owners Insurance Co*,[5] the circuit court concluded that Josalyn had two domiciles at the time of the accident, one with each parent. The circuit court thus ordered Grange to reimburse Farm Bureau for 50 percent of the PIP benefits Farm Bureau had paid and 50 percent of Farm Bureau's processing expenses.

Grange appealed to the Court of Appeals, which affirmed the circuit court's decision.[6] The Court of Appeals rejected Grange's argument that Michigan law

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> [A] person related to **you** by blood, marriage or adoption and whose principal residence is at the location shown on the Declarations page. *If a court has adjudicated that one parent is the custodial parent, that adjudication shall be conclusive with respect to the minor child's principal residence.* [Emphasis added.]

[4] *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 496-497; 274 NW2d 373 (1979).

[5] *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 682; 333 NW2d 322 (1983).

[6] *Grange Ins Co of Mich v Lawrence*, 296 Mich App 319, 325; 819 NW2d 580 (2012).

does not recognize dual domiciles for a minor child of divorced parents because, according to the panel, "[t]he Michigan Supreme Court has . . . determined . . . for purposes of the no-fault act, [that] the terms 'domicile' and 'residence' are 'legally synonymous' " and "nothing in MCL 500.3114(1) . . . limits a minor child of divorced parents to one domicile or defines domicile as a 'principal residence.' "[7] After applying the domicile factors from *Workman* and *Dairyland*, the Court of Appeals concluded that the undisputed evidence established that Josalyn resided with both parents. Regarding the effect of the judgment of divorce, which established primary physical custody with Rosinski, the Court of Appeals stated, "that order does not change the fact that the evidence showed that Josalyn actually resided with both her parents, which is the relevant inquiry under the no-fault act."[8] The Court of Appeals also held that Grange's policy was invalid because the policy, which requires a court adjudication of custody to be conclusive for determining a child's principal residence, would limit Grange's "obligation where the no-fault act does not . . . ."[9]

Grange sought leave to appeal, which this Court granted.[10]

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[7] *Id.* at 323, 324.

[8] *Id.* at 324.

[9] *Id.* at 325.

[10] *Grange Ins Co v Lawrence*, 493 Mich 851 (2012). We directed the parties to address:

> (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. [*Id.*]

B. *ACIA v STATE FARM*

In this case, Sarah is the minor child fatally injured in a motor vehicle accident. Sarah's parents, Francis Campanelli and Tina Taylor, were divorced in Michigan in 1995. The original judgment of divorce granted joint legal custody of Sarah and her sister, Ashley, to both parents and "physical custody" to Campanelli, allowing Taylor only reasonable visitation. Additionally, the judgment of divorce contained the following provision:

> DOMICILE OF THE MINOR CHILDREN
>
> The domicile or residence of said minor children shall not be removed from the State of Michigan without the prior approval of the Court, and that [Campanelli] shall promptly notify the Friend of the Court whenever said children are moved to another address.

A little more than a year after the family court granted the judgment of divorce, Campanelli secured a job in Tennessee that offered a considerable improvement in his career. He moved the family court to modify the original judgment of divorce and successfully obtained an order in February 1996, as the custodial parent, permitting him to change the children's domicile to the state of Tennessee.[11] Under the terms of that order, Taylor was entitled to six weeks of visitation in the summer, and Campanelli and Taylor were to alternate the one-week Easter, Christmas, and winter school vacations. The February 1996 order did not otherwise modify either the joint legal custody originally granted to both parents or the physical custody awarded to Campanelli.

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[11] The family court's order was entitled "Order Permitting Defendant to Change Children's Domicile to the State of Tennessee."

In 2007, when Sarah was 16-years-old, she went to Michigan to stay for the summer with her mother, who lived with Sarah's great-uncle, Terry Gravelle, in Howell, Michigan. During the time that she lived with her mother, Sarah decided that she wanted to get to know Taylor better and, with Campanelli's permission, remained in Michigan with her mother and attended high school that fall.[12]

On November 26, 2007, Sarah was a passenger in a car driven by her friend, Kayla, and insured by State Farm Mutual Automobile Insurance Company (State Farm). Kayla lost control of the car, which careened off the road and into a tree, resulting in what would ultimately be fatal injuries to Sarah. The severe injuries Sarah sustained required medical care. Automobile Club Insurance Association (ACIA), as the insurer of Sarah's uncle, Gravelle, in whose household Sarah resided, paid Sarah's medical bills during the period before her death.[13]

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[12] Taylor provided Sarah with a room of her own in her uncle's home, filed an affidavit of residence with the Howell Public Schools, affirming that Taylor lived in Howell and that Sarah resided with her. Taylor listed Gravelle's address as their residence.

[13] In the meantime, Taylor, after learning that Campanelli was planning to have Sarah flown back to Tennessee for medical care, obtained an ex parte order from the Wayne Circuit Court purporting to transfer Sarah's custody to Taylor and her domicile to Taylor's Michigan address. The Wayne Circuit Court later reversed itself on January 7, 2008, vacating the ex parte order and declaring it void *ab initio*. By that time, however, Sarah had passed away from her injuries. Sarah's parents, however, continued to litigate. Taylor sought to open an estate for Sarah in Livingston County Probate Court, contending that Sarah was domiciled in Michigan when she died. After a two-day testimonial hearing, the probate court ruled that, consistent with the provisions of the family court's orders in the divorce proceedings, Sarah was domiciled in Tennessee, not in Michigan, on the date of her death. The probate court entered orders pursuant to its ruling, declaring Sarah to be a "nonresident of Michigan" and giving Campanelli the right to make decisions regarding funeral arrangements for Sarah.

ACIA commenced an action in the circuit court to secure determinations that (1) Sarah was not "domiciled" in Michigan, (2) ACIA, therefore, was not responsible for Sarah's PIP benefits under MCL 500.3114(1), and (3) State Farm, as the insurer of the vehicle in which Sarah was a passenger when she was injured, was the responsible insurer pursuant to the no-fault priority provision of MCL 500.3114(4). State Farm denied liability and both providers filed cross-motions for summary disposition under MCR 2.116(C)(10).

The circuit court granted summary disposition in favor of State Farm, finding that Sarah "had residency in Michigan with her mother and her uncle at the time of the motor vehicle accident."[14] The circuit court noted the conflicting testimony on the issue of Sarah's intent to return to Tennessee, but then concluded that the record reflected a "lack of evidence of a clear intent to return to Tennessee . . . ." In support, the circuit court cited the absence of any definite actions by Sarah to withdraw from school in Michigan and reenroll in school in Tennessee, coupled with indications that Sarah regarded her mother's residence as her own. Accordingly, because the circuit court found that Sarah was domiciled in Michigan, it ruled that ACIA was responsible for Sarah's PIP benefits under MCL 500.3114(1).

The Court of Appeals reversed, reasoning that the evidence of Sarah's domicile, and in particular her intent, presented a question of fact for resolution by the jury and that summary disposition was, thus, not

[14] The circuit court concluded that it was not bound by the probate court's determination that Sarah was domiciled in Tennessee, see note 13, because the parties to the probate court proceedings were different.

proper for either party.[15] The Court of Appeals also rejected ACIA's argument that the judgment of divorce and subsequent February 1996 order modifying domicile conclusively established Sarah's domicile for all purposes. According to the panel, the family court "did not determine Sarah's domicile for the purpose of insurance coverage, and there is no authority that suggests that [the circuit court in the insurance dispute] was required to adopt the ruling of different jurisdictions deciding the issue for a different purpose for different parties."[16]

State Farm applied to this Court for leave to appeal and ACIA filed a response to that application, as well as a cross-application. We ordered argument on whether to grant the applications or take other action.[17]

II. STANDARD OF REVIEW

This Court reviews de novo a decision to grant or deny a motion for summary disposition.[18] Summary disposition under MCR 2.116(C)(10) is appropriately granted where no genuine issue of material fact remains and the moving party is entitled to judgment as

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[15] *Auto Club Ins Ass'n v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2011 (Docket No. 294324).

[16] *Id*. at 4-5.

[17] *Auto Club Ins Ass'n v State Farm Mut Auto Ins Co*, 491 Mich 875 (2012). We directed the parties to address "whether legal residence and domicile of the insured minor were conclusively established in Tennessee pursuant to the judgment of divorce entered by the Wayne Circuit Court, as amended, or whether the minor had the capacity to acquire a different legal residence or domicile of choice." *Id.*, citing *Vanguard Ins Co v Racine*, 224 Mich App 229, 233; 568 NW2d 156 (1997); MCR 3.211(C)(1) and (3); 8 Mich Civ Jur, Domicile, § 7; Restatement, Conflict of Laws, 2d, §§ 15 and 22(1) comments a and d.

[18] *Elba Twp v Gratiot Co Drain Com'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).

a matter of law.[19] A domicile determination is generally a question of fact; however, where the underlying material facts are not in dispute, the determination of domicile is a question of law for the circuit court.[20] We likewise review de novo issues of statutory interpretation.[21]

III. ANALYSIS

Michigan's no-fault act generally abolishes tort liability arising from the ownership, maintenance, or use of a motor vehicle.[22] Instead, insurance companies are required to provide first party insurance benefits for accidental bodily injury arising out of the use of a motor vehicle, which are commonly referred to as personal protection insurance (PIP) benefits.[23] In this regard, MCL 500.3114(1), which is at the center of the litigation in both these cases, provides the general rule for determining which Michigan insurer is liable to provide PIP benefits. The statute provides, in relevant part:

> [A] personal protection insurance policy described in [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either *domiciled in the same household*, if the injury arises from a motor vehicle accident.[24]

In these cases, the parties dispute whether the injured individual was a relative of the insured who was "domiciled in the same household" as the insured.

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[19] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[20] *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933).

[21] *Elba Twp*, 493 Mich at 278.

[22] See MCL 500.3105.

[23] MCL 500.3107; MCL 500.3108.

[24] MCL 500.3114(1) (emphasis added).

In the instance that more than one insurer's policy is applicable to the injured person under this provision, then the priority provision of MCL 500.3115(2) is triggered and may allow an insurer to recoup benefits from other insurer(s) of equal priority.[25] This is the legal situation in *Grange*, wherein the lower courts held that Josalyn had two "domiciles" within the meaning of MCL 500.3114(1)—one with Lawrence insured by Grange and another with Rosinski insured by Farm Bureau. Pursuant to MCL 500.3115(2), the lower courts thus concluded that Grange is an insurer of equal priority with Farm Bureau, thereby entitling Farm Bureau to partial recoupment of the PIP benefits that it had paid on Josalyn's behalf.

Comparatively, in some instances no insurer's PIP policy is applicable to the injured person under MCL 500.3114(1) because the person is not "the person named in the policy, the person's spouse, [or] a relative of either domiciled in the same household . . . ." In this event, MCL 500.3114(4) may apply such that the insurer of the accident vehicle is liable for PIP benefits to the occupant of a motor vehicle. MCL 500.3114(4) provides:

> Except as provided in [MCL 500.3114(1)-MCL 500.3114(3)], a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

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[25] MCL 500.3115(2) provides:

> When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers.

(a) The insurer of the owner or registrant of the vehicle occupied.

(b) The insurer of the operator of the vehicle occupied.

This is the legal posture of *ACIA*, where the dispute involves whether Sarah was "domiciled with a relative" in Michigan for the purposes of MCL 500.3114(1), or instead, whether MCL 500.3114(4) applies. The circuit court concluded that Sarah was domiciled in Michigan, thus making ACIA, the insurer of Sarah's uncle with whom she resided in Michigan, liable for PIP benefits rather than State Farm, the insurer of the accident vehicle.

The pivotal inquiry in both these insurance-coverage disputes, then, turns on the interpretation of the term "domiciled" as it is used in MCL 500.3114(1). Mainly, the meaning of "domicile," and specifically how a child's domicile is determined, will dictate the ultimate determination of which insurer is liable for PIP benefits in each case. Our inquiry first addresses the preliminary issue raised only in *Grange*: whether a child of divorced parents injured in a motor vehicle accident can be "domiciled" in more than one household for purposes of the no-fault act. We next consider the question posed in both *Grange* and *ACIA*: whether a family court order pertaining to a child's custody conclusively establishes a child's domicile under the no-fault act.

A. DOMICILE AND THE NO-FAULT ACT

Notably, the no-fault act does not define the term "domiciled." The unambiguous language of MCL 500.3114(1) simply states that "a personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either *domiciled* in the same house-

hold . . . ."[26] When construing this statutory language, our main objective is to discern the Legislature's intent through the language plainly expressed.[27] Normally, this Court will accord an undefined statutory term its ordinary and commonly used meaning.[28] However, where the Legislature uses a technical word that has acquired a particular meaning in the law, and absent any contrary legislative indication, we construe it "according to such peculiar and appropriate meaning."[29] The term "domicile" is just such a word that has a precise, technical meaning in Michigan's common law, and thus must be understood according to that particular meaning.

For over 165 years, Michigan courts have defined "domicile" to mean "the place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning."[30] Similarly, a person's domicile has been defined to be " 'that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.' "[31] In this regard, the Court has recognized that "[i]t may be laid down as a settled maxim that every man must have such a national domicile somewhere. It is equally well

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[26] Emphasis added.

[27] *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004).

[28] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[29] MCL 8.3a.

[30] *In re High*, 2 Doug 515, 523 (Mich, 1847).

[31] *Henry v Henry*, 362 Mich 85, 101-102; 106 NW2d 570 (1960), quoting *Williams v North Carolina*, 325 US 226, 236; 65 S Ct 1092; 89 L Ed 1577 (1945) (quotation marks omitted).

settled *that no person can have more than one such domicile, at one and the same time*."[32] From this settled principle, it follows that

> a man retains his domicile of origin [upon his birth] until he changes it, by acquiring another; and so each successive domicile continues, until changed by acquiring another. And it is equally obvious that the acquisition of a new domicile does, at the same instant, terminate the preceding one.[33]

In this way, our common law has recognized that from the time of a person's birth—from childhood through adulthood—a person can only have a single domicile at any given point in time. Indeed, there are few legal axioms as established as the one providing that every person has a domicile, and that a person may have one—and *only* one—domicile.

In furtherance of this understanding of domicile, the common law has necessarily distinguished between the concepts of "domicile" and "residence:"

> The former, in its ordinary acceptation, was defined to be, 'A place where a person lives or has his home,' while '[a]ny place of abode or dwelling place,' however temporary it might have been, was said to constitute a residence. A person's domicile was his legal residence or home in contemplation of law.[34]

Stated more succinctly, a person may have only one domicile, but more than one residence.[35] For purposes of

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[32] *In re High*, 2 Doug at 523 (emphasis added); see also *In re Scheyer's Estate*, 336 Mich 645, 651-652; 59 NW2d 33 (1953) ("One cannot be permanently located in more than 1 place; one cannot be domiciled in more than 1 place; one cannot intend to remain for an extended period of time in more than 1 place.").

[33] *In re High*, 2 Doug at 523.

[34] *Gluc v Klein*, 226 Mich 175, 177-178; 197 NW 691 (1924).

[35] *In re Scheyer's Estate*, 336 Mich at 651-652.

distinguishing "domicile" from "residence," this Court has explained that "domicile is acquired by the combination of residence and the intention to reside in a given place . . . . If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."[36] The traditional common-law inquiry into a person's "domicile," then, is generally a question of intent, but also considers all the facts and circumstances taken together.[37]

Returning to the language of MCL 500.3114(1), there is no indication that the Legislature intended to deviate from this well established common-law meaning of the term "domicile." And, because a person, from the moment of his birth onward, can only have one domicile within the traditional meaning of that term, it follows that a child, regardless of his parents' marital status or his multiple legal residences, may also have only one domicile at any given point in time.[38]

Indeed, rather than there being any indication that the Legislature intended to deviate from this common-law rule, there is, in fact, evidence that the Legislature *favored* this single-location rule. Had the Legislature intended to make insurers liable for PIP benefits for dual coexisting "domiciles," then it would have used the term "resided," not "domiciled," because, as previously

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[36] *Beecher v Common Council of Detroit*, 114 Mich 228, 230; 72 NW 206 (1897).

[37] *In re High*, 2 Doug 523-524 ("The question of domicile, is then, a question of fact and intent, and if these elements are found, the reference of the domicile to one place or another depends upon the comparative weight of the circumstances.").

[38] For reasons we explain later in this opinion, the Child Custody Act, MCL 722.21 *et seq*., which governs the creation of child custody orders, does not abrogate the common-law rule that a person can have only a single domicile and does not create a dual-domicile situation.

explained, a person may have more than one residence at a time, but only one domicile. However, the Legislature instead expressly chose to use the more restrictive term, "domiciled," thereby limiting the universe of insurers that are potentially liable under MCL 500.3114(1). In fact, the Legislature specifically rejected use of the term "residence," as used in the uniform act on which the no-fault act is modeled, in favor of the term "domiciled" in defining those eligible for PIP benefits under MCL 500.3114(1).[39] The Legislature thus affirmatively chose a term that it knew had a particular meaning, and we must accord this legislative choice its full weight when determining the Legislature's intent.

Therefore, given the absence of any indication that the Legislature intended a contrary meaning, the Legislature's use of the term "domiciled," evinces an intent to incorporate all those common-law legal concepts related to that term, including the law of domicile as it relates to minors more fully addressed below. Accordingly, consistent with the traditional common-law principle that a person may have only one domicile at a given point in time, we hold that a child, whose parents are divorced and who has more than one legal residence, may have only a single domicile at any one point in time that continues until the child acquires a different one.

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[39] This Court has acknowledged that the no-fault act is modeled after the Uniform Motor Vehicle Reparations Act, see *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1984). Section 1(a)(3)(ii) of 14 ULA, Civil Procedural and Remedial Laws, Uniform Motor Vehicle Accident Reparations Act, p 43, includes those "*residing* in the same household with a named insured" within the definition of "basic reparation insured," of whom are eligible for benefits. See *id*. at § 4(b), p 56. In other words, under the model act, a person need only *reside* in the same household as the policy holder to be considered a basic reparation insured who may claim benefits against the policyholder's insurance company. *Id*. at 57.

Farm Bureau, however, suggests that we should reach the opposite conclusion—that a child of divorced parents who has two legal residences may also have two coexisting domiciles, one with each parent. In support, Farm Bureau, like the Court of Appeals in *Grange*, asserts that our decision in *Workman* specifically recognized "residence" and "domicile" to be legally synonymous for purposes of MCL 500.3114(1), meaning that, just as a person can have more than one residence, a person can also have more than one "domicile." In *Workman*, the seminal case in which we interpreted the phrase "domiciled in the same household" as used in MCL 500.3114(1), we considered whether the claimant, the insured's adult daughter-in-law, was domiciled in the same household as the insured. After noting that no caselaw interpreted the phrase, "domiciled in the same household," we articulated a flexible multi-factor test to aid courts in determining domicile, in which no one factor is determinative.[40] The factors to be considered included:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises, (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household . . . .[41]

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[40] *Workman*, 404 Mich at 495-496.

[41] *Id.* at 496-497 (citations omitted). Later, in *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App at 682, the Court of Appeals added five more factors relevant for determining no-fault domicile, with a particular focus on adult children of an insured who may have complicated living arrangements:

In articulating this test, the Court stated:

> Although the statutory language of [MCL 500.3114(1)] refers to persons "*domiciled* in the same household" as an insured, we believe this body of law [that deals with the question of whether a person is a 'resident' of an insured's 'household' under particular insurance policies,] is analytically applicable to the consideration before us. We conclude this because, in this state, *the terms "domicile" and "residence" are legally synonymous (except in special circumstances)*.[42]

It is this final phrase—"the terms 'domicile' and 'residence' are legally synonymous"—on which Farm Bureau and the Court of Appeals rely. This statement, however, when read in context of the entire opinion, does not stand for the proposition that domicile is the equivalent of residence under MCL 500.3114(1). Rather, *Workman* merely acknowledged that, generally, "residence" has sometimes been given the equivalent

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> Other relevant indicia of domicile include such factors as [1] whether the claimant continues to use his parents' home as his mailing address, [2] whether he maintains some possessions with his parents, [3] whether he uses his parents' address on his driver's license or other documents, [4] whether a room is maintained for the claimant at the parents' home, and [5] whether the claimant is dependent upon the parents for support.

The *Workman-Dairyland* multifactored framework comprises the one now commonly employed by Michigan courts when a question of fact exists as to where a person is domiciled.

[42] *Workman*, 404 Mich at 495 (second emphasis added). In support of the statement, "the terms 'domicile' and 'residence' are legally synonymous," *Workman* provides the following in footnote 4, *id*. at 495 n 4:

> *Gluc v Klein*, 226 Mich 175, 178; 197 NW 691 (1924); *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933); *Reaume & Silloway, Inc v Tetzlaff*, 315 Mich 95; 23 NW2d 219 (1946). For an example of such a "special circumstance", see *School District No 1, Fractional, of Mancelona Twp v School District No 1 of Custer Twp*, 236 Mich 677, 681; 211 NW 60 (1926); *Ortman v Miller*, 33 Mich App 451, 458; 190 NW2d 242 (1971).

meaning of "domicile." *Workman* did not, however, establish that interpretation as an absolute rule. Indeed, this point is bolstered by the cases *Workman* cites in support of its statement that "the terms 'domicile' and 'residence' are legally synonymous." *Workman* first cited to *Gluc v Klein*,[43] where this Court recognized the traditional common-law distinction between "residence" and "domicile," but noted that sometimes the Legislature has given residence the same meaning as domicile. We later made the same point in both *Hartzler v Radeka*[44] and *Reaume & Silloway, Inc v Tetzlaff*.[45] Further, the two cases *Workman* cited as "special circumstances" in which "domicile" and "residence" *are not* synonymous both involved determining a minor's domicile for purposes of applying relevant statutes.[46]

However, the corollary—that domicile has sometimes been given the same meaning as residence—is simply not true. This Court has never interpreted "domicile" to be the equivalent of "residence," as demonstrated by the cases *Workman* cites and the preceding discussion regarding the common-law meaning of domicile. Indeed, *Workman* itself cannot reasonably be interpreted to advocate such a conclusion, given that *Workman* adopts a multifactor domicile test that is analytically the same as the traditional domicile test employed for more than a century at common law. Stated otherwise, *Workman* is entirely consistent with our conclusion

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[43] *Gluc*, 226 Mich at 175, 178.

[44] *Hartzler*, 265 Mich at 451, 452.

[45] *Reaume & Silloway, Inc*, 315 Mich at 95, 99.

[46] See *Sch Dist No 1 Fractional of Mancelona Twp*, 236 Mich at 681 (concluding that the Legislature, in the context of a school statute, intended to give the terms "residence" and "domicile" their traditional, distinctive common-law meanings); and *Ortman*, 33 Mich App at 458 (reaching the same conclusion in the context of a motor vehicle accident claims fund statute).

that the term "domicile" is to be interpreted the same as its common-law meaning.

Our holding thus clarifies, that to the extent that *Workman* has been understood to imply that "domicile" and "residence" retain no independent significance for the purposes of the no-fault act, such a conclusion is not valid and that "domicile" must be understood consistent with its historical underpinnings. Further, although *Workman* recognized that "domicile" and "residence" are often used interchangeably by the Legislature in other contexts and, therefore described the terms as synonymous in those situations, *Workman* also explained that it is often necessary to distinguish between the terms consistent with the Legislature's intent, as in the instant case.[47]

The Court of Appeals in *Grange* therefore erred by interpreting *Workman* to mean that domicile is the equivalent of residence and that a minor child can be "domiciled" for purposes of MCL 500.3114(1) in multiple residences.[48] Neither *Workman* nor the plain lan-

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[47] Similarly, see *Feaster v Portage Pub Sch*, 451 Mich 351, 356; 547 NW2d 328 (1996) (quoting *Feaster v Portage Pub Sch*, 210 Mich App 643, 657; 534 NW2d 242 (1995), rev'd 451 Mich 351 (1996), in turn citing *Sch Dist No 1 Fractional of Mancelona Twp*, 236 Mich at 681-682), where this Court more recently reasserted the legal difference between the terms "domicile" and "residence" in the context of applying school statutes to minor children, concluding that "[i]t is well established that residency for educational purposes is not the equivalent of legal domicile." Likewise, construing "domicile" and "residence" as synonymous under the no-fault act would entirely defeat the specific legislative choice to employ the more restrictive term "domiciled" in place of broader term "resided."

[48] For this same reason, Farm Bureau's suggestion that this Court follow the holding of a Sixth Circuit Court of Appeals case, *Walbro Corp v Amerisure Cos*, 133 F3d 961 (CA 6, 1988), is unavailing. In *Walbro*, the Sixth Circuit interpreted *Workman* to permit dual domiciles where the minor child had a legal residence with both parents as a result of a joint legal and physical custody order. Aside from its lack of any precedential value, *Walbro* misconstrued *Workman* and the statutory language of MCL

guage of MCL 500.3114(1) support this conclusion. The Court of Appeals' holding in *Grange*, and Farm Bureau's adherence to that position, is plainly inconsistent with our jurisprudence regarding the meaning of "domicile" and the clear language of MCL 500.3114(1) which, as we have explained, incorporates the common-law meaning of that term.

B. DETERMINING A CHILD'S DOMICILE

Our holding, that a child may have only one domicile at any one time consistent with traditional common-law principles, does not establish how a child's single domicile is determined. *Workman* and its progeny applying the traditional domicile test defined domicile in relation to an adult but, for reasons that we will explain, these factors are not helpful in determining a child's domicile. To resolve how a child's domicile is determined—and given our conclusion that the Legislature intended that the term "domiciled," as used in MCL 500.3114(1), be interpreted consistent with its common-law meaning—we further consider the law of domicile as it pertains to minors.

i. THE COMMON LAW OF DOMICILE PERTAINING TO MINORS

Our common law recognizes three means of acquiring a domicile, which are generally applicable to all persons depending on the factual circumstances, including: (1) domicile of origin or of nativity; (2) domicile of choice; and (3) domicile by operation of law.[49] A domicile of origin or of nativity is established when a person is

500.3114(1) in the same manner as the Court of Appeals in *Grange* as permitting a person to have more than one domicile at a given point in time. *Walbro* also wrongly applied, for reasons we explain later in this opinion, the *Workman* domicile factors to determine the child's domicile.

[49] 8 Mich Civ Jur, Domicile, § 1.

born, fulfilling the maxim that every person has a domicile from the time of birth.[50] Meanwhile, a domicile by choice occurs when a person replaces his current domicile by choosing another, consistent with the proposition that every person must have a domicile until a new domicile is determined. Finally, a domicile by operation of law occurs when a person with a legal disability lacks the capacity to acquire a domicile of choice, and thus the domicile is established by operation of law.[51]

Typically, as indicated in the preceding discussion and demonstrated by the *Workman* factors, an adult acquires a new domicile by choosing one of his or her choice, which makes the question of intent a preeminent concern in determining an adult's domicile. One of the requisites for acquiring a domicile of choice, then, is the *legal capacity* necessary to form the intent required to select a new domicile.[52]

Regarding children, a child's ability to acquire a new domicile is limited in ways that an adult's ability to acquire a domicile is not. This is because, for purposes

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[50] See *In re High*, 2 Doug at 523-524.

[51] Restatement, Conflict of Laws, 2d, §§ 22, 23; 8 Mich Civ Jur, Domicile, § 5.

[52] Comments a and b of the Restatement, § 15 provide:

> a. Requirements for acquisition of domicil of choice. The requirements for acquiring a domicil of choice are (1) *legal capacity to do so*, (2) physical presence as described in § 16 and (3) the existence of the attitude of mind described in § 18 toward the place in question. . . .
>
> b. A person may acquire a domicil of choice if
>
> (1) having had a domicil by operation of law, such as a domicil of origin, he acquires a domicil of choice in a place other than his former domicil; or
>
> (2) having had a domicil of choice in one place, he acquires a new domicil of choice in another place. [Emphasis added.]

of our legal system, an unemancipated child, unlike a competent adult, lacks the legal capacity to make legally binding determinations for him or herself and, therefore, a child lacks the *capacity* to acquire a domicile of choice.[53] Thus, while intent is critical for determining the domicile of an adult, a child's intent regarding domicile is simply irrelevant, and the traditional factors applied in determining an adult's domicile are likewise irrelevant. Instead, the child's domicile is determined by reference to the domicile of his or her parents.[54] For instance, our common law has recognized that when a child is born, the child acquires a domicile of origin, which is that of his father.[55] The child's domicile of origin remains the child's domicile until a new domicile is acquired through the actions of the child's parents or until that point in time when the minor, either through emancipation or by reaching the age of majority, can acquire a domicile of choice.[56]

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[53] See *id*. It is basic black letter law that an unemancipated minor lacks the legal capacity to acquire a domicile of choice. See *Yarborough v Yarborough*, 290 US 202, 211; 54 S Ct 181; 78 L Ed 269 (1933) ("[Minor child] was not capable by her own act of changing her domicile."); *Miss Band of Choctaw Indians v Holyfield*, 490 US 30, 48; 109 S Ct 1597; 104 L Ed 2d 29 (1989) ("[M]ost minors are legally incapable of forming the requisite intent to establish a domicile . . . ."). Our Legislature has recognized that unemancipated minors lack the necessary legal capacity to acquire a domicile of choice by expressly granting emancipated minors "the right to establish a separate domicile." MCL 722.4e(1)(d).

[54] See *Holyfield*, 490 US at 48 ("[Generally, a child's] domicile is determined by that of their parents."); see also *Lamar v Micou*, 112 US 452, 470; 5 S Ct 221; 28 L Ed 751 (1884) (stating the general rule that the domicile of an infant follows that of his father).

[55] See *In re High*, 2 Doug at 523-524 (recognizing that a child acquires a domicile of origin upon birth that is the same as his parents); *Hering v Mosher*, 144 Mich 152, 154; 107 NW 907 (1906) (noting that a child's domicile of origin is the same as his father's domicile).

[56] See *In re High*, 2 Doug at 524 (explaining that a child who "was born in Vermont, about the year 1812, where he continued to reside with his parents, who were domiciled there, until he went south some time prior to

The inquiry into a child's domicile becomes more complicated when the child's parents are divorced. Our common law, however, has accounted for these types of familial situations. Specifically, nearly a century ago in *In re Volk*,[57] this Court considered the domicile of a child for purposes of determining whether Michigan courts must accord full faith and credit to Ohio judgments pertaining to a child. In that case, the parents of the minor child had previously lived in Ohio, but after their divorce the mother established a new domicile in Michigan. The Court explained:

> *[U]nder the decree of divorce, the mother was given [the child's] unrestricted custody. His domicile thereafter became that of his mother*, and, when she removed to this State and became domiciled here, the domicile of the child was in Michigan.[58]

By acknowledging that the child's domicile changed by operation of law as a result of the decree of divorce, this Court expressly recognized that a child's domicile, upon the divorce or separation of the child's parents, is the same as that of the parent to whose custody *he has been legally given* pursuant to a custody order.[59] More simply

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1832, and before he had attained the age of twenty-one[,]" was domiciled in Vermont, as "Vermont, then, was *the domicile of his birth or nativity . . . and it continued to be his domicile until he acquired another*, which he could not do until he arrived at full age . . . ." [emphasis added]). Indeed, in the instance where a child's parents remain married, when the parents acquire a new domicile of choice, the child also acquires that same domicile consistent with the parents' intent. Under these circumstances, because the child's domicile is determined in relation to his parents' domicile, the *Workman* factors remain relevant only to the extent that they are used to determine the parents' intentions. See *Holyfield*, 490 US at 48.

[57] *In re Volk*, 254 Mich 25; 235 NW 854 (1931), overruled in part on other grounds by *Hentz v Hentz*, 371 Mich 335 (1963).

[58] *In re Volk* at 31-32 (emphasis added).

[59] The United States Supreme Court recognized the same principle in *Yarborough*, 290 US at 211, when it indicated that the child's "domicile

put, *In re Volk* held that a custody determination is determinative of a child's domicile.[60] Under our common law, then, a child's domicile upon the divorce of his parents and entry of a custody order is established by operation of law consistent with the terms of the custody order.

We reaffirm these common-law principles and, in doing so, we emphasize that domicile is a singular concept. Just as a person does not have two domiciles, a person likewise does not have a domicile set by operation of law for some purposes and perhaps a different domicile for other purposes—such as for consideration under the no-fault act or any other statute that uses the term "domicile." A person's domicile for one purpose is his domicile for all purposes; similarly, a child does not have a domicile set by court order only for certain purposes, but not others.[61] The Legislature made a deliberate choice in selecting the term "domiciled" in

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continued to be [the same as her father's] until entry of the [divorce] judgment in question [which granted the mother custody of the child]." Likewise, the Restatement, § 22, comment d states in part, "A child's domicil, in the case of the divorce or separation of his parents, is the same as that of the parent to whose custody he has been legally given."

[60] *In re Volk*, 254 Mich at 31-32. Similarly, and more recently, in *Vanguard Ins Co v Racine*, 224 Mich App 229, 233; 568 NW2d 156 (1997), the Court of Appeals noted that a party has only one domicile, and, in the case of a minor child of divorced parents, the one domicile would be that parent's home where the minor "spent the majority of his time and where [the parent] had *physical custody . . . under the divorce judgment*." (Emphasis added.)

[61] In an effort to avoid creating a two-domicile situation under its rebuttable presumption test, i.e., the concurrence would allow a child to have one domicile for purposes of the no-fault act and another different domicile in the family law context, the concurrence argues that the family court lacks the authority to determine a minor child's domicile in its custody orders. This position, however, conflicts with the concurrence's rebuttable presumption test, which recognizes the family court's authority in this regard by treating the custody order as presumptive evidence of a minor child's domicile.

Michigan's no-fault act, and where domicile is set by operation of law, that determination must be given full legal effect.

Our analysis could end with articulation of this common-law rule and affirmation of these principles. We would be remiss, however, not to acknowledge that child custody orders are created pursuant to the provisions of the Child Custody Act,[62] which was enacted 40 years after *In re Volk* was decided. Consequently, because we have concluded that MCL 500.3114(1) incorporates the common law of domicile, which provides that a custody order is determinative of a child's domicile, it is necessary to further consider whether the Child Custody Act is consistent with this common-law directive. We conclude that the Child Custody Act *is consistent* with the common-law rule and that the Act's provisions enforce the traditional determinations regarding what entities have the *legal capacity* to establish a minor child's domicile.

ii. THE CHILD CUSTODY ACT AND DOMICILE

The Child Custody Act governs the creation of child custody orders and provides a comprehensive statutory scheme for resolving custody disputes.[63] With it, the Legislature has sought to promote the best interests of children, which is the hallmark of any custody order. To this end, the Legislature has charged courts, in any dispute regarding custody, with "declar[ing] the child's inherent rights and establish[ing] the rights and duties as to the child's custody . . . in accordance with this act."[64]

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[62] Child Custody Act, MCL 722.21 *et seq*.

[63] MCL 722.26.

[64] MCL 722.24(1).

At the outset, we note that the Child Custody Act is consistent with the notion that a child may have only a single domicile at any given point in time. Nowhere does the Child Custody Act indicate that a child may have dual domiciles, as Farm Bureau suggests. Rather, while the Child Custody Act permits a child to have a "legal residence with each parent," that language serves merely as an acknowledgment that a child may have more than one *residence*.[65] Absent an express indication that the Legislature intended a different result, we will not presume that the Legislature intended to modify the common-law rule applicable to children and adults alike that a person may have only a single domicile at a given point in time.[66]

However, no provision of the Child Custody Act expressly provides that an order establishing custody or domicile is conclusive evidence of a child's domicile for purposes of the no-fault act or otherwise. Moreover, the Act allows for myriad possible scenarios in postdivorce familial relationships, recognizing different combina-

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[65] See MCL 722.31, which pertains to the requirements necessary to change a child's residence, and provides in part that "[a] child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent." Notably, the caselaw addressing disputes related to motions for a change of residency also interchangeably describe these motions as motions for a change of domicile. See *Rains v Rains*, 301 Mich App 313; ___ NW2d ___ (2013); *McKimmy v Melling*, 291 Mich App 577, 580-582; 805 NW2d 615 (2011). The courts loose use of the terms "residency" and "domicile" in the context of motions to change residency under MCL 722.31, however, has no impact on the Legislature's express decision to use the term "residence," as opposed to domicile, and does not inform the meaning of the Child Custody Act.

[66] See Const 1963, art 3, § 7 (indicating that the common law remains in force until it is "changed, amended or repealed"); see also *Dawe v Dr Reuven Bar-Levav & Assocs, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010) ("[T]he Legislature 'should speak in no uncertain terms' when it exercises its authority to modify the common law.").

tions of legal and physical custody, and offering flexibility in terms of parenting time arrangements.[67] Ultimately though, we believe that the Child Custody Act and related court rules lend further support to the conclusion that a child's domicile is established by a custody determination of the family court because that entity is the single entity entrusted by our laws with the *capacity* to determine domicile under these circumstances.

Once a custody order is entered pursuant to a judgment of divorce or otherwise, that custody order is legally binding on the parents and the order cannot be modified absent court approval or compliance with the applicable provisions of the Child Custody Act.[68] Because parents are legally bound by the terms of the custody order, the order therefore negates the parents'

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[67] For example, MCL 722.26a recognizes the possibility of "joint custody," which may consist of either joint physical custody or joint legal custody or both joint physical and legal custody. MCL 722.26a(7) defines "joint custody" to mean

> an order of the court in which 1 or both of the following is specified:
>
> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

"Although not specifically designated in the statute, the custody described in [MCL 722.26a(7)(a)] is commonly referred to as joint physical custody, and that described in [MCL 722.26a(7)(b)] is referred to as joint legal custody." *Dailey v Kloenhamer*, 291 Mich App 660, 670; 811 NW2d 501 (2011).

[68] See *Harvey v Harvey*, 470 Mich 186, 194; 680 NW2d 835 (2004) (indicating that custody orders are binding once entered by court order); *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009) (indicating that a family court's custody order is valid and binding for all purposes until properly set aside or otherwise modified).

legal capacity, which is necessary to establish a domicile of choice for the minor child that is different from that established in the custody order. Specific provisions of the Child Custody Act support the notion that a parent's ultra vires acts do not, as a matter of law, effect a change in a child's court-ordered domicile: If a parent wishes to modify a custody order, the Act requires a parent to move for modification of the custody order and to demonstrate a proper cause or change of circumstances related to the established custodial environment.[69] And, in the instance that a parent seeks to change the child's legal residence, the parent is prohibited from moving a child across state lines without court approval and, in some situations, is prohibited from moving the child more than 100 miles without prior court approval.[70] Therefore, that parents are legally

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[69] See MCL 722.27(1)(c), which indicates that a family court may "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . [and that the] court shall not . . . change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."

[70] See MCL 722.31, which provides in relevant part:

> (1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.
>
> (2) A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4), permits, the residence change. This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents.

See also MCR 3.211(C)(3), which provides:

> A judgment or order awarding custody of a minor must provide that

bound by custody orders mandates the conclusion that a child's domicile is established by the court order as a matter of law.[71]

We thus believe that our prior conclusion—that in the instance where a child's parents are divorced, the family court's custody order entered pursuant to the Child Custody Act establishes the child's domicile by operation of law and is determinative of the child's domicile for purposes of the no-fault act—is consistent with the Child Custody Act itself.[72] This holding gives the best effect to the provisions of the Child Custody Act, which entrusts courts with making custody determinations in a child's "best interests," including those

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(1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor,* * *

(3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act, MCL 722.31.

[71] The concurrence acknowledges that parents are legally bound by custody orders, but then concludes that parents retain the ability to establish a minor child's domicile in contravention of a custody order. This reasoning—and the rebuttable presumption test that stems from it—departs from established principles of Michigan's domiciliary common law and statutory law and, instead, is based on the concern that domicile dictated by a custody order may not be aligned with the minor child's actual living arrangements. This approach is not supportable in our law and we decline to give legal effect to the fact that a child's living situation may not be consistent with the custody order.

[72] We recognize that parents often reach informal agreements concerning custody matters or, having established a formal arrangement through court order, may through mutual agreement decide to deviate from that arrangement such that a child's living situation is not aligned with the custody order. Our holding does not, in reality, restrict parents in their ability to address custody arrangements in these regards, but courts should be cognizant that parents' informal modifications to the custody arrangement established in a custody order have no effect on a child's domicile.

related to living arrangements. Any contrary rule could foster noncompliance with custody orders entered under the Child Custody Act by implicitly sanctioning conduct that might establish a minor child's domicile in contravention of a controlling custody order. Instead, adherence to the rule that the custody order controls the determination of a minor child's domicile encourages compliance with legally binding court orders and statutory law.

Therefore, courts presiding over an insurance coverage dispute involving the minor child of divorced parents must treat a custody order as conclusive evidence of a child's domicile.[73] Where a court order sets a child's custody or domicile by operation of law, the factual circumstances or the parents' or child's intentions are irrelevant to the domicile determination.[74] Rather, the appropriate analysis is focused on the terms of the custody order. In directing courts to abide by the custody order, we are cognizant that the Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically "reside," whereas legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare.[75] Because the focus under our common law with respect to domicile mostly concerns a question of location and the

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[73] Despite this clear directive, the concurrence argues that our holding injects uncertainty into the realm of no-fault law. We believe that it is the concurrence's rebuttable presumption test that would create uncertainty because it would require insurers to evaluate parents' claims of domicile or leave an insurer guessing regarding its risk of exposure to liability.

[74] A domicile set by operation of law—for example, by court order—obviates the need to engage in an analysis of the *Workman-Dairyland* factors, which were designed to help determine a person's domicile when it was an open or contested question.

[75] Compare MCL 722.26a(7)(a) (physical custody) with MCL 722.26a(7)(b) (legal custody).

same is true with respect to a child's domicile in the instance that the parents are divorced,[76] the relevant consideration is which parent has *physical custody* under the terms of the order.[77] By way of example, a child's domicile will be with a parent if the custody order grants that parent primary or sole physical custody, or expressly establishes domicile with that parent through a domicile provision, regardless of whether the parents share joint legal custody.[78]

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[76] See *In re Volk*, 254 Mich at 31-32, which determined that a child's domicile was with that parent who had been given physical custody of the child.

[77] We recognize that a custody order may allow for reasonable or flexible parenting time. However, the physical-custody inquiry, which governs the domicile determination, has to do with the child's primary physical location under the express terms of the custody order and not with how the order allots "parenting time." Indeed, by allowing for reasonable or flexible parenting time in a custody order, a family court has not relinquished its authority to establish the physical custody of the minor child.

[78] Although not presently before this Court, we recognize that determining domicile by reference to a custody order may appear to lead to a perplexing result where the order grants each parent joint physical custody under MCL 722.26a(7) *and* creates an equal 50/50 division of physical custody. To begin with, we emphasize that an award of joint physical custody alone does not automatically create this potentially perplexing situation because although an order may award joint physical custody, it may also establish that one parent has *primary* physical custody. Alternatively, the details of the physical custody division may reveal that one parent has physical custody of the child more often than the other parent despite the joint physical custody arrangement. Thus, it is only in the very rare event that a custody order awards joint physical custody *and* grants both parents an equal amount of time to exercise physical custody that this issue arises. Indeed, MCL 722.26a(7) does not require that parents share *equal* physical custodial time for a court to award joint physical custody; rather, [MCL 722.26a(7)(a)] merely defines joint physical custody as an order "[t]hat the child shall reside *alternately for specific periods* with each of the parents." Emphasis added. The statute does not, however, require that the child reside with each parent for an *equal* amount of time to constitute joint physical custody.

C. APPLICATION

i. *GRANGE v LAWRENCE*

When the family court entered the 2005 judgment of divorce between Lawrence and Rosinski, their child Josalyn acquired a domicile by operation of law consistent with the terms of the judgment of divorce. Specifically, the order granted Lawrence and Rosinski joint legal custody, while Rosinski was granted primary physical custody and Lawrence liberal parenting time. Because the order granted Rosinski primary physical custody, Josalyn's domicile was with Rosinski. So long as Josalyn lacked the legal capacity to acquire a new domicile of choice and neither of her parents successfully moved to modify the order through a motion to change custody or residence under MCL 722.27 or MCL 722.31 in a family court of continuing jurisdiction, Josalyn's domicile would remain with Rosinski pursuant to the terms of the judgment of divorce.

At the time of the accident in 2009 the judgment of divorce had never been modified pursuant to the provisions of the Child Custody Act. Nor had Josalyn reached the age of majority or become emancipated, such that she could acquire a different domicile of her own choosing. Therefore, at the time of the accident, Josalyn's domicile was with Rosinski pursuant to the terms

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In the unusual event that a custody order *does* grant an equal division of physical custody, and only in this instance, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom he is living at the time. Restatement, § 22 (1971). Thus, the child's domicile is with the parent who has physical custody as established by the custody order at the specific time of the incident at issue. This approach is consistent with the terms of the custody order and avoids a finding that the child has dual coexisting domiciles. Such a rule is consistent with *In re Volk* and retains our traditional understanding that a person can only have one domicile at a time.

of the judgment of divorce. In reaching the contrary conclusion that Josalyn was domiciled with both parents, the lower courts erred by concluding that a person could have dual domiciles, erred by failing to recognize the legal effect of the family court's custody order, and erred by applying the *Workman* factors that are inapplicable to a person whose domicile is set by operation of law.

Therefore, because Josalyn can only have one domicile, it follows that she was not domiciled with Lawrence, Grange's insured. The terms of the judgment of divorce provide conclusive evidence of Josalyn's domicile and, there being no ambiguity in that order, there is no question of fact that Josalyn was domiciled in Rosinski's household. It further follows that because Josalyn was not domiciled with Lawrence, Grange is not liable for Josalyn's PIP benefits under MCL 500.3114(1). For this same reason, Grange is not an insurer of equal priority with Farm Bureau and, thus, Grange is not required to reimburse Farm Bureau under MCL 500.3115(2) for the PIP benefits it paid for Josalyn's care following her accident.[79] The lower courts therefore erred by denying Grange summary disposition.

ii. *ACIA v STATE FARM*

In *ACIA*, the 1995 judgment of divorce granted Taylor and Campanelli joint legal custody, Campanelli

[79] Given our holding that a custody determination of a minor child governs domicile, Farm Bureau's argument that Grange's policy conflicts with the no-fault act is unavailing. Recall that the pertinent portion of Grange's policy states: "If a court has adjudicated that one parent is the custodial parent, that adjudication shall be conclusive with respect to the minor child's principal residence." This provision is plainly consistent with our holding and does not, as the Court of Appeals held, restrict coverage that otherwise would have been permitted under the no-fault act.

primary physical custody, and, in an express domicile provision, established Sarah's domicile in Michigan with Campanelli. Upon entry of this order, Sarah's domicile was established by operation of law and her parents no longer had the legal capacity to establish a different domicile of choice on Sarah's behalf, and nor could Sarah, not having reached the age of majority and not being emancipated, acquire a new domicile of her own choosing. Campanelli, however, successfully moved for a change of residency in 1996 and the family court entered an order modifying the judgment of divorce by changing Sarah's domicile to Tennessee. Taylor and Campanelli retained joint legal custody and Campanelli retained primary physical custody. Sarah's domicile, then, was changed by operation of law to Tennessee upon entry of the 1996 order.

There is no dispute that the 1996 order expressly establishing Sarah's domicile in Tennessee remained in effect at the time of the accident in 2007, when Sarah was only 16 years of age. Although Sarah was then residing with her mother in Michigan, Sarah was domiciled in Tennessee at the time of the accident as established by the 1996 order. There being no question of fact as to Sarah's domicile in Tennessee, it is clear that ACIA, the insurer of the Michigan household, is not liable for Sarah's PIP benefits under MCL 500.3114(1). Instead, State Farm is the insurer in first priority to pay PIP benefits, and the lower courts thus erred by denying ACIA summary disposition.

IV. CONCLUSION

It has long been established in our common law that a person, including a child, may have only a single domicile at any one time. We reaffirm this principle and hold that a child of divorced parents who may have

more than one legal residence, nevertheless still has only one domicile at a given point in time, including for purposes of the no-fault act. In the instance that the child's parents are divorced and a family court has entered an order relating to custody, we hold, consistent with our common law and the Child Custody Act, that the child's domicile is established by operation of law and that the custody order is determinative of the child's domicile for purposes of the no-fault act.

In *Grange*, the judgment of divorce conclusively established the minor child's domicile with her mother at the time of the accident and, thus, Grange is not liable for providing PIP benefits following the child's automobile accident. Accordingly, we reverse the judgment of the Court of Appeals in *Grange* and we remand to the circuit court for entry of summary disposition in favor of Grange.

In *ACIA*, the custody order conclusively established the minor child's domicile with her father at the time of the accident and, thus, ACIA is not liable for providing PIP benefits following the child's automobile accident. We thus reverse the judgment of the Court of Appeals and we remand to the circuit court for entry of summary disposition in favor of ACIA.

YOUNG, C.J., and CAVANAGH and VIVIANO, JJ., concurred with KELLY, J.

ZAHRA, J. (*concurring*). I concur in the result reached by the majority in these cases. I also agree with the majority that a person, including a minor child, can have only one domicile at any given time. I disagree, however, with the rule the majority has adopted for determining the domicile of a child with two legal residences under the Child Custody Act[1] for several reasons. The majority

[1] MCL 722.21 *et seq*.

holds that the domicile of a child with two legal residences is necessarily equated with a family court order establishing physical custody of that child, regardless of whether the parents in fact follow the family court's order. Although this rule appears to have the benefit of reaffirming the legally binding nature of a custody order, such a perfunctory rule falls far short of addressing the practical realities of post-divorce familial relationships.

The majority assumes that physical custody orders are the same as domicile determinations as a matter of law.[2] I question this assumption. Instead, I believe the Child Custody Act grants the family court the authority to establish the *custodial environment(s)* of the child or children subject to that order. It is from this custodial environment that the legal determination of domicile can be made.

I also disagree that a family court order of joint physical custody can establish an alternating domicile system, whereby the minor child's domicile is wherever the custody order indicates the child is supposed to be. Such a system is a semantic end-run around our traditional rule that a person may only have one domicile and ignores the practical reality that in virtually all cases, a child will have a primary residence that will constitute the child's domicile.

I conclude that the majority's rule unduly impinges on the ability of an insurer to accurately assess its risks

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[2] The majority is equating *physical* custody with domicile by operation of law, despite the fact that a child whose parents share, at a minimum, joint legal custody has a legal residence with each parent. While in the overwhelming number of cases it may turn out that a child's domicile is the same as that indicated by the custody order, in my view, a custody order does not have the effect of creating domicile, instead it creates the custodial environment from which domicile can be established. See part I(C).

when entering insurance agreements and places an unreasonable burden on insurers to inquire about, obtain, and interpret family court orders. This is because the majority rule places no-fault personal protection insurance (PIP) liability on the insurer of the parent who has been ordered physical custody, even when the child is not primarily living with that parent. The majority's rule, in my view, is inconsistent with the no-fault act, which provides PIP protection for "accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in *the same household* . . . .[3]

It is an undeniable fact that parents involved in custody disputes often reach an agreement between themselves to provide for a different custodial environment than that provided in the family court's initial order of custody. I would adopt a rule that recognizes this reality. Specifically, I would conclude that family court orders of custody establish a presumption of domicile that may be rebutted when the child's actual living arrangements are so clearly inconsistent with the family court's custody order that it is reasonable to conclude that the parents have expressly or impliedly reached an agreement regarding the child's domicile. To rebut this presumption, I would require courts to consider the factors traditionally used to assess domicile to determine the domicile of minor children.[4]

Thus, in *Grange*, I conclude that the presumption of domicile created by the family court's judgment of

[3] MCL 500.3114(1) (emphasis added).

[4] Notwithstanding all the good intentions behind a court order establishing joint custody, the reality remains that there is but one domicile for a minor child. As explained more fully in this opinion, see part I(F), factors such as where the child goes to school, where the majority of the child's belongings are kept, and the address used to register the child for functions will assist a fact-finder in making a domicile determination.

divorce is not rebutted under the facts of this case and, consistent with the majority, I would reverse the judgment of the Court of Appeals and remand to the circuit court for entry of summary disposition in favor of Grange. In *ACIA*, I conclude that the Court of Appeals erred by finding a question of fact regarding the child's domicile. Reviewing the record as a whole, I conclude that the evidence did not rebut the presumption, created by the family court's orders, that the child was domiciled in Tennessee. Consistent with the majority, I would reverse the judgment of the Court of Appeals and remand to the circuit court for entry of summary disposition in favor of ACIA.

I. ANALYSIS

A. DOMICILE GENERALLY

A person's domicile is significant in a variety of legal contexts,[5] and it is a concept with deep roots in Michigan law.[6] This Court stated in 1847 that it is "well settled that no person can have more than one [national] domicile, at one and the same time . . . ."[7] This Court has recently reiterated that a person may have only one domicile, and "a domicile is 'the place where a person has his home, with no present intention of removing, and to which he intends to return after going

[5] See, e.g., *People v Dowdy*, 489 Mich 373, 376; 802 NW2d 239 (2011) (addressing "whether homeless sex offenders have a 'residence' or 'domicile' such that they can comply" with the Sex Offenders Registration Act); *In re Servaas*, 484 Mich 634, 642; 774 NW2d 46 (2009) (discussing Const 1963, art 6, § 20, which requires a judge or justice to vacate his or her office if he or she "removes his domicile beyond the limits of the territory from which he was elected or appointed . . . .").

[6] See *In re High*, 2 Doug 515, 522 (1847) ("It may be laid down as a settled maxim that every man must have such a national domicile somewhere.").

[7] *Id.*

elsewhere for a longer or shorter time.' "[8] Generally, domicile is "a question of fact and intent[,]" and a determination of domicile involves looking at all the facts and circumstances to determine whether the evidence that a person is domiciled in one location outweighs the evidence that a person is domiciled in another location.[9]

As observed by the majority, there are three means of acquiring a domicile, depending on the factual context: "(1) domicile of origin or of nativity; (2) domicile of choice; and (3) domicile by operation of law."[10] In *Miss Band of Choctaw Indians v Holyfield*, the Supreme Court of the United States discussed the concept of domicile, drawing on "common-law principles of domicile" and explaining:

> "Domicile" is, of course, a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes, and its meaning is generally uncontroverted. "Domicile" is not necessarily synonymous with "resi-

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[8] *Dowdy*, 489 Mich at 385, quoting *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933).

[9] As stated by this Court in *In re High*, 2 Doug at 523-524:

> [Domicile] is always that place which has more of the qualities of a principal or permanent residence, and more pretensions to be considered as such, than any other place. Two things, it is said, must concur to constitute domicile. First, residence, which however is not indispensable to retain domicile after it has been once acquired; and, secondly, intention of making it the home of the party: *Story's Confl. Laws*, § 44. The question of domicile, is then, a question of fact and intent, and if these elements are found, the reference of the domicile to one place or another depends upon the comparative weight of the circumstances. In the language of the chief justice, in *Abington v. North Bridgewater*, 23 *Pick.*, 178, "it depends, not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another.

[10] 8 Mich Civ Jur, Domicile, § 1.

> dence," and one can reside in one place but be domiciled in another. For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. One acquires a "domicile of origin" at birth, and that domicile continues until a new one (a "domicile of choice") is acquired. Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents.[11]

Domicile by operation of law occurs when a person lacks the capacity to establish a domicile by choice.[12] Therefore, because a minor child typically cannot form the requisite intent to establish a domicile by choice, a minor child's domicile is determined, by operation of law, by the domicile of the child's parents.[13] One's domicile of origin is the starting point, and it remains a person's domicile until that domicile is usurped by a subsequent domicile attained by choice or by operation of law.[14] Where a child's parents have changed their own

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[11] *Miss Band of Choctaw Indians v Holyfield*, 490 US 30, 48; 109 S Ct 1597; 104 L Ed 2d 29 (1996) (citations omitted).

[12] 8 Mich Civ Jur, Domicile, § 5.

[13] *Miss Band of Choctaw Indians*, 490 US at 48. See 8 Mich Civ Jur, Domicile, § 21 ("Everyone is assigned a domicile of origin at birth by operation of law.") (emphasis added). But note, when a minor child has been emancipated, he or she may establish a domicile by choice. See MCL 722.4e(1)(d), which provides: "A minor emancipated by operation of law or by court order shall be considered to have the rights and responsibilities of an adult . . . . A minor shall be considered emancipated for the purposes of, but not limited to, . . . [t]he right to establish a separate domicile."

[14] Specifically, "[t]he domicil[e] of origin is the domicil[e] which a person has at birth[,]" and "[t]he domicil[e] of a legitimate child at birth is the domicil[e] of its father at that time, subject to the rule stated in § 22 pertaining to divorce or separation of the parents. If the child is not the legitimate child of its father, or is born after the father's death, its domicile at birth is the domicil[e] of its mother at that time." Restatement Conflict of Laws, 2d, § 14(2), p 59. The domicile of origin "continues until a new domicile is acquired." *Id.* at comment b.

domicile, the domicile of the child likewise changes by operation of law.[15] However, these common law notions of domicile do not resolve the question of where a child is domiciled when the child's parents share, at a minimum,[16] joint legal custody such that the child has two legal residences pursuant to the Child Custody Act.[17]

B. DOMICILE AS IT RELATES TO THE MICHIGAN NO-FAULT ACT

Pursuant to MCL 500.3114(1), the no-fault act provides PIP protection for "accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . ." Generally speaking, domicile determinations for purposes of assessing insurer liability in the no-fault context are made by considering the factual circumstances surrounding the party's living situation and by balancing and weighing several factors, none of which is determinative on its own.[18] A non-exhaustive list of factors for determining whether a person is "domiciled in the same household" under the no-fault act was articulated by this Court in *Workman*:

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[15] See *Hering v Mosher*, 144 Mich 152, 154, 155; 107 NW 917 (1906), in which this Court stated, "We accept the doctrine, as a general proposition, that the domicile of a child is that of its origin, or of its last surviving parent[,]" and "If [the child's father] gained a domicile [in Wayne County], conceding the general rule to apply, it became in law the domicile of this child." This Court also recognized in *Hering* that "[a] parent may give his child domicile different from his own by consenting to its adoption; that he may do so by less formal proceedings we consider equally permissible." *Id.* at 156.

[16] Even when a family court order awards physical custody primarily or exclusively to one parent, the Legislature has determined that where joint legal custody exists, the minor child has a legal residence with each parent. MCL 722.31. See also part I(C).

[17] See part I(E).

[18] *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 496; 274 NW2d 373 (1979).

> Among the relevant factors are the following: (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household.[19]

To address "the particular problems posed by young people departing from the parents' home and establishing new domiciles as part of the normal transition to adulthood and independence[,]"[20] the Court of Appeals has considered whether a child of majority age is "domiciled" with the child's parents in several cases.[21] In the first of these cases, *Dairyland*, the Court of Appeals laid out additional relevant factors for determining whether a child is domiciled with his or her parents:

> [(1)] whether the claimant continues to use his parents' home as his mailing address, [(2)] whether he maintains some possessions with his parents, [(3)] whether he uses his parents' address on his driver's license or other documents, [(4)] whether a room is maintained for the claimant at the parents' home, and [(5)] whether the claimant is dependent upon the parents for support.[22]

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[19] *Id.* at 496-497 (citations omitted).

[20] *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 681; 333 NW2d 322 (1983).

[21] See, e.g., *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362; 656 NW2d 856 (2002); *Goldstein v Progressive Cas Ins Co*, 218 Mich App 105; 553 NW2d 353 (1996) (noting that the injured child, who was a student attending college out of state from his parents' residence, with no specific age provided, was domiciled with his parents, not at the college).

[22] *Dairyland*, 123 Mich App at 682.

However, this Court has not yet addressed where a *minor* child is "domiciled" for purposes of no-fault insurance when the child's parents maintain two separate households, which both constitute a legal residence of the child pursuant to the Child Custody Act.[23] Because domestic relations law and the Child Custody Act are implicated in this no-fault context, it is appropriate to review the law regarding child custody.

C. CUSTODY DETERMINATIONS

Under the Child Custody Act, until a child turns 18, the family court has jurisdiction to make child custody determinations when there is a child custody dispute.[24] The Child Custody Act provides, in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. . . .[25]

The Child Custody Act first provided for joint custody in 1981.[26] MCL 722.26a requires the family court to advise parents of joint custody and, upon request of either parent, to consider awarding joint custody of a child. "Joint custody" is defined as:

> . . . an order of the court in which 1 or both of the following is specified:

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[23] MCL 722.31(1).

[24] MCL 722.27.

[25] MCL 722.27(1)(a).

[26] MCL 722.26a.

> (a) That the child shall reside alternately for specific periods with each of the parents[, or]
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.[][27]

Although not specifically named as such by the statute, "the custody described in [(a)] is commonly referred to as joint physical custody, and that described in [(b)] is referred to as joint legal custody."[28] Therefore, a family court may grant (1) "legal custody" to one or both parents and (2) "physical custody" solely to one parent or jointly to both, which would involve the child "resid-[ing] alternately for specific periods with each of the parents."[29]

Under MCL 722.31, where the parents of a child share joint legal custody and parental custody of that child is governed by a court order, the child is considered to have a legal residence with each parent for purposes of evaluating a parent's action to change the child's legal residence.[30]

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[27] MCL 722.26a(7).

[28] *Dailey v Kloenhamer*, 291 Mich App 660, 670; 811 NW2d 501 (2011).

[29] MCL 722.26a(7)(a).

[30] MCL 722.31 provides, in part:

> (1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.
>
> (2) A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court . . . permits, the residence change. This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents. . . .

D. A MINOR CHILD MAY NOT HAVE DUAL DOMICILES

Complications arise in determining the domicile of a child for purposes of no-fault insurance where the child has two legal residences because his or her parents share legal custody. The trial court and the Court of Appeals both reached the extraordinary conclusion in *Grange* that Josalyn had *two domiciles*: one with Rosinski and one with Lawrence. This conclusion departs from established Michigan law that a person may have only one domicile.[31] I join the majority in reaffirming this long-standing principle. Further, I agree with the majority's conclusion that *Workman*[32] "does not stand for the proposition that domicile is the equivalent of residence under MCL 500.3114(1)."[33]

As this Court stated in *Gluc v Klein*:

> Under the common law, there was a distinction between "domicile" and "residence." The former, in its ordinary acceptation, was defined to be, "A place where a person lives or has his home," while "Any place of abode or dwelling place," however temporary it might have been, was said to constitute a residence. A person's domicile was his *legal* residence or home in contemplation of law.[34]

Actions of a parent pursuant to MCL 722.31 are commonly referred to as petitions to change domicile, despite MCL 722.31's use of the term "residence." See, e.g., *McKimmy v Melling*, 291 Mich App 577, 580-582; 805 NW2d 615 (2011) (discussing change of domicile and change of legal residence interchangeably). It is significant that while the Legislature chose to focus on "legal residence," some practitioners and courts apparently colloquially use the term "domicile."

[31] *Dowdy*, 489 Mich at 385; *In re High*, 2 Doug at 522.

[32] *Workman*, 404 Mich at 495 (stating "the terms 'domicile' and 'residence' are legally synonymous").

[33] *Ante* at 498.

[34] *Gluc v Klein*, 226 Mich 175, 177-178; 197 NW 691 (1924) (emphasis added).

While "residence" may be defined in more restrictive ways under Michigan law,[35] for example, "*legal* residence" as discussed in *Gluc*, the underlying distinction between the concepts of domicile and residence remains: while a person may have only one domicile, he or she may have more than one residence. And while legal residence is often equated with domicile, because there can be only one domicile, where two legal residences exist, it is axiomatic that only one can be determined to be the domicile. The fact that a domicile determination is complicated by the factual circumstances of the inquiry does not constitute a sound reason to depart from the established principle that a person can have only one domicile. Therefore, even where a child is considered to have a legal residence with each parent, his or her domicile must be that of only *one* of the child's parents.

E. THE MAJORITY'S DOMICILE BY OPERATION OF LAW APPROACH

The majority attempts to extend the common-law doctrine of domicile by operation of law beyond its logical and practical bounds. I agree with the majority that unemancipated minor children cannot establish a domicile by choice, given that they are incapable of forming the requisite intent.[36] But domicile by operation of law, the means by which unemancipated minors

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[35] See, e.g., *Dowdy*, 489 Mich at 382, where this Court noted that the Legislature chose to define the word "residence" as used in the Sex Offender Registry Act to mean

> *that place* at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for purposes of this act. [Quotation marks and citation omitted.]

[36] *Miss Band of Choctaw Indians*, 490 US at 48.

acquire the domicile of their parents, is not easily determined when parents share joint legal custody, given that joint legal custody creates two legal residences for the child, either of which could constitute the child's domicile.[37] While the domicile-by-operation-of-law framework indicates that there are two potential residences where a child could be considered domiciled in this context, given that there can only be one domicile, it stops short of answering, "Which legal residence constitutes the child's domicile?"

Despite the fact that the majority and I agree that a child may only have one domicile at any given time, the majority's alternating-domicile theory for children whose parents share joint physical custody contradicts this long-standing principle and in substance permits dual domiciles for such children. This alternating-domicile concept is unprecedented in the domicile jurisprudence of this state, which views domicile as that place where a person ultimately returns, despite going elsewhere for a period of time.[38] As the majority states, "For over 165 years, Michigan courts have defined

[37] MCL 722.31(1). The general rule is that "[a] child's domicile, in the case of the divorce or separation of his parents, is the same as that of the parent to whose custody he has been legally given." Restatement Conflicts of Laws, 2d, § 22, comment d. However, this rule is unhelpful where legal custody has been given *jointly* to both parents. See also *In re Volk*, 254 Mich 25, 32; 235 NW 854 (1931), overruled in part on other grounds by *Hentz v Hentz*, 371 Mich 335 (1963), in which this Court concluded that a child whose mother was given unrestricted custody of her minor child pursuant to a judgment of divorce was domiciled with the child's mother, quoting 9 RCL, p 549, which stated, "When a divorce has been granted to the wife, however, and unrestricted custody of the minor child of the marriage given her in the decree, her own domicile, and not the father's, establishes that of the child." However, in the cases at issue, unlike *Volk*, the parents shared *joint* legal custody. Neither parent in either of the present cases was granted unrestricted custody, as in *Volk*. Therefore, I question the majority's reliance on this case.

[38] *In re High*, 2 Doug at 522-523.

'domicile' to mean 'the place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning.' "[39] The fact that a child cannot establish a domicile by choice is not a sufficient reason to ignore that *permanence* underpins the concept of domicile in our jurisprudence.[40]

Further, the majority opinion assumes that a custody order establishes domicile as a matter of law. While a family court's orders pertaining to custody and the legal residence of a child, if implemented, can certainly establish custodial environments from which a domicile arises and, thus, a legal determination of domicile can be made, I question whether the family court has the authority under the Child Custody Act to explicitly *set* a child's domicile by court order. The Child Custody Act speaks in terms of "legal residence" and only uses the word "domicile" in one section of the statute, MCL 722.27b(9), which states:

> The court shall not enter an order prohibiting an individual who has legal custody of a child from changing the domicile of the child if the prohibition is primarily for the purpose of allowing a grandparent to exercise the rights conferred in a grandparenting time order entered under this section.

Significantly, the use of "domicile" in this section does not suggest that family courts have the authority to establish, as a matter of law, a child's domicile in making a custody determination. Rather, this section assumes a parent has legal custody of a child, and it prohibits a court from barring that parent from a

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[39] *Ante* at 493, quoting *In re High*, 2 Doug at 523.

[40] *See In re High*, 2 Doug at 522 ("[Domicile] is always that place which has more of the qualities of a principal or permanent residence, and more pretensions to be considered as such, than any other place.").

change of domicile so that a grandparent may seek or maintain visitation with the child.

Moreover, the majority rule now requires insurance companies to inquire about custody orders, obtain a copy of those orders, and interpret those orders to properly assess its risks,[41] which unduly burdens insurers and injects unreasonable uncertainty into an insurer's risk-assessment process.[42] The majority's rule prevents an insurer from being able to simply ask, "Who resides with you?" to assess its risks. Ultimately, the majority's rule, in my view, is inconsistent with the no-fault act, which provides PIP protection "to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in *the same household* . . . ."[43] Under the majority's rule, a child could be "domiciled" in one state pursuant to a custody order, but actually live in another state.[44] It is difficult to discern how such a situation could constitute being domiciled *in the same household*.

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[41] See *Titan Ins Co v Hyten*, 491 Mich 547, 570; 817 NW2d 562 (2012) (reaffirming the principle that "an insurer has no duty to investigate or verify the representations of a potential insured").

[42] Footnote 77 of the majority's opinion, which indicates that in situations of joint legal and physical custody, domicile would alternate consistent with the family court's orders, is particularly troubling in this regard.

[43] MCL 500.3114(1). Emphasis added.

[44] Take, for example, the following hypothetical: A Michigan couple gets divorced, and the mother and the father are awarded joint legal custody of the couple's three-year-old daughter, but mother is awarded sole physical custody. The father moves to Florida because he cannot find work in Michigan. Ultimately, after several months, the mother decides she does not want to raise the young child, discusses this with the father, and the child is sent to live with the father in Florida. The mother and the father do not go back to court to seek a change in custody in either state. The child gets into a car accident at the age of 16 in Florida. Under the majority's rule, the child would be domiciled in Michigan, despite living for nearly 13 years in Florida under the exclusive care of her father.

F. DETERMINATION OF DOMICILE OF CHILDREN WITH TWO LEGAL RESIDENCES

A domicile determination for a minor child of parents who have separate domiciles brings with it unique considerations due to the family court's involvement in making child custody determinations and the court's involvement in circumstances where a change in the legal residence of a child is disputed.[45] Like the traditional examination of a person's domicile, in my view, the determination of the domicile of a child with two legal residences requires a review of all the facts and circumstances to determine whether the evidence that the child is domiciled in one legal residence outweighs the evidence that the child is domiciled in another legal residence.[46] But in light of the family court's involvement in determining where a child resides, and the deference owed to that court's determinations, an inquiry into where a child is domiciled also necessarily involves consideration of the family court's orders relating to custody of a child and a child's legal residence(s). While generally no one factor is conclusive in determining domicile,[47] in this unique context, a family court's custody and residence determinations are the starting point for determining a child's domicile because "[a] party must obey an order entered by a court with proper jurisdiction."[48] Therefore, I would begin with the presumption that the parties to family court orders relating to custody and residence of the child have in fact obeyed and implemented those orders.[49]

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[45] MCL 722.27; MCL 722.31.

[46] See *In re High*, 2 Doug at 522-523.

[47] *Workman*, 404 Mich at 496.

[48] *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998).

[49] See the discussion of presumptions in *Johnson v Secretary of State*, 406 Mich 420, 432; 280 NW2d 9 (1979), where this Court noted:

Further, custody and residence determinations are made by family courts when *disputes* arise between parents.[50] A family court's custody and residence determinations inform where and with whom the child is *supposed* to live, sleep, spend his or her time, and ultimately return, though the child may spend time elsewhere. I would establish a rule that presumes that these determinations reflect the actual living situation of the child, and, thus, function as a proxy for the intent of the parents regarding the child's domicile, due to the parents' inability to form a joint parental intent.

Nonetheless, I recognize the reality that, with the passage of time, a child's living situation will not always align with the family court's orders, despite the general rule that a party must follow the orders of a court. It is common for parents, after the bitterness of a custody dispute has subsided, to resolve their differences over time and to reach an agreement regarding the living

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> The burden of producing evidence is not invariably allocated to the pleader of the fact to be proved. That burden may be otherwise allocated by the Legislature or judicial decision based, among other factors, on an estimate of the probabilities, fairness and special policy considerations, and similar concerns may justify the creation, judicially or by law, of a presumption to aid the party who has the burden of production.

See also *Juvelis v Snider*, 68 F3d 648, 651, 657 (CA 3, 1995) (permitting the domicile by operation of law conclusion that a "profoundly retarded and physically handicapped 33 year old" is domiciled where his parents were domiciled to be rebutted by (1) "several objective factors that support the conclusion" that the man had "established a domicile in Pennsylvania," (2) the man's expressed "subjective attachment" to his residence, "within his limited ability to" express such an attachment, and (3) the fact that his parents acted in good faith and in the man's best interest by asserting that the man was domiciled at the residential home in Pennsylvania).

[50] See MCL 722.27(1); MCL 722.31(2).

arrangements for their child.[51] Parents commonly reach amicable, private agreements, reflective of their joint intent, that conflict with an existing family court order.

Regarding a change in legal residence, the Child Custody Act requires parents to seek the family court's approval before moving a child more than 100 miles from his or her legal residence, unless, among other exceptions, the other parent *consents* to the move.[52] Regarding a modification of a custody order, however, the Child Custody Act envisions parents returning to the family court to seek modifications.[53] Therefore,

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[51] This Court held in *Harvey v Harvey*, 470 Mich 186, 194; 680 NW2d 835 (2004), that parties cannot "limit the trial court's authority to review custody determinations" by stipulation to a particular custody arrangement. There is no question that if a custody or legal-residence matter came before the family court, the family court alone is charged with making determinations in the child's best interests, and stipulation by the parties to an alternative custody arrangement cannot usurp that authority. However, this is not the situation in the cases currently before this Court; the situation in question is one in which parents, after the entry of a court order regarding custody or legal residence, have not sought the family court's subsequent intervention and have amicably chosen, *despite* the binding legal nature of the orders, to act in contravention of a family court's orders. See also *Phillips v Jordan*, 241 Mich App 17, 23-24; 614 NW2d 183 (2000) (holding that the trial court properly set aside a stipulated custody order where "the trial court entered the stipulated order to change custody without making any independent determination regarding the best interests of the child pursuant to the Child Custody Act").

[52] MCL 722.31(2).

[53] MCL 722.27(1)(c) provides, in part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may] . . .
>
> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child

while parents have a legal duty to seek the family court's approval of amicable agreements regarding custody modifications, this does not always occur. The majority's view fails to take this reality into account.

In consideration of these realities, while at the same time recognizing the need for a rule that fosters consistency, I would hold that, for purposes of determining domicile under the no-fault act, where the facts regarding the child's living arrangements are reasonably consistent with the provisions of the family court's orders, those orders will be determinative of the child's domicile.[54] However, where the facts of the child's living

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reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

[54] When family court orders exist, they are, in my view, central to determining the domicile of a minor child in the no-fault context. But domicile determinations in no-fault decisions have no effect in family court adjudications regarding a child's custody and legal residence. Family courts are charged with making determinations that focus on the best interests of the child. See MCL 722.27(1) ("If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for *the best interests of the child* the court may do 1 or more of the following[.]") (emphasis added); see also MCL 722.31(4) ("Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, *with the child as the primary focus* in the court's deliberations[.]") (emphasis added); *Gagnon v Glowacki*, 295 Mich App 557, 570; 815 NW2d 141 (2012) ("After granting a change of domicile, the trial court must determine whether there will be a change in the established custodial environment and, if so, determine whether the relocating parent can prove, by clear and convincing evidence, that the change is in *the child's best interest*.") (emphasis added). No-fault decisions regarding insurer priority on the basis of domicile determinations are inapposite to custody and legal residence determinations in the

arrangements are so clearly inconsistent with the family court's orders that it is reasonable to conclude that the child's parents have expressly or impliedly reached an agreement regarding the child's domicile that differs from the domicile indicated by the family court's orders, the presumption of domicile created by the family court's orders would be rebutted.[55] Under this rule, courts would make domicile determinations in light of the actual facts of the custodial situation, rather than solely on a court order that may have little relevance to the actual living situation of the child after the passage

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family court context because no-fault law focuses on the practical issue of which insurer is liable for insurance coverage and does not take into consideration the best interests of the child. Again, I question whether the family court has the authority under the Child Custody Act to explicitly *set* a child's domicile, as opposed to establishing the custodial environment in which the child will live.

[55] The majority approach fails to recognize that a court order may allow parents to modify the time a child spends with each parent. For example, in Grange the custody order provides:

> IT IS FURTHER ORDERED that the Defendant, EDWARD BLAINE LAWRENCE, shall have rights of parenting time with the minor child at the following times:
>
> 1. Alternating weekends from Friday at 6p.m. until Sunday at 6 p.m.;
>
> 2. Every Wednesday from 4:30 p.m. until 7:30 p.m.[;]
>
> 3. Alternating Holidays by mutual agreement . . . ;
>
> 4. *Any other reasonable times that the parties may agree to*[.] [Emphasis added.]

Under this provision of the order, the parents were free to alter the child's living arrangements such that the father could be primarily responsible for the physical custody of the child. The majority would ignore a subsequent decision by the parents to make the father the new primary custodian in fact, reasoning that such changes only alter parenting time and not the domicile. For the reasons stated in this opinion, we believe the better approach is to make domicile determinations on the basis of the actual living situation of the child.

of time, namely, with regard to which parent actually has physical custody of the child.[56] This presumption would promote certainty regarding domicile determinations in the no-fault context,[57] maintain the long-standing character of the no-fault domicile inquiry as an inquiry focused on the actual facts of the situation,[58] and afford the appropriate deference that custody and legal-residence determinations ought to be given outside the domestic relations context.[59]

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[56] It is important to note that while "physical custody" is a term commonly associated with the custody described in MCL 722.26a(7)(a), this phrase is not defined in the Child Custody Act. However, MCL 722.1102(n), a provision of the Uniform Child-Custody Jurisdiction and Enforcement Act, defines "physical custody" as "the physical care and supervision of a child."

[57] See *Citizens Mut Ins Co v Community Servs Ins*, 65 Mich App 731, 733; 238 NW2d 182 (1975) ("There is reason for limiting insurance benefits to any relative of the insured or his spouse to those relatives domiciled in the insured's household. *It creates a definite limit to the exposure of the insurer, an essential factor in determining the insurance premium*.") (emphasis added); but see *Bierbusse v Farmers Ins Group of Cos*, 84 Mich App 34, 36-38; 269 NW2d 297 (1978) (declining to follow the "hard and fast rule set forth in *Citizens Mutual*" because doing so would deny relief to the plaintiff daughter, holding, "When a couple is separated pending divorce and one spouse is the named insured on a no-fault policy, the other spouse and the children of the named insured are covered by the no-fault policy, even though they are domiciled in separate households, until the divorce is finalized."). The Court of Appeals in *Bierbusse* also stated, "*While agreeing that the statute should be interpreted in a manner that allows an insurer to reasonably calculate the scope of risk and the premium incidental thereto*, we do not believe that a per se rule excluding from coverage any relative not domiciled in the same household as the named insured is in accord with the legislative intent." *Id.* at 37 (emphasis added).

[58] *Workman*, 404 Mich at 496-497; *In re High*, 2 Doug at 523.

[59] The rule I propose is consistent with this Court's decision in *Volk* in which the child was determined to be domiciled with the child's mother where the mother was given unrestricted custody. Under my rule, just as under the majority rule, a child whose mother or father is given sole legal *and* physical custody, i.e., where one parent has *unrestricted* custody, is domiciled with that parent because there is only one legal residence that can constitute the child's domicile.

In determining whether this presumption can be rebutted, I would have courts look to the traditional nonexclusive factors for determining domicile for purposes of no-fault insurance articulated by this Court in *Workman* and, particularly, those articulated by the Court of Appeals in *Dairyland*, which specifically address whether a child is domiciled with his or her parents under the no-fault act. While *Dairyland* involved a child that had reached the age of majority, I find these factors to be similarly relevant for determining the intent of a minor child's parents regarding the child's domicile because they focus on objective indicators of the intent to have the child remain permanently in a given home. Additionally, there are other relevant factors that are unique to the context of minor children whose parents share joint custody: (1) where the child actually spends the majority of his or her time, and (2) where the child actually sleeps the majority of the nights of the week. It bears repeating, however, that none of these domicile factors would alone be determinative.[60]

II. APPLICATION

A. *GRANGE INS CO OF MICH v LAWRENCE*

Because the underlying facts necessary to determine

Further, I note that in *Vanguard Insurance Co v Racine*, 224 Mich App 229, 233; 568 NW2d 156 (1997), the Court of Appeals stated that a person has one domicile and concluded that the child at issue "would be" domiciled with the child's mother because the mother's home "was where [the child] spent the majority of his time and where [the child's mother] had physical custody of [the child] under the divorce judgment." However, I note that the Court of Appeals made this statement without fully analyzing this issue and without providing authority to support its conclusion. Additionally, this statement of the Court of Appeals cannot fairly be interpreted as indicating that the court considered the custody determination in the judgment of divorce to be conclusive of domicile, given that the court, in the same breath, pointed to where the child spent the majority of his time.

[60] *Workman*, 404 Mich at 496.

Josalyn's domicile at the time of her death are not in dispute, where Josalyn was domiciled is a question of law.[61] In the present case, the judgment of divorce granted joint legal custody to both Lawrence and Rosinski, but primary physical custody to Rosinski and a significant amount of parenting time to Lawrence. The family court's judgment demonstrates that it was intended that Josalyn would spend the majority of her time at Rosinski's residence, and while there was the intent for Josalyn to spend time with Lawrence at his residence, the intent was always for the child to return to Rosinski's residence. Therefore, under the rule I would establish, the custody determination contained within the judgment of divorce in this case would create a rebuttable presumption that the child was domiciled with Rosinski.

With regard to whether this presumption created by the family court order could be rebutted, I would conclude that it cannot under the facts of this case. Because Rosinski's residence was identified whenever an address was needed for the child, the little mail Josalyn received would have been sent to this address. The accident report and Josalyn's death certificate both listed Rosinski's home as the child's home. While Lawrence did maintain a room for the children in his apartment, the sisters shared a bed, and the majority of Josalyn's clothing and her pets were kept at Rosinski's residence. Josalyn depended on both of her parents for support. The facts also indicate that Josalyn spent the majority of her time and the majority of her overnights at Rosinski's home. Significantly, both Lawrence and Rosinski indicated that Rosinski's home was Josalyn's primary residence, given the ordinary meaning of the phrase. Overall, the facts in this case indicate that

[61] See *Fowler*, 254 Mich App at 364.

Lawrence and Rosinski implemented the custody order and do not demonstrate that Lawrence and Rosinski jointly intended for Lawrence's residence to be the child's only domicile. On this basis, I would conclude that the lower courts erred by concluding that Josalyn was domiciled with both Lawrence and Rosinski and that Grange was liable for PIP benefits arising out of Josalyn's injuries and death.[62]

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[62] In our grant order, this Court asked the parties to address in part "whether an insurance policy provision giving preclusive effect to a court-ordered custody arrangement is enforceable." *Grange Ins Co of Mich v Lawrence*, 493 Mich 851 (2012). For the reasons set forth in this opinion, I agree with the majority that Grange is entitled to summary disposition. Nonetheless, under my rule, I would conclude that a portion of the Grange policy may be invalid.

"To the degree that [a policy] is in conflict with the [no-fault] statute, it is contrary to public policy and, therefore, invalid." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 601; 648 NW2d 591 (2002). Regarding PIP benefits, the Grange policy defined a covered "insured," in pertinent part, as "any family member," which in turn was defined as:

> [A] person related to **you** by blood, marriage or adoption and whose principal residence is at the location shown on the Declarations Page. *If a court has adjudicated that one parent is the custodial parent, that adjudication shall be conclusive with respect to the minor child's principal residence*. [Emphasis added.]

The issue is whether, under my rule, the italicized portion of this definition would violate the no-fault act, which provides for PIP benefits for relatives of an insured, who, in relevant part, are a "*relative of [a person named in the policy or the person's spouse] domiciled in the same household* . . . ." MCL 500.3114(1) (emphasis added).

> It is clear from the policy's choice of the phrase "principal residence" that Grange anticipated the factual dilemma that arose in this case: a child of divorced parents with *two legal residences* under Michigan law. The policy's statement that a court adjudication regarding custody is conclusive constitutes Grange's attempt to close what it saw as a potential gap in the no-fault act that could have been interpreted to expand Grange's liability. Because a minor child of divorced parents could have two legal residences, Grange recognized that it was not entirely clear under Michigan law whether such a child could likewise have *two domiciles* for purposes of PIP benefits

B. *ACIA v STATE FARM MUTUAL AUTO INS CO*

The material facts necessary to determine Sarah's domicile at the time of her death are not in dispute; therefore, where Sarah was domiciled is a question of law.[63] The original judgment of divorce granted physical custody to Campanelli and indicated that the child's domicile was to be in Michigan. However, Campanelli obtained permission as the custodial parent, by order of the court, to change the child's domicile to Tennessee. Before the child's death, an ex parte order from the circuit court purportedly transferred custody of Sarah to Taylor and changed Sarah's domicile to Taylor's Michigan address; however, this order was subsequently vacated and declared void *ab initio*. The judgment of divorce granting physical custody to Campanelli and the subsequent order changing the child's domicile to Tennessee demonstrate that it was intended that Sarah would spend the majority of her time with Campanelli in Tennessee. While there was the intent for Sarah to leave Tennessee to spend time with Taylor in Michigan, the intent was always for Sarah to return to Tennessee. Therefore, I would conclude that these orders would establish a presumption that Sarah was domiciled in Tennessee with Campanelli.

With regard to whether this presumption could be overcome in this case, the factual situation presented in *ACIA* is a closer question than the situation presented in *Grange*. However, as in *Grange*, I would conclude that the presumption likewise cannot be rebutted under the facts of *ACIA*. The fact that Sarah stayed in Michigan after her summer break, attended high school in Michigan the following fall, and obtained a part-time job in Michigan,

pursuant to MCL 500.3114(1). However, because Grange's policy makes custody orders conclusive of domicile, the policy would conflict with the rule I have proposed in this opinion.

[63] See *Fowler*, 254 Mich App at 364.

indicates that Sarah used Taylor's address as her mailing address and on documents. Taylor's address was also listed as Sarah's address on Sarah's hospital records and death certificate. Given the length of Sarah's stay in Michigan, it can be inferred that she had a significant amount of possessions at Taylor's Michigan residence. The facts indicate that Sarah had her own room in Michigan and that Taylor provided for Sarah while she was in Michigan. It is also clear that for the period of time that Sarah was staying in Michigan, she actually spent most of her time and overnights in Michigan; however, prior to Sarah coming to Michigan, she spent nearly 11 years in Tennessee with Campanelli, only occasionally visiting Taylor in Michigan. None of the facts in the record suggest that Sarah's domicile in Tennessee ceased to exist; the facts indicate that Campanelli gave Sarah permission to stay temporarily in Michigan after the summer to attend school in the fall so that Sarah could get to know Taylor better. Campanelli stated, "I did eventually agree that she could stay on a temporary basis and enroll in high school[,]" and further stated, "It was never intended to be permanent . . . ."

The facts in this case are not so clearly inconsistent with the family court's orders so as to rebut the presumption that domicile is established by the custody order. Absent evidence of a clear joint intent on the part of Sarah's parents to change Sarah's domicile, the presumption that Sarah was domiciled in Tennessee would stand. While the facts certainly indicate that there was the intent for Sarah to remain for an extended period of time in Michigan, the facts do not clearly indicate that Sarah's parents jointly intended for her to remain in Michigan.

In my view, the lower courts improperly focused on Sarah's intent with regard to her domicile and whether

she intended to remain in Michigan or return to Tennessee. While Sarah was an older teen at 16 years old, she was not emancipated. An unemancipated minor child's intent is *not pertinent* in determining where the child is domiciled under the no-fault act.[64] The appropriate inquiry instead focuses on whether the *child's parents* have reached a joint intent regarding the child's domicile that differs from the domicile indicated by the family court's orders.

I would conclude that Sarah was domiciled with Campanelli in Tennessee at the time of her death; therefore, ACIA is not liable for providing PIP benefits for Sarah's injuries and death.

III. CONCLUSION

Consistent with the majority opinion, I would reaffirm Michigan's long-standing principle that a person, including a minor child, can have only one domicile. Further, I concur in the majority's results in these cases. I would reach those results instead by holding that when a minor child has two legal residences pursuant to the Child Custody Act, family court orders relating to custody of the child and the child's residence(s) create a rebuttable presumption of domicile under the no-fault act. Under the facts of these cases, the presumptions in these cases would not be rebutted.

MARKMAN and MCCORMACK, JJ., concurred with ZAHRA, J.

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[64] See *Miss Band of Choctaw Indians*, 490 US at 48; MCL 722.4e(1)(d). I recognize that a child's preference is considered by the family court in certain circumstances. See MCL 722.23(i) (listing "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference[,]" as a factor in the best-interest-of-the-child determinations). However, I would distinguish that the intent of the child is not pertinent for purposes of determining domicile under the no-fault act.

FISHER SAND AND GRAVEL COMPANY v NEAL A SWEEBE, INC

Docket No. 143374. Argued January 9, 2013 (Calendar No. 1). Decided July 30, 2013.

On August 13, 2009, Fisher Sand and Gravel Company brought an action in the Midland Circuit Court against Neal A. Sweebe, Inc., asserting claims for breach of contract, account stated, and unjust enrichment with regard to concrete supplies plaintiff provided to defendant. Plaintiff filed an amended complaint on October 29, 2009, that added a claim for amount owed on an open account. Plaintiff had provided concrete supplies to defendant from October 1991 through October 2004 and had issued invoices, and defendant had made sporadic payments toward the accrued balance. On May 9, 2005, defendant received a delivery of goods from plaintiff, and plaintiff issued an invoice for $152.98. On May 13, 2005, defendant made a payment of $152.98. That was the last time that defendant made any payment to plaintiff. Defendant moved for summary disposition, contending that the action was barred by the four-year limitations period in the Uniform Commercial Code (UCC) pertaining to contracts for the sale of goods, MCL 440.2725(1). Plaintiff contended that defendant's obligation to pay on the open account was an obligation that was distinct from the underlying contract for the sale of goods and that the action was governed by the general six-year limitations period applicable to actions for breach of contract contained in the Revised Judicature Act (RJA), MCL 600.5807(8). The court, Michael J. Beale, J., agreed with defendant and granted its motion for summary disposition. Plaintiff appealed the dismissal of its account-stated and open-account claims. The Court of Appeals, OWENS, P.J., and METER, J. (O'CONNELL, J., dissenting), affirmed, concluding that the UCC's four-year limitations period was applicable to both plaintiff's open-account and account-stated claims. 293 Mich App 66 (2011). The Supreme Court granted leave to appeal. 491 Mich 914 (2012).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices CAVANAGH, KELLY, and MCCORMACK, the Supreme Court *held*:

Because actions on an open account and actions on an account stated are distinct and independent from the underlying transactions giving rise to the antecedent debt, neither action is governed by the four-year limitations period provided in § 2725 of the UCC, MCL 440.2725. Rather, both actions are governed by the general six-year limitations period applicable to actions for breach of contract contained in the RJA, MCL 600.5807(8).

1. Michigan law has recognized a number of collection actions, including open-account claims, mutual-and-open-account-current claims, and account-stated claims, but Michigan law concerning these claims has not always been clear. An open account is one that consists of a series of transactions and is continuous or current, and not closed or stated. An account stated is a contract based on assent to an agreed balance, and it is an evidentiary admission by the parties of the facts asserted in the computation and of the promise by the debtor to pay the amount due. An open account may be converted into an account stated, and whether that conversion has occurred will depend on the facts.

2. "Account stated" is an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note, having a like consideration for its support. It requires the manifestation of assent by both parties to the correctness of the statement of the account between them. Assent may be inferred from a party's inaction; as against a party receiving an account, and not objecting to it within a reasonable time, its correctness may be considered as admitted. It is not necessary, in support of an account stated, to show the nature of the original transaction, or indebtedness, or to give the items constituting the account. Rather, an action on an account stated is an independent cause of action, separate and distinct from the underlying transactions giving rise to the antecedent debt. Therefore, contrary to the opinion of the Court of Appeals in this case, in an account-stated action it is immaterial whether the underlying transactions involved the sale of goods. Because the language of MCL 440.2725 plainly states that it only applies to actions for breach of contract for the sale of goods, and an action on an account stated is an action on a promise to pay a certain amount that has nothing to do with any underlying sales transactions, MCL 440.2725 does not apply to an action on an account stated. Rather, it being established that an account stated is a contract based on assent to an agreed balance, an action on an account stated is subject to the six-year limitations period governing general contract actions provided in MCL 600.5807(8). An account-stated claim accrues when assent to the statement of

account is expressed or implied. Having erroneously concluded that plaintiff's account-stated claim was time-barred, the trial court did not consider whether defendant had properly objected to plaintiff's statement of the account. The case had to be remanded for consideration of whether defendant assented to plaintiff's statement of the account.

3. In an action on an open account, there is no assent to the balance due. Thus, the creditor may be required to establish the validity of the entries in the account. When an integral component of a transaction for goods or services is an express agreement for the periodic payment of money, an open-account claim cannot be established by the mere performance or nonperformance of the contract obligation. Under those circumstances, the creditor's remedy is to timely pursue a breach of contract action when the debtor fails to live up to the terms of the underlying agreement. When the credit relationship is not defined as an integral part of the transaction for goods or services, and instead arises from a course of dealing between the parties, an open-account claim may arise by implied contract. With regard to the limitations period applicable to open-account claims, the language of MCL 440.2725 plainly states that it only applies to actions for breach of contract for the sale of goods. An open-account claim is not based on a breach of contract for the sale of goods; it is an action to collect on the single liability stemming from the parties' credit relationship regardless of the underlying transactions comprising the account. The Court of Appeals erred by holding that the four-year limitations period provided in MCL 440.2725 applies to actions on an open account. An open-account claim, like an account-stated claim, is premised on an express or implied contract and is subject to the six-year period of limitations governing general contract actions set forth in MCL 600.5807(8). An open-account claim generally accrues on the date of each item proved in the account. Those items are severally barred when as to them the statute has run. A partial payment on an account restarts the running of the limitations period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment has admitted the full obligation. In this case, it was unclear whether an integral component of the parties' transactions was an express agreement for the periodic payment of money, and the trial court was directed to decide that issue on remand. The trial court was also directed to revisit its determination that defendant's May 13, 2005, payment was disconnected from the other transactions comprising the account. If that payment or any other payment within the six-year period preceding commencement of this case operated to renew defendant's promise to pay its

entire indebtedness to plaintiff, plaintiff's open-account claim was timely commenced within the six-year limitations period provided in MCL 600.5807(8).

Judgment of the Court of Appeals reversed; case remanded to the trial court for further proceedings.

Justice MARKMAN, concurring in part and dissenting in part, agreed with the majority that plaintiff's account-stated claim was subject to the six-year limitations period governing general contract actions set forth in MCL 600.5807(8), but disagreed with the majority that plaintiff's open-account claim was subject to the same six-year limitations period governing general contract actions. Justice MARKMAN concluded that the UCC's four-year limitations period, MCL 440.2725, applies to an open-account claim where the balance owed on the open account arose from the underlying sale of goods as it did in this case. The presence in an account-stated claim of an independent agreement concerning the single liability due under the account, and the absence of an independent agreement concerning any single liability in an open-account claim, is the critical distinction that determines which limitations period applies to each claim. Because there is no independent agreement in an open-account claim, the plaintiff must prove his or her right to collect on each of the underlying transactions that comprise the account. An open-account claim is the equivalent of a suit for the breach of the legal obligations that result from the parties' discrete transactions that comprise the account. Accordingly, where the underlying transactions pertain to an agreement to pass title of goods from the seller to the buyer for a price, as in this case, under the language of the UCC the four-year limitations period of MCL 440.2725 must be applied.

Justice VIVIANO took no part in the decision of this case.

1. CONTRACTS — COLLECTION ACTIONS — ACCOUNTS STATED — LIMITATION OF ACTIONS.

An account stated is a contract based on assent to an agreed balance; it is an evidentiary admission by the parties of the facts asserted in the computation and of the promise by the debtor to pay the amount due; it requires the manifestation of assent by both parties to the correctness of the statement of the account between them; assent may be inferred from a party's inaction; as against a party receiving an account, and not objecting to it within a reasonable time, its correctness may be considered as admitted; an action on an account stated is an independent cause of action, separate and distinct from the underlying transactions giving rise to the antecedent debt; an action on an account stated is subject to the

six-year limitations period governing general contract actions provided in MCL 600.5807(8); an account-stated claim accrues when assent to the statement of account is expressed or implied.

2. CONTRACTS — COLLECTION ACTIONS — OPEN ACCOUNTS — LIMITATION OF ACTIONS.

An open account is one that consists of a series of transactions and is continuous or current, and not closed or stated; in an action for an amount owed on an open account, there is no assent to the balance due, and the creditor may be required to establish the validity of the entries in the account; when an integral component of a transaction for goods or services is an express agreement for the periodic payment of money, an open-account claim cannot be established by the mere performance or nonperformance of the contract obligation; under those circumstances, the creditor's remedy is to timely pursue a breach of contract action when the debtor fails to live up to the terms of the underlying agreement; when the credit relationship is not defined as an integral part of the transaction for goods or services, and instead arises from a course of dealing between the parties, an open-account claim may arise by implied contract; an open-account claim is subject to the six-year period of limitations governing general contract actions set forth in MCL 600.5807(8); an open-account claim generally accrues on the date of each item proved in the account, and those items are severally barred when as to them the statute has run; a partial payment on an account restarts the running of the limitations period for an open-account claim unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment has admitted the full obligation.

Allan Falk, P.C. (by *Allan Falk*), and *McClintic & McClintic, P.C.* (by *William M. McClintic* and *Gavin W. McClintic*), for plaintiff.

W. Jay Brown PLC (by *W. Jay Brown*) for defendant.

Amicus Curiae:

Roger L. Premo for the Michigan Creditors Bar Association.

ZAHRA, J. At issue in this case is whether the four-year period of limitations in § 2725 of article 2 of

Michigan's Uniform Commercial Code (UCC),[1] MCL 440.2725, is applicable to actions on either an open account or an account stated when the underlying debt stemmed from the sale of goods. Because actions on an account stated and actions on an open account are distinct and independent from the underlying transactions giving rise to the antecedent debt, neither action is governed by the four-year limitations period provided in § 2725 of the UCC. Rather, both actions are governed by the six-year period of limitations provided in MCL 600.5807(8). Accordingly, we reverse the contrary judgment of the Court of Appeals, which barred plaintiff's open account and account stated actions as untimely, and remand the case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

Plaintiff provided concrete supplies to defendant commencing in October 1991. Plaintiff timely and regularly invoiced defendant for these supplies. Defendant made sporadic payments to plaintiff in random amounts. Plaintiff maintained an account that recorded the supplies sold to defendant and the payments defendant submitted to plaintiff on that account. Through the course of the litigants' business relationship, defendant never paid its account in full.[2] Commencing in 2003, defendant acquired from plaintiff less product

[1] MCL 440.1101 *et seq*.

[2] Defendant takes issue with the amount claimed due by plaintiff. Defendant maintains plaintiff owed defendant outstanding sums as a result of work done on a nuclear plant in Midland, a project that was abandoned by Consumers Power Company in 1984. Thus, defendant claims that it was entitled to offset the entire amount that plaintiff claimed it was owed "if such old events were to be litigated." Plaintiff responds that the alleged open account on which its claim is predicated began in October 1991, more than 6 years after the nuclear plant project

than it had acquired in prior years. Specifically, defendant made only 4 purchases from plaintiff in 2003 and 10 purchases from plaintiff in 2004. On May 9, 2005, defendant made what turned out to be its final purchase from plaintiff. On that date, plaintiff delivered a small amount of supplies to defendant, for which defendant was invoiced $152.98. Defendant paid the invoiced amount on May 13, 2005, by check. Defendant did not designate on its check that the tendered amount was to satisfy the invoice of May 9, 2005. Plaintiff claims it credited the payment against the open account balance. That was the last payment defendant made to plaintiff.

More than four years later plaintiff sued defendant, claiming that defendant owed plaintiff $92,968.57, including $3,718.32 in finance charges.[3] Plaintiff's claims included breach of contract, unjust enrichment, and account stated.[4] Plaintiff filed an amended complaint on October 29, 2009, adding a claim for amount owed on an open account. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claims were barred by the four-year period of limitations provided in § 2725 of the UCC. Plaintiff countered that defendant's obligation to pay on the open account was independent of any sale of goods and that its claim was therefore governed by the six-year

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was abandoned. Thus, plaintiff claims, any counterclaim for setoff was barred at the time plaintiff's claim accrued.

[3] The record is not entirely clear regarding the amount that plaintiff claims it is owed. Contrary to the figures used in the complaint and the amended complaint, in plaintiff's brief on appeal in this Court it claims it is owed $91,820.35 for materials provided over the course of the business relationship and $1,362.40 for interest on the account and late payment charges.

[4] In support of its account stated claim, plaintiff attached as exhibits to its complaint a summary of the account and an "AFFIDAVIT OF ACCOUNT STATED," the combination of which verified the alleged amount due pursuant to MCL 600.2145.

period of limitations provided in MCL 600.5807(8). Whether defendant's May 13, 2005, payment was a payment on the open account or a payment for a distinct transaction was also disputed because defendant's $152.98 payment matched an invoice for the same amount dated May 9, 2005. The trial court held that plaintiff's action was governed by the four-year period of limitations provided in § 2725 because the parties' open account related to the sale of goods. Therefore, the trial court concluded, plaintiff's claims based on open account and account stated were not timely because the action was commenced more than four years after the claims accrued.[5] A divided panel of the Court of Appeals affirmed in a published opinion, holding that the UCC's four-year limitations period was applicable to actions on both an open account and an account stated.[6]

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[5] Because the trial court granted summary disposition in favor of defendant solely on the basis of its determination that the UCC's four-year limitations period applied, the court did not decide whether the parties had assented to a sum stated, either expressly or by implication because of defendant's inaction, thus converting the open account claim to an account stated claim. Nor did the trial court find that defendant's May 9, 2005, payment of $152.98 revived plaintiff's cause of action.

[6] *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 293 Mich App 66; 810 NW2d 277 (2011). The Court of Appeals described the statutory context of the dispute:

> The Revised Judicature Act provides a limitations period of six years "for . . . actions to recover damages . . . due for breach of contract." MCL 600.5807(8). All sales of goods are governed by Article 2 of the UCC, MCL 440.2102. Section 2725 of the UCC, MCL 440.2725, provides that "[a]n action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued." . . .
>
> . . . "In actions brought to recover the balance due upon a mutual and open account current, the claim accrues at the time of the last item proved in the account." MCL 600.5831. Plaintiff contends that its claim accrued on May 13, 2005, the last date on which defendant made a payment. Assuming, without deciding,

The Court of Appeals noted that it was unable to find anything in Michigan's jurisprudence directly addressing whether the four-year period of limitations in the UCC is applicable to an open account relating to the sale of goods.[7] Plaintiff argued that the UCC did not apply to its claim because "payment on an open account triggers a new obligation, separate and distinct from an underlying agreement."[8] The Court of Appeals dismissed plaintiff's contentions because the cases supporting plaintiff's argument did not involve the sale of goods subject to the UCC.[9] The Court of Appeals consulted the official comments to the UCC,[10] which provide that the purpose of article 2 is to take " 'sales contracts out of the general laws limiting the time for commencing contractual actions . . . .' "[11] Though it acknowledged that the official comments do not have the force of law, the Court of Appeals noted that applying the UCC's four-year period of limitations to actions on open account would accomplish the goal identified in

> that defendant's May 13, 2005, payment may be considered a payment toward the parties' open account, plaintiff's action was filed in August 2009, more than four years after the May 2005 payment. Thus, if plaintiff's action is governed by the four-year limitations period in the UCC, it is untimely. [*Id*. at 70-71 (citation omitted).]

[7] The Court of Appeals referred only to plaintiff's open account action. It is clear from the context of the Court of Appeals' decision that the Court's analysis applied to plaintiff's open account action *and* its account stated action.

[8] *Id*. at 72, citing *Collateral Liquidation, Inc v Palm*, 296 Mich 702, 704; 296 NW 846 (1941), *Miner v Lorman*, 56 Mich 212, 216; 22 NW 265 (1885), and *Bonga v Bloomer*, 14 Mich App 315; 165 NW2d 487 (1968).

[9] *Fisher Sand & Gravel*, 293 Mich App at 72.

[10] The official comments are prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Thomson West, Uniform Commercial Code: Official Text and Comments (2012-2013 ed), Preface, p iii.

[11] *Fisher Sand & Gravel*, 293 Mich App at 73 (citation omitted).

the comments of promoting "uniformity and consistency" among the jurisdictions.[12] The Court of Appeals also noted that "[o]ther jurisdictions that have addressed this question have favored applying the UCC limitations period to an action based on an open account related to the sale of goods."[13]

Judge O'CONNELL dissented, asserting that "[p]ayment on an open account triggers a new obligation, separate and distinct from an underlying agreement," and therefore, the new obligation is governed by the six-year period of limitations in MCL 600.5807(8).[14] Thus, Judge O'CONNELL would have reversed the judgment of the trial court.[15]

This Court granted leave to appeal to determine whether an action on an open account relating to the sale of goods is subject to the four-year period of limitations in § 2725 of the UCC or the general six-year period of limitations applicable to contract actions in MCL 600.5807(8).[16]

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[12] *Id*.

[13] *Id*. Specifically, the Court of Appeals relied on a case from the Oregon Court of Appeals, *Moorman Mfg Co of California, Inc v Hall*, 113 Or App 30, 33; 830 P2d 606 (1992), which held that

> [a]lthough an account stated is based on a separate agreement between the parties, it relates to and cannot be divorced from the underlying sales transaction. The UCC drafters intended that one limitation apply to all transactions involving the sale of goods, regardless of the theory of liability asserted. [Citation omitted.]

[14] *Fisher Sand & Gravel*, 293 Mich App at 76 (O'CONNELL, J., dissenting).

[15] *Id*. at 78.

[16] *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 491 Mich 914 (2012). Absent from our grant order is any reference to account stated actions. Thus it appears that at the time leave was granted we failed to appreciate the distinction between open accounts and accounts stated.

II. STANDARD OF REVIEW

MCR 2.116(C)(7) allows a party to file a motion for summary disposition on the ground that a claim is barred because of the expiration of the applicable period of limitations. A movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. Moreover, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.[17] Appellate review of a trial court's summary disposition ruling pursuant to MCR 2.116(C)(7) is de novo.[18] Questions of statutory interpretation are also reviewed de novo.[19]

III. ANALYSIS

A. COLLECTION ACTIONS GENERALLY

Michigan has recognized a number of collection actions. These actions include open account claims, mutual and open account current claims, and account stated claims. The purpose of these causes of action is to recover sums due that arose out of a course of dealing between the parties.

Historically the common law has distinguished an open account from a mutual and open account current. An "open account" is traditionally defined as " '1. [a]n unpaid or unsettled account. 2. [a]n account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single

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[17] *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994).

[18] *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[19] *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

liability.' "[20] This Court has characterized an open account as " 'one which consists of a series of transactions and is continuous or current, and not closed or stated.' "[21] By comparison, a "mutual account" is traditionally defined as "[a]n account showing mutual transactions between parties, as by showing debits and credits on both sides of the account."[22] Consistent with this traditional definition, this Court has characterized a mutual and open account current as an account that is both mutual and open, resulting from "a course of dealing where each party furnishes credit to the other on the reliance that upon settlement the accounts will be allowed, so that one will reduce the balance due on the other."[23]

An account stated action is based on " 'an agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance.' "[24] Importantly, an open account may be converted into an account stated:[25]

> The conversion of an open account into an account stated, is an operation by which the parties *assent* to a sum

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[20] *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 355-356; 771 NW2d 411 (2009), quoting Black's Law Dictionary (7th ed).

[21] *A Krolik & Co v Ossowski*, 213 Mich 1, 7; 180 NW 499 (1920) (citation omitted).

[22] Black's Law Dictionary (7th ed), p 18.

[23] *In re Hiscock Estate*, 79 Mich 536, 538; 44 NW 947 (1890).

[24] *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW 215 (1940), quoting *Thomasma v Carpenter*, 175 Mich 428, 434; 141 NW 559 (1913).

[25] While an open account may be converted into an action on an account stated, we are aware of no authority that requires an open account as a prerequisite to an action on an account stated.

> as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account. The parties may still impeach it for fraud or mistake.[26]

In the past these claims have been conflated or treated inconsistently by the Legislature and Michigan courts.[27] For example, the burden-shifting statute (now MCL 600.2145) has expressly included open account claims and claims on an account stated since as far back as the 1870s, but has never expressly included claims on mutual and open accounts.[28] Furthermore, the accrual of mutual and open account claims is governed by MCL 600.5831, while no specific statutory provision exists for the accrual of either open account claims or claims on an account stated.[29]

At times, this Court has not been a model of clarity when addressing collection actions. As previously discussed, this Court has characterized a mutual and open account current as an account that is both mutual and open, resulting from "a course of dealing where each party furnishes credit to the other on the reliance that upon settlement the accounts will be allowed, so that

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[26] *White v Campbell*, 25 Mich 463, 468 (1872) (in which the plaintiff brought action on an account stated).

[27] To the extent the Legislature desires to clarify this area of the law, it might consider revisiting the statutory framework that corresponds with these collection actions.

[28] See How Stat 7525; 1871 CL 5954.

[29] See MCL 600.5831 ("In actions brought to recover the balance due upon a mutual and open account current, the claim accrues at the time of the last item proved in the account.").

one will reduce the balance due on the other."[30] But in *Fuerbringer v Herman* the Court held that payment of money on an account is sufficient to render the account mutual.[31] Allowing payments toward an account to be sufficient to render the account mutual is against the general authority. As observed in Williston on Contracts:

> [I]t is generally held essential, in order to constitute such an account as shall fall within the principle in question, that there shall be mutual open, current dealings and claims subject to a future final balance.
>
> A payment, therefore, given and received as partial discharge of an account for goods or services does not make the account mutual; it merely diminishes the amount due on a one-sided account.[32]

The *Fuerbringer* Court dismissed this Court's earlier decision in *In re Hiscock Estate* without analysis,[33] leaving practitioners and lawmakers to wonder whether there is a difference in Michigan between an open account and an open and mutual account current. As recently as 2009, this Court considered whether an action to collect past due attorney fees was an open and mutual account current. While the Court concluded that the action was not an open and mutual account current, this holding was not based on the lack of mutual exchange of credit between the law firm and its client but instead on the fact that the underlying service contract expressly provided the terms of payment.[34]

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[30] *In re Hiscock Estate*, 79 Mich at 538.

[31] *Fuerbringer v Herman*, 225 Mich 76, 79; 195 NW 693 (1923).

[32] 31 Williston, Contracts (4th ed), § 79.26, pp 389-390 (citations omitted).

[33] *Fuerbringer*, 225 Mich at 79.

[34] *Seyburn*, 483 Mich at 348.

Notwithstanding these inconsistencies, the common thread in actions on accounts is that they arise "where the parties have conducted a series of transactions for which a balance remains to be paid."[35] We now turn to the instant matter, which involves an open account claim and an account stated claim.

B. ACTIONS ON AN ACCOUNT STATED

Of the three claims discussed in this opinion, the account stated claim is most clearly defined under Michigan law. An account stated "is a contract based on assent to an agreed balance, and it is an evidentiary admission by the parties of the facts asserted in the computation and of the promise by the debtor to pay the amount due."[36] This Court has characterized an account stated as " 'but an expression to convey the idea of a contract having an account for its consideration, and is no more an account than is a promissory note or contract, having a like consideration for its support.' "[37] An account stated, like all contracts, requires mutual assent. Specifically, "[a]n account stated requires the manifestation of assent by both parties to the correctness of the statement of the account between them."[38]

In his treatise on contract law, Professor Arthur Corbin summarized the nature of an action on an account stated:

> If a claimant renders an account and it is assented to as correct by the other party with an express or implied promise to pay, an action may be maintained on the

[35] 1 Am Jur 2d, Accounts and Accounting, § 8, p 628.

[36] 13 Corbin, Contracts (rev ed), § 72.4(2), p 478, citing Restatement Contracts, 2d, § 282, comment c.

[37] *A Krolik & Co*, 213 Mich at 8, quoting *Auzerais v Naglee*, 74 Cal 60; 15 P 371 (1887).

[38] 13 Corbin, Contracts (rev ed), § 72.4(2), p 481.

> promise. *The account stated is a new, independent cause of action superseding and merging the antecedent causes of action represented by the particular items included in the computation.*[39]

In *White v Campbell*, this Court likened the obligation to pay the antecedent debt to that commonly associated with a promissory note:

> [T]he agreed statement serves in place of the original account, *as the foundation of an action*. *It becomes an original demand*, and amounts to an express promise to pay the actual sum stated. The creditor becomes entitled to recover the agreed balance, *in an action based on the fact of its acknowledgment by the debtor*, upon an adjustment of their respective claims. The effect of the operation is said to be much the same as though the debtor had given his note for the balance.[40]

The parties to an account stated need not expressly assent to the sum due, as there are instances when assent may be inferred from a party's *inaction*:

> [A]s against a party receiving an account, and not objecting to it within a reasonable time, its correctness may be considered as admitted by him, and the balance as the debt; or, in other words, that the party rendering the account may, under such circumstances, treat it as an account stated . . . . If the party to whom the account is rendered, object[s] within a reasonable time, there is no room for inferring an admission of its correctness.[41]

In other words, the debtor's new promise to pay is a matter of express or implied contract, depending on the conduct of the parties. When the parties expressly agree to the sum due, the stated account forms an express contract. By contrast, when one party's assent is in-

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[39] *Id*. at § 72.4, pp 466-467 (emphasis added).

[40] *White*, 25 Mich at 468 (citations omitted) (emphasis altered).

[41] *White*, 25 Mich at 469, citing *Lockwood v Thorne*, 11 NY 170 (1854), and *Lockwood v Thorne*, 18 NY 285 (1858).

ferred from inaction, the stated account operates to form an implied contract.[42] No matter the method of assent, the debtor in an account stated action has received goods or services without having paid for them, and an action exists when the price of those goods or services is greater than the sum paid.[43]

The Court of Appeals held that because the transactions giving rise to the debt on account related to the sale of goods, the four-year period of limitations set forth in § 2725 of the UCC applies to plaintiff's account stated claim. The Court of Appeals was persuaded by a case from the Oregon Court of Appeals that characterized account stated claims by the nature of the underlying obligations comprising the account. Specifically, the Michigan Court of Appeals relied on *Moorman Mfg Co of California, Inc v Hall*, which stated that " '[a]lthough an account stated is based on a separate agreement between the parties, it relates to and cannot be divorced from the underlying sales transaction.' "[44] But

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[42] An account stated is an implied-in-fact contract when one party assents by implication because the requisite mutual assent is inferred from the conduct of the parties. See *Cascaden v Magryta*, 247 Mich 267, 270; 225 NW 511 (1929).

[43] 13 Corbin, Contracts (rev ed), § 72.1(3), p 457. Historically, a promise resulting from an account stated

> was enforced because it was a promise to pay a pre-existing debt called by the courts "past" consideration. In reality, the promise is enforced as other subsequent promises, such as a subsequent promise after the receipt of a material benefit or the promise to pay a debt that is barred by the statute of limitations. In each of these factual situations, the retention of a benefit previously received, the goods or services previously rendered, is unjust or the retention of the prior transfer of goods or services cannot be justified on the basis of a legal principle or a legal relationship. This is the fundamental reason for the enforcement of the promise. [*Id*. (citations omitted).]

[44] *Fisher Sand & Gravel*, 293 Mich App at 74, quoting *Moorman Mfg*, 113 Or App at 33.

the *Moorman Mfg* case runs contrary to this Court's prior pronouncements regarding the materiality of the underlying transactions in an account stated action. As early as 1857 this Court observed:

> It is not necessary, in support of an account stated, to show the nature of the original transaction, or indebtedness, or to give the items constituting the account. . . . Neither does the nature of the original transaction, out of which the acknowledgment of indebtedness grew, appear to be material.[45]

It follows, then, that an action on an account stated is indeed an independent cause of action, separate and distinct from the underlying transactions giving rise to the antecedent debt. Therefore, it is immaterial whether the underlying transactions involved the sale of goods.

The Court of Appeals erroneously relied on the official comment to § 2725 of the UCC to arrive at its result. The official comments to the UCC do not have the force of law.[46] When ascertaining the Legislature's intent, a reviewing court should focus first on the plain language of the statute in question,[47] and when the language of the statute is unambiguous, it must be enforced as written.[48] Examining the plain language of § 2725, Professor Corbin concluded that, because an action on an account stated is not an action "for breach of any contract for sale,"[49] the four-year limitations period does not apply to actions on an account stated:

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[45] *Stevens v Tuller*, 4 Mich 387, 388-389 (1857).

[46] *Shurlow v Bonthuis*, 456 Mich 730, 735 n 7; 576 NW2d 159 (1998), citing White & Summers, Uniform Commercial Code (3d ed), § 4, p 12; see also *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 260 n 6; 761 NW2d 694 (2008).

[47] *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).

[48] *Sun Valley*, 460 Mich at 236.

[49] MCL 440.2725.

> Recent authorities hold that an action on an account stated arising out of a transaction in goods is subject to the four-year statute of limitations applicable to the underlying goods transaction. Despite the laudable goal of minimizing hardship and confusion for buyers and sellers "doing business on a nationwide scale," the four-year limitation period of [§ 2725] is inapplicable to an action on an account stated. First, [§ 2725] states that an action "for breach of any contract for *sale* must be commenced within four years." . . . An action on an account stated is not an action for the breach of a contract for sale. Rather, it is an action to enforce a subsequent promise to pay an account. Indeed, the action on such a promise is analogous to an action on a promise to pay embodied in a note or letter of credit. An action on either of these formal promises to pay is subject to the limitations period applicable to the promise to pay, not the underlying transaction, which might be a sale of goods.[50]

Because the language of § 2725 plainly states that it only applies to actions on the sale of goods,[51] and an action on an account stated is an action on a promise to pay a certain amount that has nothing to do with any underlying sales transactions, the Court of Appeals erred by relying on the official comment to § 2725 of the UCC. Further, even if the underlying debt stemmed from the sale of goods, the Court of Appeals erred by concluding that the four-year limitations period applies because the nature of the underlying transactions is immaterial.

Therefore, it being established that an account stated is "a contract based on assent to an agreed balance,"[52] an action on an account stated is subject to the six-year

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[50] 13 Corbin, Contracts (rev ed), § 72.4(2), pp 472-473 (citations omitted).

[51] See also MCL 440.2102 (stating that article 2 of the UCC applies to transactions in goods).

[52] 13 Corbin, Contracts (rev ed), § 72.4(2), p 478.

limitations period governing general contract actions provided in MCL 600.5807(8).[53]

Applying these legal principles to the present case, plaintiff submitted with its complaint a summary of the account and an "AFFIDAVIT OF ACCOUNT STATED." Defendant did not expressly assent to the balance due as reflected in this affidavit. Nonetheless, plaintiff claims its statement of the account stood unimpeached at the time the trial court dismissed plaintiff's claims.[54] Having erroneously concluded that plaintiff's claim was time-barred, the trial court did not consider whether defendant had properly objected to plaintiff's statement of the account. On remand, we direct the trial court to consider whether plaintiff presented evidence that defendant assented to plaintiff's statement of the account, either expressly or by implication.

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[53] A cause of action on an account stated accrues upon an adjustment of the parties' respective claims against one another. *White*, 25 Mich at 468 ("The creditor becomes entitled to recover the agreed balance, in an action based on the fact of its acknowledgement by the debtor, *upon an adjustment of their respective claims*[.]") (emphasis added). In other words, the accrual of an account stated claim "occurs when assent to the statement of account is either expressed or implied . . . ." 13 Corbin, Contracts (rev ed), § 72.4(2), p 473. Further, it has also long been established in Michigan law that payment on an account stated renews the running of the period of limitations. *Miner*, 56 Mich at 216. In *Miner*, Chief Justice COOLEY opined:

> [Partial payment of a demand] operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such lapse of time as may have occurred previous to the payment being made. The payment is not a contract; it is not in itself even a promise; but it furnishes ground for implying a promise in renewal from its date, of any right of action which before may have existed. [*Id.*]

[54] While defendant does not contest that it owes plaintiff, it does contend that it should be allowed to offset the amount owed plaintiff against money plaintiff owes defendant from prior dealings. This contention is inconsequential to the issue before this Court and, therefore, we take no position on it.

C. ACTIONS ON AN OPEN ACCOUNT

Like account stated claims, actions on an open account have long been recognized in Michigan.[55] Nonetheless, the caselaw defining this claim is far less developed than the caselaw addressing accounts stated. This may be because a suit on an open account is, from a creditor's perspective, a less desirable claim than an action on an account stated. In an action on an account stated, the creditor must present proof of the debtor's express or implied assent to the balance due. Upon such proof, the underlying transactions become irrelevant. In an action on an open account, however, there is no assent to a balance due. Thus, the creditor may be required to establish the validity of the entries in the account.[56] Additionally, open account claims were tradi-

[55] See *Locke v Farley*, 41 Mich 405, 406; 1 NW 955 (1879) ("The action was brought on an account for goods alleged to have been sold and delivered to Locke by the defendants in error as a partnership under the name of Farley, Hawey & Co." A central issue to the case was whether the parties' affidavits met the requirements of 1871 CL 5954—one of many predecessors of the modern-day burden-shifting statute, MCL 600.2145. The former statute applied to accounts stated and open accounts alike, as does the current statute); *Snyder v Patton & Gibson Co*, 143 Mich 350, 351; 106 NW 1106 (1906) ("The suit was brought to recover an unpaid balance upon an account for labor."); *Star Steel Supply Co v White*, 4 Mich App 178, 180; 144 NW2d 673 (1966) ("The plaintiff's suit is based on a statement of the open account with an affidavit of open account . . . .").

[56] While a creditor may establish a prima facie case of indebtedness in an open account action by annexing both an affidavit of the amount due and a copy of the account to the complaint pursuant to MCL 600.2145, that action is not required to commence an open account action. A creditor may instead prove his or her account "in the ancient way" by offering testimony and other evidence demonstrating indebtedness. *McHugh v Butler*, 39 Mich 185, 186 (1878) ("Here the affidavit was made out of time, and when the plaintiff went to trial his situation was no better than it would have been if no affidavit had been made. He was required to prove his case in the ancient way."); see also *Snyder*, 143 Mich at 351-352.

tionally rooted in assumpsit.[57] "Assumpsit" is defined as "**1.** An express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another <an assumpsit to pay a debt>. **2.** A common-law action for breach of such a promise or for breach of a contract ."[58] With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished.[59] But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved:

> It is to be understood that the abolition of the forms of action *does not abolish the remedies thereunder*. If a cause of action is stated in the complaint showing the pleader entitled to relief, the appropriate substantive remedy will

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[57] See, e.g., *Morrill v Bissell*, 99 Mich 409, 412; 58 NW 324 (1894) ("Plaintiff . . . commenced an action of *assumpsit* in the circuit court . . . upon an account for goods sold and delivered. The suit was by declaration upon the common counts."); *McHugh*, 39 Mich 185 (an assumpsit action in which the plaintiff "sued to recover on an open account and served with the declaration a copy of the account and of an affidavit made by him of the amount due"); *Gordon v Sibley*, 59 Mich 250, 251; 26 NW 485 (1886) ("[P]laintiff declared orally in assumpsit for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant, at the defendant's request, during the year 1883, and claimed damages, $100."); *Grand Dress, Inc v Detroit Dress Co*, 248 Mich 447, 448; 227 NW 723 (1929) ("This suit was brought in assumpsit upon an open account. The declaration was on the common counts, accompanied by a bill of particulars.").

[58] Black's Law Dictionary (9th ed), p 142.

[59] The Michigan Court Rules state that "[t]here is one form of action known as a 'civil action.' " MCR 2.101(A). *Former* GCR 1963, 110.3 abolished the technical forms of pleading:

> All common counts, general issues, demurrers, pleas, fictions and technical forms of action or pleading, are abolished. The form and sufficiency of all motions and pleadings shall be determined by these rules, construed and enforced to secure a just, speedy, and inexpensive determination of all controversies on their merits. [Reprinted in 1 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed), p 176.]

> remain, no matter if the action is labeled as to form or is merely designated as a civil action.[60]

Thus, there is no doubt that plaintiff can pursue a civil action on an open account. Unclear from our jurisprudence, however, is whether an action on an open account, like an action on an account stated, is an independent cause of action, separate and distinct from the underlying transactions giving rise to the antecedent debt, or a claim that is dependent on the underlying transactions.

This Court's opinion in *Goodsole v Jeffery* is insightful in distinguishing open account claims from claims based on an antecedent debt that arises from an express contract defining the rights and liabilities of the parties.[61] In *Goodsole*, the litigants agreed by oral contract that the plaintiff would provide the defendant a piano and the defendant would pay the plaintiff rent of $2.50 per month on the eighth day of each month commencing August 8, 1906. It appears the contract was for an indefinite term. The plaintiff kept a book of the charges and payments. The last charge for rent came on May 8, 1911, and the last payment made to the plaintiff was February 2, 1910. On August 30, 1916, the plaintiff brought suit to collect all unpaid rental charges through May 8, 1911. The plaintiff maintained that since the debt was on an open and mutual account, the entire amount was due and owing. The defendant argued that only unpaid rental charges that had accrued within 6 years of the complaint were collectable. This Court held that the plaintiff failed to establish the existence of an open and mutual account current:

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[60] Committee Comment, reprinted in 1 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed), p 179 (emphasis added).

[61] *Goodsole v Jeffery*, 202 Mich 201; 168 NW2d 461 (1918).

> I know of no decision of this court, and think there is none to be found in any jurisdiction, holding that where the dealings of the parties relate entirely to and are governed by a special contract for the payment of money, at agreed upon periods, an open mutual account is established by performance of the contract obligation, whether a book account of it is kept or not. . . . [T]he defendant having pleaded the statute of limitations, judgment should have been directed in his favor . . . .[62]

More than 20 years after *Goodsole*, this Court again considered the distinction between a claim on an account and a claim based on the underlying transactions giving rise to the debt that arises from an express contract defining the rights and liabilities of the parties. In *In re Dei's Estate*, the plaintiff, an attorney, performed legal services for Christina Dei from 1925 to 1933, during which time Dei only made two payments on the account.[63] Dei died in 1935. After the plaintiff was made aware of Dei's death, he brought a claim against her estate for the unpaid balance on the account. The estate defended against the claim by arguing that any legal services provided more than six years before Dei's death were barred by the statute of limitations. The Court framed the issue as follows:

> As to whether the whole or any part of plaintiff's claim is barred by the statute of limitations, we must first determine whether or not the account as presented was a mutual and open account current. If so, the [entire amount due on the account is collectable.] If not, only those items charged against decedent in her lifetime can be allowed that accrued within six years prior to her death.[64]

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[62] *Id.* at 203.

[63] *In re Dei's Estate*, 293 Mich 651, 652-654; 292 NW 513 (1940). Although *In re Dei's Estate* involved an action on a mutual and open account current, we see no reason why the rationale employed ought not apply to actions on an open account.

[64] *Id.* at 655-656.

In concluding that the relationship between the plaintiff and Dei created an open and mutual account, the Court distinguished its holding in *Goodsole*. Unlike *Goodsole*, there was no agreement that defined the terms of payment for the services rendered. Thus, because the particulars of the decedent's credit relationship with her lawyer were not governed by the terms of the underlying services agreement, the plaintiff had a valid mutual and open account current claim.[65]

This Court recently reexamined *In re Dei's Estate* in *Seyburn*, which also involved a claim for unpaid legal fees.[66] In *Seyburn*, this Court examined whether a claim for unpaid attorney fees was an action on an open and mutual account current. The Court looked to the retainer agreement and concluded that the parties' credit relationship was expressly defined by the explicit terms of their agreement for services:

> In the present case, it is undisputed that plaintiff and defendant entered into a signed contract containing specific terms. The contract stated that plaintiff agreed to provide legal services to defendant and, in turn, defendant would make payments of money to plaintiff. Specifically, the contract provided for plaintiff to send a billing statement by the 20th of each month, using hourly billing at an established rate, and also required defendant to pay within 10 days of the date of the statement. In addition, the contract defined the liabilities of both parties.[67]

Thus, because the terms of the parties' credit relationship were provided for in their contract for services, a mutual and open account current claim could not be

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[65] *Id*. at 656-658.

[66] *Seyburn*, 483 Mich 345.

[67] *Id*. at 357.

established on the basis of the parties' mere failure to perform pursuant to their contractual obligations.

We hold that when an integral component of a transaction for goods or services is an express agreement for the periodic payment of money, an open account claim cannot be established by the mere performance or nonperformance of the contract obligation.[68] Under those circumstances, the creditor's remedy is to timely pursue a breach of contract action when the debtor fails to live up to the terms of the underlying agreement. But when the credit relationship is not defined as an integral part of the transaction for goods or services, and instead arises from a course of dealing between the parties, an open account claim may arise by implied contract.[69] Applying this holding to the present case, it is unclear whether an integral component of the parties' transactions was an express agreement for the periodic payment of money. Thus, we direct the trial court to determine as much on remand.

There are several factors that weigh in favor of our holding today. Significantly, for more than 150 years, Michigan courts have recognized actions on an open account. Likewise, for the same period of time our Legislature has recognized this claim, along with a

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[68] See *Goodsole*, 202 Mich at 203; *In re Dei's Estate*, 293 Mich at 656-658; *Seyburn*, 483 Mich at 357.

[69] Justice MARKMAN, similarly to the out-of-state authority on which he relies, recognizes that article 2 of the UCC governs individual sales on credit but declines to acknowledge a distinction between individual sales on credit and serial sales on credit that lack an express agreement for the periodic payment of money that are melded into an account. Any lack of statutory analysis in this opinion stems from the absence of any express mention of actions on accounts in article 2 of the UCC. As previously discussed, this Court's treatment of these collection actions has been anything but a model of clarity and consistency, and the disagreement between Justice MARKMAN and the majority of this Court is not an unreasonable one.

claim for an account stated. These suits are premised on the debt due on the account and rarely discuss the underlying transactions, except to the extent that the transactions provide a defense to the debt.[70]

Recognition of an action on an open account as an independent claim that arises out of the course of dealing between a creditor and debtor also promotes commerce without encouraging creditors to file lawsuits to preserve their right to collect on debts. Assume for example that a merchant sold goods and services on account whereby goods and services would be regularly delivered to a purchaser who in turn made sporadic payments in varying amounts as the relationship developed. As the parties' relationship nears its fourth year, the merchant would have to insist on settlement of the account or risk the possibility that all or part of the balance due on account could be declared uncollectable after the four-year limitations period on the sale of goods expires. Even if this merchant dealt exclusively in the sale of services, he would face the same dilemma in year six.

We must next determine what limitations period applies to open account claims. For all the reasons stated previously in our analysis of the limitations period for accounts stated, we reject the notion that § 2725 of the UCC applies when the underlying account arises from the sale of goods. The language of § 2725 plainly states that it only applies to actions for breach of

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[70] *Grand Dress*, 248 Mich at 448-449 (in which the defendant, through its counteraffidavit, not only admitted indebtedness regarding some items but also disputed some ledger entries on the grounds that the plaintiff had allegedly increased the agreed-to price for a number of items by $0.25); *Star Steel Supply*, 4 Mich App at 181-183 (in which the defendant disputed a number of charges on an open account in response to the plaintiff's "affidavit of open account").

contract for the sale of goods.[71] An open account claim is not a breach of contract action for the sale of goods; it is an action to collect on the single liability stemming from the parties' credit relationship regardless of the underlying transactions comprising the account.[72] Thus, the Court of Appeals erred by holding that the four-year period of limitations provided in § 2725 of the UCC applies to actions on an open account.

We further conclude that an open account, like an account stated, is premised on an express or implied contract. In some instances, the credit relationship between the creditor and debtor may be defined by an express contract.[73] Yet, in other instances, the credit relationship will arise from the parties' course of dealing.[74] Having established that an open account claim is an action for breach of an express or implied contract, we conclude that open account claims are subject to the

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[71] See also MCL 440.2102 (stating that article 2 of the UCC applies to transactions in goods).

[72] See the text accompanying notes 49-51 of this opinion. While Professor Corbin's analysis expressly relates to an account stated, it is informative and persuasive with regard to an open account claim. See 13 Corbin, Contracts (rev ed), § 72.4(2), pp 472-473. While § 2725 applies to actions "for breach of any contract for *sale*," an open account claim is no more an action for a breach of a contract for sale than is an account stated claim. (Emphasis added.) Rather, an open account claim is an action to recover the single liability stemming from the parties' credit relationship. Like an account stated claim, an open account claim is analogous to "an action on a promise to pay embodied in a note or letter of credit." *Id*. at p 473. As Professor Corbin noted, an action on a note or letter of credit "is subject to the limitations period applicable to the promise to pay, not the underlying transaction, which might be a sale of goods." *Id*.

[73] See the text accompanying note 68 of this opinion. Of course, when the credit relationship is provided for by the terms of the parties' contract, those terms shall govern. A credit card relationship is an example of this type of contract.

[74] See *Star Steele Supply*, 4 Mich App at 180 (in which the plaintiff entered into a course of dealings with the defendant, selling goods, wares, merchandise, and services on open account); *In re Dei's Estate*, 293 Mich at

six-year period of limitations governing general contract actions provided in MCL 600.5807(8).

An open account claim generally accrues on the date of each item proved in the account.[75] Furthermore, those items "are severally barred when as to them the statute has run."[76] Partial payment on an account, however, may toll or even remove the statute of limitations under certain circumstances.[77] As recently as 2000, this Court unanimously held that

> a partial payment [on a debt] restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation.
>
> This rule is at least as old as *Miner v Lorman*, 56 Mich 212, 216; 22 NW 265 (1885). Though other aspects of *Miner* led this Court to conclude that the plaintiff could not prevail in his suit, Justice COOLEY's opinion for a unanimous Court included this explanation:
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> "The statute does not prescribe what effect part payment of a demand shall have, but it is familiar law that it operates as an acknowledgment of the continued existence of the demand, and as a waiver of any right to take advantage, by plea of the statute of limitations, of any such lapse of time as may have occurred previous to the payment being made. The payment is not a contract; it is not in itself even a promise; but it furnishes ground for implying a promise in renewal from its date, of any right of action which before may have existed."
>
> The Supreme Court frequently has restated this principle. In *Hiscock v Hiscock*, 257 Mich 16, 25; 240 NW 50; 78 ALR 953 (1932), a dispute concerning payments on a mortgage, the Court said:

652-654 (in which the plaintiff provided a variety of services to the decedent over the course of years, and the decedent made sporadic payments toward the account over the same).

[75] 1 Am Jur 2d, Accounts and Accounting, § 22, p 644.

[76] *Id*.

[77] *Id*. at § 24, p 646.

> "A voluntary and unqualified payment subsequent to the bar [of the statute of limitations] is the best evidence that the debtor does not claim his legal rights, but, on the contrary, intends to waive them and to perform his moral obligation to pay the whole of the just debt."
>
> With little discussion, the principle was applied in *Wagner v Kincaid*, 291 Mich 262, 266; 289 NW 154 (1939). To the same end, we explained in *Collateral Liquidation, Inc v Palm*, 296 Mich 702, 704; 296 NW 846 (1941), that "[t]he effect of the payment under the statute is equivalent to a new promise." And in *Beaupre v Holzbaugh*, 327 Mich 101, 107-108; 41 NW2d 338; 27 ALR2d 532 (1950), this Court said, "In the absence of any showing that payment was not intended by the parties to imply a new promise to pay, the statute was tolled by the payment and the note was not outlawed when suit was begun."
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> In recent years, the Court of Appeals has likewise applied this rule. *Alpena Friend of the Court ex rel Paul v Durecki*, [195 Mich App 635; 491 NW2d 864 (1992)]; *Federal Deposit Ins Corp v Garbutt*, 142 Mich App 462, 468; 370 NW2d 387 (1985); *Bonga* [*v Bloomer*, 14 Mich App 315, 319; 165 NW2d 487 (1968)].[78]

Indeed, consistently with the quoted passage, this Court concluded in *Yeiter* that the partial payments made less than six years before commencement of the action operated to renew the defendant's promise to pay the entire amount owed, thereby restarting the six-year limitations period provided in MCL 600.5807(8).[79]

In the instant case, plaintiff's May 9, 2005, delivery of concrete supplies was accompanied by an invoice in the amount of $152.98. On May 13, 2005, defendant rendered payment in the amount of the invoice, but did not pay the alleged balance due. Relying on this Court's

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[78] *Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493, 497-499, 607 NW2d 68 (2000) (alteration in original).

[79] *Id*. at 499-501.

decision in *Seyburn*,[80] the trial court held that defendant's May 13, 2005, payment to plaintiff "was a disconnected event which would give rise to a separate obligation on the part of the [d]efendant . . . ." *Seyburn* has no bearing on the accrual of plaintiff's open account claim.[81] Indeed, the instant case is seemingly devoid of an event, such as the termination of the relationship in *Seyburn*, that would suggest that defendant's May 13, 2005, payment was disconnected from the other underlying transactions giving rise to plaintiff's claim. Accordingly, the trial court's conclusion to that effect is questionable. Thus, we direct the trial court to revisit on remand its determination that the May 13, 2005, payment was disconnected from the other transactions in light of this opinion. If the trial court finds that the May 13, 2005, payment—or any other payment within the six-year period preceding commencement of this suit—operated to renew defendant's promise to pay its entire indebtedness to plaintiff, plaintiff's action will have been commenced within the six-year limitations period provided in MCL 600.5807(8).

IV. CONCLUSION

Because both an action on an account stated and one on an open account are distinct from the underlying transactions giving rise to the antecedent debt, neither is governed by the four-year limitations period provided in § 2725 of the UCC. We conclude that both open account claims and actions on account stated are subject to the six-year period of limitations provided in

[80] *Seyburn*, 483 Mich 345.

[81] This Court concluded in *Seyburn* that the parties' relationship was governed by the explicit terms of their contract and that the plaintiff's claim accrued upon the termination of the attorney-client relationship. *Seyburn*, 483 Mich at 348.

MCL 600.5807(8). Thus, we reverse the contrary judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

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

MARKMAN, J. (*concurring in part and dissenting in part*). At issue is whether either an "account stated" or an "amount owed on open account" claim is subject to the four-year limitations period of § 2-725 of the Uniform Commercial Code (UCC), MCL 440.2725, which applies to actions for breach of the legal obligations that result from the sale of goods.[1] I agree with the majority that the UCC's four-year limitations period does not apply to an "account stated" claim because an "account stated" claim does not constitute an action for breach of the legal obligations that result from the sale of goods. Such a claim is not based upon the buyer's failure to pay the seller for goods, but rather upon the buyer and seller having reached a subsequent and independent agreement that the buyer will pay the seller a specific dollar amount that reflects the aggregate amount owed for the goods. An "account stated" claim is an action to enforce the buyer's subsequent and independent promise to settle the account, analogous to an action on a buyer's promise to pay embodied in a promissory note, and is subject to the limitations period applicable to the promise to pay, i.e., the six-year limitations period governing general contract actions set forth in MCL 600.5807(8). However, unlike the majority, I believe

[1] The UCC as drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute identifies the statute of limitations in question as § 2-725, while the comparable Michigan statute is identified as § 2725.

that the UCC's four-year limitations period applies to an "amount owed on open account" claim when the balance owed on the open account arose from the sale of goods, as it did here, because such a claim constitutes an action for breach of the legal obligations that result from the sale of goods. An "amount owed on open account" claim is based on the buyer's failure to pay the seller for goods, not on the buyer and seller having reached any subsequent and independent agreement that the buyer will pay the seller a specific dollar amount that they believe reflects the aggregate amount owed for the goods. Accordingly, I respectfully dissent from the majority's analysis of plaintiff's "amount owed on open account" claim in which it concludes that the "amount owed on open account" claim is subject to the six-year limitations period governing general contract actions.

I. PLAINTIFF'S CLAIMS

Plaintiff's amended complaint set forth four causes of action: (1) breach of contract, (2) amount owed on open account, (3) account stated, and (4) unjust enrichment. Plaintiff did not appeal the dismissal of its breach of contract and unjust enrichment claims. Thus, only the "account stated" and "amount owed on open account" claims are at issue here. Regarding the "account stated" claim, plaintiff alleges that it submitted "statements of account" to defendant and that defendant either acknowledged the statements as correct, agreed to pay the balance shown on the statements, or never objected to the statements. Regarding the "amount owed on open account" claim, plaintiff alleges that it "supplied concrete on open account to Defendant from approximately October 30, 1991 through October 25, 2004," that "Defendant did make payments on the

account on June 30, 1992 in the amount of $5,000.00, December 29, 1995 in the amount of $105.03, July 10, 1998 in the amount of $229.95, and September 25, 2002 in the amount of $327.02," and that "Defendant has failed and refused to pay the [$92,968.57] balance on the open account."

The sole issue here is whether these "account stated" and "amount owed on open account" claims are subject to the UCC's four-year limitations period, MCL 440.2725, or the general six-year limitations period applicable to contract actions, MCL 600.5807(8). Defendant contends that because the underlying transactions were for the sale of goods, this action is subject to the UCC's four-year limitations period regardless of whether the action is pleaded as an "account stated" or "amount owed on open account" claim. Plaintiff contends that "account stated" and "amount owed on open account" claims are independent causes of action governed by the general six-year limitations period, without regard to the underlying nature of the transactions giving rise to the claims.

The majority agrees with plaintiff that the six-year limitations period applies to both the "account stated" and "amount owed on open account" claims. I agree with the majority and plaintiff that the six-year limitations period applies to the "account stated" claim, but I agree with defendant that the UCC's four-year limitation period applies to the "amount owed on open account" claim.

II. "ACCOUNT STATED" CLAIM

I agree with the majority that an "account stated" claim results from a separate and distinct bargaining process in which the parties sum up all the credits and debits flowing between themselves, "strike a

balance" or settle, and then enter into an agreement that the debtor shall pay the creditor a particular amount. *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW 215 (1940). When the parties "strike a balance" or settle, it closes the open account, transforming it into an account stated, and the ascertained balance is subject to a new limitations period because it constitutes an original and separate demand. *Id.* Any subsequent judicial inquiry concerns only whether the parties have in fact agreed on the amount due and whether that amount remains due. See *Pelavin v Fenton, Davis & Boyle*, 255 Mich 680, 683; 239 NW 268 (1931).

In other words, when an account becomes "stated," it establishes a *new* cause of action against the debtor in the same manner that a debtor giving a promissory note to a creditor for an antecedent debt would create a new cause of action against that debtor independent of the original indebtedness. *White v Campbell*, 25 Mich 463, 468 (1872) ("[T]he agreed statement serves in place of the original account, as the foundation of an action. . . . The effect of the operation is said to be much the same as though the debtor had given his note for the balance[.]"). Accordingly, because the parties' independent agreement here concerning the amount due under the account establishes the basis for defendant's liability on the "account stated" claim, and because that liability is not based on the underlying transactions in goods out of which the original account stemmed, I agree with the majority that the six-year limitations period governing general contract actions in MCL 600.5807(8) applies to the "account stated" claim, not the four-year limitations period in § 2-725 of the UCC that would apply to the underlying transactions in goods out of which the original account stemmed.

I disagree, however, with the majority's discussion concerning when an "account stated" claim *accrues* for statute of limitation purposes. Specifically, I disagree with the majority that an "account stated" claim accrues "upon an adjustment of the parties' respective claims against one another," or " 'when assent to the statement of account is either expressed or implied . . . .' " *Ante* at 562 n 53, citing *White*, 25 Mich at 468. In Michigan, a breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. In other words, the limitations period begins to run on the date the contract is breached, not when the contract is formed as a result of the parties' "assent" to the statement of account. The majority, I believe, misreads this Court's statement in *White*, which merely describes the manner in which an open account is converted into an account stated, i.e., an open account becomes an account stated when there is "an adjustment of . . . claims." *White*, 25 Mich at 468. The sentence on which the majority relies does not describe *when* an "account stated" claim accrues.[2]

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[2] This becomes clear when the sentence on which the majority relies is read in context:

> The conversion of an open account into an account stated, is an operation by which the parties *assent* to a sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account. The parties may still impeach it for fraud or mistake. But so long as it is not impeached, the agreed statement serves in place of the original account, as the foundation of an action. It becomes an original demand, and amounts to an *express* promise to pay the actual sum stated. *The creditor becomes entitled to recover the agreed balance, in an action based on the fact of its acknowledgment by the debtor, upon an adjustment of their respective claims*:

III. "AMOUNT OWED ON OPEN ACCOUNT" CLAIM

Further, I agree with the majority that an open account constitutes a commercial arrangement in which a seller allows a customer to buy on credit without a formal borrowing agreement or other guarantee as to the customer's payment. That is, under an "open account" arrangement, the seller delivers goods to the customer and a series of credit charges are made on the customer's open account without an express agreement between the seller and the customer as to when the customer will pay the seller for the goods. I further agree with the majority that the critical factor in deciding whether an account is open is whether the terms of payment are specified by the parties' agreement or are left open and undetermined, and that there can be no open account where the parties have an express agreement defining their liabilities.

I disagree with the majority, however, as to the limitations period that applies when a seller sues a customer for the amount owed on open account and, as here, the open account has arisen from a UCC sale of goods. The majority concludes that the six-year limitations period governing general contract actions in MCL 600.5807(8) applies to an "amount owed on open account" claim when the account has arisen from a UCC sale of goods, but fails to provide a sufficient basis for so concluding. The majority provides almost no analysis concerning why the UCC's four-year limitations period does not apply to such a claim. It merely mentions the relevant UCC statutory language once, in conclusory fashion, stating only that "[a]n open account claim is

Ashley v. Hill, 6 Conn., 246 [1826]. The effect of the operation is said to be much the same as though the debtor had given his note for the balance: *Bass v. Bass*, 8 Pick., 187 [Mass, 1829]. [*White*, 25 Mich at 468 (emphasis added to the relevant sentence).]

not a breach of contract action for the sale of goods . . . ." *Ante* at 570. The majority does not offer any analysis of the relevant statutory language or offer any support for this assertion.

"The stated purposes of the [UCC] are '(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; [and] (c) to make uniform the law among the various jurisdictions.' " *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 519; 486 NW2d 612 (1992), quoting MCL 440.1102(2) (second alteration in original).

"To achieve these goals, Article 2 of the [UCC] governs the relationship between the parties involved in 'transactions in goods.' " *Neibarger*, 439 Mich at 519, quoting MCL 440.2102. Article 2 recognizes that modern commercial transactions may be conducted with little formality and few written agreements. Indeed, no writing is required when the goods have been received and accepted by the buyer. MCL 440.2201(3)(c). The parties do not even need to agree on the price term to have effected a valid transaction. MCL 440.2305(1) (price term can be left open and "[i]n such a case the price is a reasonable price at the time for delivery"). The UCC also recognizes that sellers will often sell goods to buyers on open account. That is, it recognizes that sellers will agree to sell goods to buyers on credit and deliver the goods to buyers before receiving any payment. As an example, MCL 440.2310(d) states that if "the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period." And as

a further example, MCL 440.2511(1) states that "[*u*]*nless otherwise agreed* tender of payment is a condition to the seller's duty to tender and complete any delivery." (Emphasis added.) As stated in the official comments to the UCC:

> The requirement of payment against delivery in subsection (1) is applicable to non-commercial sales generally and to ordinary sales at retail although it has no application to the great body of commercial contracts which carry credit terms. Subsection (1) applies also to . . . contracts which look to shipment by the seller but contain no term on time and manner of payment . . . . [Thomson West, Uniform Commercial Code: Official Text and Comments (2012-2013 ed), § 2-511, p 125.][3]

Thus, article 2 fully recognizes that there will be breaches of contracts for the sale of goods sold on open account.

The limitations period provision for article 2 provides:

> (1) An action for breach of *any contract for sale* must be commenced within 4 years after the cause of action has accrued. . . .
>
> (2) A cause of action accrues when the breach occurs . . . . [MCL 440.2725.]

MCL 440.2106(1) defines "contract for sale" as including

> both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price [MCL 440.2401]. A "present sale" means a sale which is accomplished by the making of the *contract*. [Emphasis added.]

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[3] See also, e.g., MCL 440.2702(2) ("Where the seller discovers that the buyer has *received goods on credit* while insolvent . . . .").

MCL 440.1201(11)[4] defines "contract" as follows:[5]

> "Contract" means the total legal obligation which results from the parties' *agreement* as affected by this act and any other applicable rules of law. (Compare "Agreement".) [Emphasis added.]

And MCL 440.1201(3)[6] defines "agreement" as follows:

> "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act [MCL 440.1205 and MCL 440.2208]. Whether an agreement has legal consequences is determined by the provisions of this act, if applicable; otherwise by the law of contracts [MCL 440.1103]. (Compare "Contract".)

Applying these definitions, the question is whether an "amount owed on open account" claim constitutes "[a]n action for breach of" "the total legal obligation that results from the parties' agreement" to "pass[] . . . title [of goods] . . . for a price[.]"[7] In contrast to an "account stated" claim, in which the basis for liability is the parties' independent agreement concerning the amount due under the account, the basis for liability in an "amount owed on open account" claim is the *underlying transactions* that comprise the account. In "an open account . . . the items composing it must be

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[4] The MCL 440.1201(11) definition of "contract" was superseded effective July 1, 2013, by the substantially similar definition now found at MCL 440.1201(2)(*l*).

[5] MCL 440.1201 is part of article 1. However, article 2 of the UCC states that "article 1 contains general definitions and principles of construction and interpretation applicable throughout [article 2]." MCL 440.2103(4).

[6] The MCL 440.1201(3) definition of "agreement" was superseded effective July 1, 2013, by the substantially similar definition now found at MCL 440.1201(2)(c).

[7] The majority never addresses this particular question or considers this language derived from the UCC.

proved" because the parties have not reached an independent agreement as to the amount due under the account. *A Krolik & Co v Ossowski*, 213 Mich 1, 7; 180 NW 499 (1920). Because the plaintiff must instead prove its right to collect on each underlying transaction comprising a part of the account balance, the "amount owed on open account" claim is simply the equivalent of a suit for breach of the legal obligations that result from the parties' discrete transactions that individually comprise the account. Accordingly, when the underlying transactions pertain to an agreement to pass title of goods from the seller to the buyer for a price, MCL 440.2106(1), as they do in this case, the four-year limitations period of MCL 440.2725(1) must be applied.[8]

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[8] This conclusion is supported by the overwhelming weight of authority in this country. See, e.g., *May Co v Trusnik*, 54 Ohio App 2d 71, 74-75; 375 NE2d 72 (1977) ("[A]n action brought by a merchant for the price of items purchased by a customer on his or her charge account is governed by the four-year statute of limitations in U.C.C. 2-725. It is an action for breach of the sales contract rather than an action to collect a debt.") (citations omitted); *Troy Boiler Works, Inc v Sterile Technologies, Inc*, 777 NYS 2d 574, 578; 3 Misc 3d 1006 (S Ct, 2003) (stating that the UCC article 2 limitations period applies to "any . . . claim on an account . . . since the underlying transaction was for the sale of goods and any such claims relate to and cannot be divorced from the underlying sales transaction"); *Advance Tufting, Inc v Daneshyar*, 259 Ga App 415, 417; 577 SE2d 90 (2003) (applying the UCC article 2 limitations period to "the instant suit on an open commercial account detailing transactions in which goods were sold"); *Troyer v Cowles Prod Co, Inc*, 732 NE2d 246, 247 (Ind App, 2000) (applying the UCC article 2 limitations period to a "claim on account arising from goods sold and delivered . . . but not yet paid for"); *Moorman Mfg Co of California, Inc v Hall*, 113 Or App 30, 32; 830 P2d 606 (1992) (applying the UCC article 2 limitations period "to an account . . . claim involving an underlying sale of goods"); *Deluxe Sales & Service, Inc v Hyundai Engineering & Constr Co, Ltd*, 254 NJ Super 370, 374-377; 603 A2d 552 (1992) (applying the UCC article 2 limitations period to an action seeking to collect amounts due on open an account); *Rivers Machinery Co, Inc v Barclay Int'l, Inc*, 553 So 2d 579, 580 (Ala, 1989) (applying the UCC article 2 limitations period to a seller's action against a buyer for failing "to pay the invoices for the period of May 5,

In its analysis of the "amount owed on open account" claim, the majority asserts, erroneously in my view, that "[a]n open account claim is not a breach of contract action for the sale of goods; it is an action to collect on *the single liability stemming from the parties' credit relationship* regardless of the underlying transactions comprising the account." *Ante* at 570 (emphasis added). But the very definition on which the majority relies for the emphasized language undermines the majority's conclusion. Citing Black's Law Dictionary (7th ed), p 19, the majority defines an "open account" as "1. [a]n unpaid or *unsettled* account. 2. [a]n account that is left open for ongoing debit and credit entries and that has a fluctuating balance *until either party finds it convenient*

1982, through August 23, 1983"); *Sprague & Henwood v Johnson*, 606 F Supp 1564 (WD Va, 1985) (applying the UCC article 2 limitations period to the seller's action to recover a debt on an open account); *Greer Limestone Co v Nestor*, 175 W Va 289, 291, 293; 332 SE2d 589 (1985) (applying the UCC article 2 limitations period in an action "to recover the remaining balance on an [open] account" comprised of "transactions involving the sale of goods"); *Hughes v Collegedale Distrib*, 355 So 2d 79 (Miss, 1978) (applying the UCC article 2 limitations period to an action arising out of the purchase of health foods on an open account); *Sesow v Swearingen*, 552 P2d 705, 706 (Okla, 1976) (applying the UCC article 2 limitations period to a "suit on an open account established by the sale of goods"); *Big D Serv Co, Inc v Climatrol Indus, Inc*, 523 SW2d 236 (Tex, 1975) ("[T]he four-year statute of limitations provided for in [article 2 of the UCC] should be applied to suits on sworn accounts . . . in the context of an action for breach of a contract for sale. Suits on sworn accounts which are not founded on breach of contract for sale are not governed by this statute."); *Kinsey v Hubby-Reese Co, Inc*, 530 SW2d 846, 846-847 (Tex Civ App, 1975) ("Suits on open accounts such as the instant case are governed by [the UCC article 2 limitations period] . . . ."); *Wilson v Browning Arms Co*, 501 SW2d 705, 706 (Tex Civ App, 1973) (same); *Aluminum Co of America v Electro Flo Corp*, 451 F2d 1115, 1116 (CA 10, 1971) (applying the UCC in a suit brought "on an open account for goods sold and delivered"); see also 49 ALR 5th 1, § 10[a], pp 130-135 (discussing actions to collect on debt or open account in which the UCC limitations period was applied). Indeed, I am unaware of any authority reaching a contrary conclusion on this issue.

to settle and close, at which time there is a single liability." *Ante* at 553-554 (emphasis added) (citation and quotation marks omitted). As this definition makes clear, an "open account" is one open to dispute, where nothing has occurred to bind either party by the account statements. The very essence of an open account is that there is no "single liability" because the account has not been settled and closed. See *ante* at 554 ("This Court has characterized an open account as 'one which consists of a series of transactions and is continuous or current, and *not closed or stated*.' ") (emphasis added) (citation and quotation marks omitted).[9]

The majority employs this "single liability" definition to assert that the underlying transactions comprising the account are somehow not the actual source of liability for an "amount owed on open account" claim, because all the underlying transactions merge into one "action on an open account" to collect on the "single liability." *Ante* at 570. This, however, is incorrect. Again, an account stated, but not an open account, results in a single liability. The majority even implicitly recognizes in its discussion of the "account stated" claim that, absent an account stated, the causes of action based on the underlying transactions remain viable: "The account stated is a new, independent cause of action

[9] In contrast, an account with a "single liability" is *an account stated*. Indeed, an account that has been closed and settled is precisely the type of account needed for an "account stated" claim. *A Krolik & Co*, 213 Mich at 7 ("An account stated means a balance struck between the parties on a settlement; and where a plaintiff is able to show that the mutual dealings which have occurred between the parties have been adjusted, *settled*, and a balance struck, the law implies a promise to pay that balance.") (citation and quotation marks omitted); *White*, 25 Mich at 468 ("If the account had ceased to be an open one, it must have been because the circumstances had converted it into an account stated. There is no suggestion that the balance had been adjusted in any way, and consequently, the account could not have been settled.").

superseding and merging the *antecedent causes of action* represented by the particular items included in the computation." *Ante* at 558 (emphasis altered) (citation and quotation marks omitted).

This same principle was recognized by this Court in *Phelps v Abbott*, 116 Mich 624, 625; 74 NW 1010 (1898), in which we held that an open account does not constitute a single claim or a single cause of action, explicitly rejecting

> the claim of the defendant that a debt due upon a continuous account of book entries, made in the ordinary course of dealing is entire, and cannot be split up into separate and distinct demands, so as to form the basis of several suits; that an open account containing many items, all of which are due, constitutes but one claim, and one right of action.

Likewise, in *Kruce v Lakeside Biscuit Co*, 198 Mich 736, 742; 165 NW 609 (1917), this Court acknowledged that, under *Phelps* and other cases, separate suits could be maintained on each transaction comprising an open account. In *A Krolik & Co*, 213 Mich at 7-8, citing *Phelps*, 116 Mich 624, this Court reaffirmed that "[t]he right to bring separate suits upon claims embraced in an open account has been recognized," holding that the "[p]laintiffs' claim was not an open account. It constituted an entire demand. Separate actions could not be brought upon it."

In furtherance of its argument that the underlying transactions comprising the open account are somehow not the actual source of liability, the majority asserts that "these ['amount owed on open account' suits] are premised on the debt due on the account and rarely discuss the underlying transactions, except to the extent that the transactions provide a defense to the debt." *Ante* at 569. This, however, is also incorrect. Many cases discuss the underlying transactions be-

cause, again, these transactions are the source of liability for an "amount owed on open account" claim and, if the transactions are disputed, they must be proved in order for the plaintiff to recover on an "amount owed on open account" claim. For example, in *Holser v Skae*, 169 Mich 484, 486; 135 NW 260 (1912), the plaintiff sued to recover a $352.87 balance that the defendant allegedly owed on an open account consisting of $5,152.47 worth of charges and $4,799.60 worth of credits. One item of charge was for " 'plumbing and heating as per contract' " and amounted to $3,151.25. *Id.* "The only matter disputed and put in issue by defendant was the heating and plumbing contract." *Id*. at 487. Specifically, the defendant argued that the plaintiff had failed "to properly perform the contract" by failing to install "the heating system to conform with the specifications . . . ." *Id.* The defendant sought $271.48 of "recoupment," which represented his costs in repairing the heating system. *Id*. The jury allowed the claim and deducted the $271.48 "from plaintiff's full claim, rendering a verdict for the balance in his favor." *Id.* On appeal, the plaintiff argued:

> In behalf of the plaintiff, it is claimed there could be no recoupment for the reason that this action is to recover a balance due on an open account between the parties and not on a part of the contract; that payments were made and credited from time to time on such open account as a whole, and plaintiff now sues on such account to recover a general balance remaining unpaid. One item of plaintiff's bill of particulars going to make up his account is this contract for plumbing and heating. *He must prove it in order to recover.* Defendant's counterclaim is comprehended in, and connected with, and grows out of, said contract. It is a familiar rule that any damages may be recouped for which a cause of action growing out of the same transaction lies at the time of pleading. Plaintiff cannot defeat a right to recoup on a contract *which he must prove in order to recover*, by

> including other items with it in his declaration and making a general claim for balance due on the whole under an open account. [*Id*. at 488.][10]

Indeed, the majority itself appears to acknowledge that, in contrast with an "account stated" claim, in which the underlying transactions that make up the account are irrelevant, the underlying transactions in an "amount owed on open account" claim are not irrelevant and must be proved:

> [T]he caselaw defining [an "amount owed on open account" claim] is far less developed than the caselaw addressing accounts stated. This may be because a suit on an open account is, from a creditor's perspective, a less desirable claim than an action on an account stated. In an action on an account stated, the creditor must present proof of the debtor's express or implied assent to the balance due. Upon such proof, the underlying transactions become irrelevant. In an action on an open account, however, there is no assent to a balance due. Thus, *the creditor may be required to establish the validity of the entries in the account*. [*Ante* at 563 (emphasis added).]

In the instant case, in order for plaintiff to "establish the validity of the account" and prove its "amount owed on open account" claim, it must establish as fact that it completed each and every disputed "contract for sale" that comprises the open account and that defendant is

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[10] See *A Krolik & Co*, 213 Mich at 5 ("[T]he advantage which a creditor is considered to have in having his account stated—the amount fixed or determined by agreement, expressed or implied—over having an open account where the items composing it must be proved, is waived by the creditor where his action is brought and defended upon his account as an open account."); *Snyder v Patton & Gibson Co*, 143 Mich 350, 352-353; 106 NW 1106 (1906) (concluding that it was proper for the trial court to submit evidence to the jury regarding the underlying transactions); *Joslin v Cook*, 341 Mich 236; 67 NW2d 56 (1954) (holding that the plaintiff had proved "several transactions" by the preponderance of evidence).

in breach of the same.[11]

The majority states:

> Justice MARKMAN, similarly to the out-of-state authority on which he relies, recognizes that article 2 of the UCC governs individual sales on credit but declines to acknowledge a distinction between individual sales on credit and serial sales on credit that lack an express agreement for the periodic payment of money that are melded into an account. Any lack of statutory analysis in this opinion stems from the absence of any express mention of actions on accounts in article 2 of the UCC. As previously discussed, this Court's treatment of these collection actions has been anything but a model of clarity and consistency, and the disagreement between Justice MARKMAN and the majority of this Court is not an unreasonable one. [*Ante* at 568 n 69.]

First, with all due respect, I do not "rely" on out-of-state authority for my conclusion. I rely on the relevant statutory language of the UCC and the abundant authority of *this state* that I have discussed throughout this opinion. Second, I fully acknowledge individual sales on credit, and I also fully acknowledge that multiple individual sales may be made on credit absent an express agreement as to any payment terms, periodic or otherwise. What I do not acknowledge, however, and what the authority of this state and every other state

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[11] In order to recover the amount due on an open account, the plaintiff may file and serve on the defendant an affidavit of the amount due with a copy of the account annexed to the affidavit, together with the complaint, and the affidavit shall be deemed prima facie evidence of the alleged indebtedness, unless the defendant files an answer and supporting affidavit denying the indebtedness and serves these documents on the plaintiff or his attorney. MCL 600.2145. Plaintiff filed and served on defendant such an affidavit along with a copy of the account and complaint. Defendant filed and served on plaintiff an answer and supporting affidavit denying the indebtedness. Thus, plaintiff will have the burden to prove as fact that it completed each and every disputed "contract for sale" that comprises the open account and that defendant is in breach of the same.

does not appear to acknowledge, is that any of these circumstances can ever become "melded" into an open account.

Finally, the majority's conclusion that "[a]n open account claim generally accrues *on the date of each item proved in the account*," *ante* at 571 (emphasis added), directly contradicts its own "single liability" theory. How can there be a "single liability" when the statute runs on each item individually? The majority does not say. Notably, the authority on which the majority relies for its conclusion that "[a]n open account claim generally accrues on the date of each item proved in the account," *ante* at 571, directly contravenes the majority's "single liability" theory:

> In the case of an open running account which is not also a mutual account, so far as the statute of limitations is concerned, the cause of action arises from the date of each item, and they are severally barred when as to them the statute has run. *However, there is some authority that where all the items of a unilateral account constitute a single demand, the statute begins to run from the date of the last item*, and the rule may be changed by statute so that, if the last item in the account falls within the period of limitation, it draws with it all the other items. [1 Am Jur 2d, Accounts and Accounting, § 22, p 644 (citations omitted) (emphasis added).]

Again, as already discussed, this Court has expressly rejected the argument that an "amount owed on open account" claim constitutes a single demand, accrues on the date of the last item entered into the account, or draws with it all debts accrued before that time. *Phelps*, 116 Mich at 625.[12] Although the majority believes that

[12] Indeed, many other decisions of this Court also make it clear that an "amount owed on open account" claim does not constitute a single demand or encompass all debts accrued before that time. With the exception of when the parties have a mutual and open account current,

an "amount owed on open account" claim constitutes a "single demand," it does not explain why it is not applying the rule set forth in the very authority it invokes that is *applicable* "where all the items of a unilateral account constitute a single demand." See 1 Am Jur 2d, Accounts and Accounting, § 22, p 644. Further, in its discussion of the hypothetical merchant, see *ante* at 569, the majority seems to *rely* upon the very rule that it is not applying because it implies that an "amount owed on open account" claim draws with it all debts accrued before that time:

> Recognition of an action on an open account as an independent claim that arises out of the course of dealing between a creditor and debtor also promotes commerce without encouraging creditors to file lawsuits to preserve their right to collect on debts. Assume for example that a merchant sold goods and services on account whereby goods and services would be regularly delivered to a purchaser who in turn made sporadic payments in varying amounts as the relationship developed. As the parties' relationship nears its fourth year, the merchant would have to insist on settlement of the account or risk the possibility that all or part of the balance due on account could be

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this Court has treated the limitations period as if it arose from the date of each item entered into the account. See, e.g., *In re Hiscock Estate*, 79 Mich 536, 537-538; 44 NW 947 (1890) (concluding that transactions occurring more than six years before the commencement of an "open account" claim are barred by the statute of limitations, except in cases of mutual and open account); *McKnight v Lowitz*, 196 Mich 368, 376-377; 163 NW 94 (1917) (holding that when the plaintiff had filed suit on March 26, 1915, the limitations period had run on his September 3, 1908, transaction but not his September 8, 1910, transaction, when it did not appear that he had a mutual and open account against the defendant); *Hollywood v Reed*, 55 Mich 308, 310-311; 21 NW 313 (1884) (holding that transactions that occurred more than six years before the commencement of suit would be barred by the statute of limitations unless the jury were to find that a disputed payment had been made, in which case the account would be open and mutual and the plaintiff could then recover on the whole account).

> declared uncollectable after the four-year limitations period on the sale of goods expires. Even if this merchant dealt exclusively in the sale of services, he would face the same dilemma in year six. [*Ante* at 569.]

It is unclear from the majority's discussion why the merchant would not face this very same "dilemma" in "year six" given its holdings that a six-year limitations period applies to an "amount owed on open account" claim and that "[a]n open account claim generally accrues on the date of each item proved in the account." *Ante* at 571. Is this because the claim draws with it all debts accrued before that time? The majority does not say.

Regarding the majority's discussion of the hypothetical merchant, I believe that the majority misapprehends the nature of the open account. The merchant would have four years from the date of each transaction to sue on that transaction. The merchant could apply the debtor's payments against the oldest transactions, unless the debtor indicated a contrary intent. Operating in this fashion, the merchant would not have to "insist on settlement of the account" when the parties' relationship neared its fourth year, because the debtor's "sporadic payments in varying amounts" would presumably have satisfied the oldest transactions that are approaching their four-year limitations period. The merchant would only need to sue the debtor if the debtor's account was delinquent with regard to *four years'* worth of transactions.[13]

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[13] The majority's decision to apply a six-year limitations period to an "amount owed on open account" claim whereas a four-year limitations period is to be applied to the *underlying* sales transactions is problematic. If an underlying sales transaction has a four-year limitations period, but an "amount owed on open account" claim based on that sales transaction has a six-year limitations period, a seller can wait five years to bring an "amount owed on open account" claim against the buyer, and the buyer

In sum, the majority fails to recognize that the *presence* in an "account stated" claim of an independent agreement concerning the "single liability" due under the account, and the *absence* of an independent agreement concerning any "single liability" in an "amount owed on open account" claim, is a *critical* distinction that determines which limitations period applies to each claim. That is, when the parties' independent agreement concerning the amount due under the account constitutes the basis for liability (an "account stated" claim), the general six-year limitations period applicable to contract actions applies. When there is no independent agreement, and thus the basis for liability continues to be the underlying transactions in goods that comprise the account (an "amount owed on open account" claim), the four-year limitations period of the UCC applies, for there is no separate and distinct basis for the claim apart from the individual transactions in goods. For this reason, the majority is incorrect, in my judgment, in its assertion that "an open account claim is no more an action for a breach of a contract for sale than is an account stated claim." *Ante* at 570 n 72.

IV. CONCLUSION

I agree with the majority that an "account stated" claim arising out of transactions in goods is subject to the general six-year limitations period applicable to contract actions, MCL 600.5807(8). Thus, I concur with the majority's decision to reinstate plaintiff's "account stated" claim. However, I disagree with the majority that plaintiff's "amount owed on open account" claim is

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will be unable to bring a counterclaim for breach of the underlying transaction (for example, breach of the warranty of merchantability) because the buyer's separately applicable four-year limitations period will have already run.

subject to the same limitations period. Rather, the latter claim is simply the equivalent of a suit for breach of the underlying transactions in goods that comprise the account and is, therefore, subject to the four-year limitations period set forth in article 2 of the UCC, MCL 440.2725. Thus, I respectfully dissent from the majority's decision to reinstate plaintiff's "amount owed on open account" claim. Accordingly, I would remand to the trial court so that plaintiff could proceed exclusively on its "account stated" claim.

VIVIANO, J., took no part in the decision of this case.

BAILEY v SCHAAF

Docket No. 144055. Argued March 5, 2013 (Calendar No. 4). Decided July 30, 2013.

Devon S. Bailey brought an action in the Genesee Circuit Court against Steven G. Schaaf, T.J. Realty, Inc., doing business as Hi-Tech Protection, Evergreen Regency Townhomes, Ltd., Radney Management & Investments, and others for injuries suffered on August 4, 2006 while at a friend's apartment in a complex owned and operated by Radney. In 2003, Radney entered into a contract with Hi-Tech to provide Evergreen with security personnel to patrol the premises and a new contract was negotiated in the summer of 2006, with an effective date of August 28, 2006. Hi-Tech security guards William Baker and Chris Campbell were on duty and patrolling the complex on the night Bailey was injured. A resident had informed Baker and Campbell that Schaaf was threatening people with a gun at an outdoor gathering. Bailey alleged that Baker and Campbell ignored the warning. Sometime later they heard two gun shots; Schaaf shot Bailey twice in the back, rendering Bailey a paraplegic. Bailey alleged that Baker and Campbell were agents of Hi-Tech, and that Hi-Tech was an agent of Radney and Evergreen. Bailey asserted multiple claims against all defendants under theories of premises liability, negligent hiring and supervising, ordinary negligence, vicarious liability, and breach of contract. The court, Joseph J. Farah, J., granted partial summary disposition to defendants and Bailey appealed. The Court of Appeals, BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., affirmed in part and reversed in part the circuit court's order. 293 Mich App 611. The Court of Appeals concluded in part that Evergreen and Radney owed Bailey a duty to call the police in response to an ongoing situation on the premises, extending the Supreme Court's decision in *MacDonald v PKT, Inc*, 464 Mich 322, 338; 628 NW2d 33 (2001) to the landlord-tenant context. In addition the Court of Appeals rejected Bailey's argument that he was a third-party beneficiary of the provision-of-security contract between Hi-Tech and Evergreen and that Hi-Tech did not owe Bailey a duty that was separate and distinct from Hi-Tech's duties under the original 2003 contract between Hi-Tech and Evergreen that was in effect at the time of Bailey's injuries. The Supreme

Court granted defendants' application for leave to appeal and the parties were asked to address whether the Court of Appeals erred when it extended the *MacDonald* holding to the landlord-tenant context. Bailey's application for leave to cross-appeal remained pending. 491 Mich 924 (2012).

In an opinion by Chief Justice YOUNG, joined by Justices KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

Consistent with the limited duty of care recognized in *MacDonald* as applying to the merchant-invitee relationship, landlords have a duty to reasonably expedite police involvement when put on notice of criminal acts occurring in common areas that pose a risk of imminent and foreseeable harm to an identifiable tenant or invitee.

1. The common law imposes a duty of care when a special relationship exists, which is predicated on an imbalance of control. Michigan law has recognized that a special relationship exists between owners and occupiers of land and their invitees, including between a landlord and its tenants and their invitees and between a merchant and its invitees. The common law establishes that a landlord and merchant have coextensive duties to protect invitees and tenants from physical hazards on the premises. The element of control is essential in establishing a landlord or merchant's duty over the premises. Where tenants, their invitees, or a merchant's invitees lack control over certain premises, the landlord or merchant bears the burden of control and has the duty to keep such areas reasonably safe. Like the duty owed by merchants to their invitees as articulated in *MacDonald*, a landlord owes a duty to respond when put on notice of a risk of imminent harm to an identifiable tenant or invitee in the common areas of the landlord's premises. If and when this duty is triggered, the duty only requires a landlord to reasonably expedite police involvement. The duty is imposed on the landlord only when given notice to such a situation that is occurring in an area within its control; the landlord does not have a duty to respond to criminal acts occurring within the leasehold of the tenant.

2. In this case, the Court of Appeals properly held that defendants were not entitled to summary disposition under MCR 2.11(C)(8) because, accepting Bailey's allegation as true, defendants had a duty to reasonably expedite the involvement of the police. Bailey also alleged sufficient facts involving the existence of a contract for security services between the security company and the landlord. The facts alleged would establish an agency relationship, imputing to the landlord Green's notice to Baker and

Campbell of the ongoing situation and placing defendants on notice that their invitees and tenants faced a specific and imminent harm.

3. The case is remanded to the Court of Appeals for consideration of Evergreen and Radney's vicarious liability issues under *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280; 731 NW2d 29 (2007), including whether the issues were properly preserved. With regard to Bailey's application for leave to appeal as cross-appellant, part V(E) of the Court of Appeals judgment, which upheld the trial court's dismissal of Bailey's negligence claims against Hi-Tech on the basis of the contract between Hi-Tech and Evergreen, is vacated and the case was remanded to the Court of Appeals for reconsideration of that issue in light of *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011) and *Hill v Sears, Roebuck & Co*, 492 Mich 651; 822 NW2d 190 (2012). Bailey's application for leave to appeal as cross-appellant is denied in all other respects.

Court of Appeals judgment affirmed in part, vacated in part, and the case remanded to the Court of Appeals for further proceedings consistent with the opinion.

Justice MCCORMACK, concurring, agreed that the landlord-tenant relationship is a special relationship and that the security guards breached a duty to Bailey by failing to alert law enforcement when notified of the possibility of imminent danger. The landlord-tenant relationship is a special relationship; as a result, the law imposes a duty on landlords to protect tenants from certain risks. Moreover, this relationship involves a voluntary market exchange. Because the costs of maintaining security are ultimately passed off to tenants, the question of how much security a landlord should provide is a question for the market to decide.

Justice CAVANAGH, concurring in part and dissenting in part, agreed that the minimal duty that *MacDonald* imposed on merchants should be applied to landlords on the basis of the landlord-tenant relationship. Landlords share a special relationship with their tenants and invitees, which implicates a landlord's duty to protect against the conduct of third parties that pose an imminent and foreseeable risk of harm within the common areas of the premises. Unlike the majority's conclusion that the common law has recognized the landlord-tenant special relationship within the context of imposing a duty to protect another from third-party conduct, imposition of the duty is justified by analyzing the nature of the landlord-tenant relationship, which is the critical factor to be considered when imposing a duty to protect another. Michigan's

caselaw regarding a merchant's duty to protect its invitees from the conduct of a third party has either been silent or expressly declined to opine as to whether a landlord has a similar duty to protect its tenants and invitees.

Justice MARKMAN, dissenting, would have held that under the common law there is no legal duty to aid or protect another from third-party criminal conduct unless a "special relationship" exists in which a person can be said to have entrusted himself to the control and protection of another person with a consequent loss of control to protect himself. The majority failed to satisfy its burden of demonstrating compelling reasons for why Michigan's common law, which has not recognized a landlord-tenant special relationship establishing a legal duty to aid or protect, should be altered to further apportion among those who have perpetrated *no* criminal conduct, legal responsibility for the harms caused by those who *have* perpetrated criminal conduct. Justice MARKMAN would continue to adhere to the common-law rule that it is the criminal perpetrator who is legally and exclusively responsible for the harms caused by his or her criminal conduct.

LANDLORD AND TENANT — PREMISES LIABILITY — CRIMINAL ACTIVITIES — FORESEEABLE AND IMMINENT RISK OF HARM — DUTY TO SUMMON POLICE.

Under the common law a landlord and merchant have coextensive duties to protect invitees and tenants from physical hazards on the premises; where tenants, their invitees, or a merchant's invitees lack control over certain premises, the landlord or merchant bears the burden of control and has the duty to keep such areas reasonably safe; a landlord owes a duty to respond when put on notice of a risk of imminent harm to an identifiable tenant or invitee in the common areas of the landlord's premises; the duty is imposed on the landlord only when given notice of such a situation that is occurring in an area within its control; a landlord's duty to respond is limited to reasonably expediting the involvement of the police; the landlord does not have a duty to respond to criminal acts occurring within the leasehold of the tenant.

Donald M. Fulkerson and *David A. Robinson* for Devon Scott Bailey.

Pedersen, Keenan, King, Wachsberg & Andrzejak, P.C. (by *Thomas E, Keenan*) and *Gary P. Supanich PLLC* (by *Gary P. Supanich*), for T.J. Realty, Inc., d/b/a Hi-Tech Protection, Timothy Johnson, Captain William

Boyd Baker, Christopher Campbell, Evergreen Regency Townhomes, Ltd. and Radney Management & Investments.

Amici Curiae:

Charfoos & Christensen, P.C. (by *David R. Parker*), for Michigan Association for Justice.

Lacy & Jones, LLP (by *Carson J. Tucker*), for the Michigan Defense Trial Counsel.

YOUNG, C.J. Our common law has long imposed the same duty of care on landlords and merchants to remedy physical defects in premises over which they exert control. This consistency is premised on the similar degree of control both landlords and merchants exercise over the premises. Where third parties commit criminal acts against tenants and invitees in these controlled areas, landlords and merchants share a similar, albeit lesser, degree of control because of the inherent unpredictability of criminal conduct. Such unpredictability requires the imposition of a duty concomitant with the decreased amount of control. In *MacDonald v PKT, Inc*,[1] we held that Michigan law imposes a duty on a merchant only when the merchant has notice that a third party's criminal acts pose a risk of imminent and foreseeable harm to an identifiable invitee. In such a situation, the merchant's duty to that invitee is limited to reasonably expediting involvement of the police. Recognizing that landlords and merchants exert similar degrees of control over their premises, and cognizant of our historical and consistent treatment of their duty to remedy physical defects, today we make clear that landlords owe the same limited duty of care

[1] *MacDonald v PKT, Inc*, 464 Mich 322, 338; 628 NW2d 33 (2001).

when put on notice of criminal acts that pose a risk of imminent and foreseeable harm to an identifiable tenant or invitee—a duty to reasonably expedite police involvement.

In this case, because the plaintiff alleged that the landlord's agents were informed of an imminent threat of criminal conduct against him and the landlord failed to contact the police after such notice, we affirm the judgment of the Court of Appeals in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Evergreen Regency Townhomes, LTD (Evergreen) is located in Flint, Michigan, and is owned and operated by Radney Management & Investments, Inc. (Radney). In 2003, Radney entered into a contract with Hi-Tech Protection (Hi-Tech) to provide Evergreen with security personnel to patrol the premises.[2] In the summer of 2006, Radney and Hi-Tech negotiated a new contract with an effective date of August 28, 2006.

On August 4, 2006, plaintiff, Devon Bailey, attended an outdoor social gathering in the common area of Evergreen's apartment complex, where Hi-Tech's security guards William Baker and Christopher Campbell were patrolling the premises in a golf cart. At one point during the social event, Evergreen resident Laura Green informed the security guards that defendant Steven Schaaf was brandishing a revolver and threatening to kill someone. The security guards did not respond. Sometime after Green informed the security

[2] T.J. Realty, Inc. conducted business under the assumed name of Hi-Tech. Timothy Johnson is the President of Hi-Tech and the owner of T.J. Realty, Inc.

guards of Schaaf's behavior, the security guards heard two gunshots. Schaaf had shot plaintiff twice in his back, rendering plaintiff a paraplegic.

Plaintiff filed a civil suit against Schaaf,[3] Evergreen, Radney, and Hi-Tech, its owner, and the two security guards on duty at the time of the incident. Plaintiff alleged that the security guards, Baker and Campbell, were agents of Hi-Tech, and that Hi-Tech was an agent of Radney and Evergreen. Plaintiff asserted multiple claims against defendants on the basis of various theories of liability, including premises liability, negligent hiring and supervising, ordinary negligence, vicarious liability, and breach of contract. Defendants filed a motion for partial summary disposition under MCR 2.116(C)(8), arguing that no defendant owed plaintiff any duty. Plaintiff also filed a motion for partial summary disposition under MCR 2.116(C)(10), asserting that as a matter of law defendants Radney, Evergreen, and Hi-Tech owed plaintiff a duty on the basis of the contract to provide security services. The Genesee Circuit Court granted defendants' motion and denied plaintiff's motion, which resulted in the dismissal of plaintiff's claims.

The Court of Appeals affirmed in part and reversed in part the trial court's order.[4] Regarding plaintiff's premises liability claim against defendants Evergreen and Radney, the Court of Appeals held that defendants owed plaintiff a duty to call the police in response to an ongoing situation on the premises, extending this Court's decision in *MacDonald* to the landlord-tenant

[3] Schaaf pleaded *nolo contendere* to various criminal charges and is currently incarcerated. In the instant civil action against defendant Schaaf, the trial court entered a default judgment against Schaaf; as a result, his civil liability is not currently at issue.

[4] *Bailey v Schaaf*, 293 Mich App 611; 810 NW2d 641 (2011)

context.[5] However, the Court of Appeals rejected plaintiff's argument that he was a third-party beneficiary of the provision-of-security contract between Hi-Tech and Evergreen, holding that the parties' contract on which plaintiff relied—which had an effective date of August 28, 2006—was not in effect on August 4, 2006, at the time of plaintiff's injuries.[6] Finally, the Court of Appeals, applying *Fultz v Union-Commerce Assoc*,[7] held that Hi-Tech did not owe plaintiff a duty that was separate and distinct from Hi-Tech's duties under the original 2003 contract between Hi-Tech and Evergreen that was in effect at the time of plaintiff's injuries.[8]

Defendants Radney and Evergreen filed an application for leave to appeal in this Court, arguing that the Court of Appeals erred by extending *MacDonald* to the landlord-tenant context, or, alternatively, that defendants were not vicariously liable for the security guards' negligence because the security guards were not their agents. Moreover, even if the security guards were defendants' agents, defendants argue that they could not be liable as principals under *Al-Shimmari v Detroit Medical Center*.[9] Plaintiff also sought leave to cross-appeal the Court of Appeals' holdings regarding plaintiff's claims that he was a third-party beneficiary of the contract between Evergreen and Hi-Tech, and that Hi-Tech owed plaintiff a duty that was separate and distinct from its contractual obligations to Evergreen.

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[5] *Id.* at 640-642.

[6] *Id*. at 625-626.

[7] *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). After *Bailey* was submitted to the Court of Appeals, but before that Court issued its decision in the case, this Court clarified *Fultz*. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011); *Hill v Sears, Roebuck & Co*, 492 Mich 651; 822 NW2d 190 (2012).

[8] *Bailey*, 293 Mich App at 642-643.

[9] *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280; 731 NW2d 29 (2007).

We granted defendants' application for leave to appeal and asked the parties to address

> whether the Court of Appeals erred when it extended the limited duty of merchants—to involve the police when a situation on the premises poses an imminent risk of harm to identifiable invitees, see [*MacDonald*, 464 Mich at 322]—to landlords and other premises proprietors, such as the defendant apartment complex and property management company.[10]

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the basis of the pleadings alone and the ruling is reviewed de novo.[11] "The motion must be granted if no factual development could justify the plaintiff's claim for relief."[12] When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint.[13] Whether a defendant owes a particular plaintiff a duty is a question of law that this Court reviews de novo.[14] "Only after finding that a duty exists may the factfinder determine whether, in light of the particular facts of the case, there was a breach of the duty."[15] While ordinarily a jury determines what constitutes the breach of a duty to provide reasonable care under the circumstances, "in cases in which overriding public policy concerns arise, the court determines what constitutes reasonable care."[16]

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[10] *Bailey v Schaaf*, 491 Mich 924 (2012). Plaintiff's application for leave to appeal as cross-appellant remained pending. *Id.*

[11] *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[12] *Id.*

[13] *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995).

[14] *Loweke*, 489 Mich at 162.

[15] *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997).

[16] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500-501; 418 NW2d 381 (1988); *MacDonald*, 464 Mich at 336.

III. HISTORY OF COMMON LAW DUTY OF LANDLORDS AND MERCHANTS TO REMEDY PHYSICAL DEFECTS IN AREAS UNDER THEIR CONTROL

It is a basic principle of negligence law that, as a general rule, "there is no duty that obligates one person to aid or protect another."[17] However, our common law imposes a duty of care when a special relationship exists.[18] These special relationships are predicated on an imbalance of *control*, where "one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself."[19] Michigan law has recognized that a special relationship exists between "[o]wners and occupiers of land [and] their invitees," including between a landlord and its tenants and their invitees and between a merchant and its invitees.[20]

The law of torts has historically conditioned the special relationship on the control that a possessor of premises—whether landlord or merchant—exerts over the premises. As a result, the law of torts has treated landlords and merchants the same in the context of their duties to maintain the physical premises over which they exercise control. In the landlord-tenant context, Justice COOLEY's seminal treatise on torts provides that, "[i]n case of office and apartment buildings

[17] Williams, 429 Mich at 498-499; Hargreaves v Deacon, 25 Mich 1, 4 (1872) ("[W]here injury arises to a person from the neglect of one, in doing his lawful business in a lawful way, to provide against accident, the question arises at once whether he was under any legal obligation to look out for the protection of that particular person under those particular circumstances. For the law does not require such vigilance in all cases, or on behalf of all persons."), abrogated on other grounds, Stitt v Holland Abundant Life Fellowship, 462 Mich 591, 599; 614 NW2d 88 (2000).

[18] *Williams*, 429 Mich at 499.

[19] *Id.*

[20] *Id.* at 499-500.

the landlord must exercise due care to keep the halls, stairs, passageways, and like appurtenances reasonably safe for the tenants and their families and servants and for those who come to visit or transact business with them."[21] Professors Prosser and Keeton confirm the same and, moreover, recognize that landlords are "closely analogous" to merchants because they both have a duty to keep reasonably safe from physical hazard areas over which they exert control.[22]

This state's common law has likewise historically recognized the congruence between a landlord's and a merchant's duties of care concerning the physical maintenance of premises over which they exercise control. This Court has consistently imposed on both landlords and merchants a duty of care to keep the premises within their control reasonably safe from physical hazard. In *Butler v Watson*, a poorly attached post situated on the rear porch of a residential apartment building fell and struck a small child.[23] When considering the duties that a residential landlord owes to his tenants and their guests, this Court reasoned that a landlord owes a duty to its tenants and "all those who were approaching or leaving their premises for legitimate purposes" to "exercise reasonable diligence to keep such common portions of the property in a reasonably safe condition . . . ."[24] This Court imposed the duty because of the control that the landlord continued to exercise over the common portion of the property:

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[21] 3 Cooley, A Treatise on the Law of Torts (4th ed), p 219.

[22] Prosser & Keeton, Torts (5th ed), § 63, p 440.

[23] *Butler v Watson*, 193 Mich 322, 323-324; 159 NW 507 (1916). The child was a guest of her grandparents who were tenants in the apartment building.

[24] *Id.* at 327-328, quoting *Herdt v Koenig*, 137 Mo App 589; 119 SW 56 (1909) (quotation marks omitted).

> [I]n such circumstances[,] the landlord not having let the common portion of the property to any one tenant, he has reserved the control thereof to himself. Having thus reserved control, it is his duty to exercise ordinary care for the safety of those about the same, other than trespassers, or mere licensees.[25]

Thus, the landlord owed his tenants and their guests the duty to repair and make reasonably safe the porch upon which plaintiff was injured because it was a common area used by all the tenants and its control was reserved to the landlord.

Similarly, in *Goodman v Theatre Parking, Inc*, a man exited his car in defendant's parking lot and stepped on a cinder, spraining his ankle.[26] This Court recognized that a merchant owed its invitees a "duty to maintain its premises in a reasonably safe condition in view of the contemplated use thereof and the purposes for which the invitation has been extended," and held that the defendant was obligated to keep the surface of its lot in a safe condition so that its patrons would not be harmed in entering or leaving the parking lot.[27] Similarly, this Court's caselaw has consistently established that a merchant's duty of reasonable care over the physical premises does not extend to open and obvious physical hazards because of an invitee's coexisting ability to take reasonable measures to avoid such hazards.[28]

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[25] *Butler*, 193 Mich at 327 (quotation marks and citation omitted).

[26] *Goodman v Theatre Parking, Inc*, 286 Mich 80, 81; 281 NW 545 (1938).

[27] *Id.* at 81-82. Nevertheless, this Court held that the plaintiff was ultimately barred from recovery because of his contributory negligence in failing to avoid the hazard. *Id.* at 83.

[28] Although *Goodman* negated the merchant's liability on the basis of the plaintiff's contributory negligence, our subsequent caselaw has clarified that the *scope* of a premises possessor's duty "does not generally encompass removal of open and obvious dangers." *Lugo v Ameritech*

Siegel v Detroit City Ice & Fuel Co provides strong common-law support for concluding that a landlord and merchant have coextensive duties to protect invitees and tenants from physical hazards on the premises.[29] There, two defendants—the commercial owner of a parking lot and the merchant theater that leased the parking lot from the owner—were both held liable for an invitee's injury that arose from a hazard on the parking lot. After getting out of his car on his way to the theater, the plaintiff fell in a large oblong hole in the parking lot, injuring his femur. This Court explained that, because both the owner/landlord and the merchant/tenant shared control of the property due to the "joint right of ingress and egress," they both owed a duty of care to invitees on the property.[30] Recognizing that "[t]his is not a case where either the tenant or the landlord had exclusive control and possession of common passageways," the Court's decision turned on the fact that "defendants each had possession and control" of the premises.[31] Notably, this Court did not establish that different duties existed for the owner/landlord and the merchant/tenant.

Providing further support for this principle is our opinion in *Lipsitz v Schechter*, which continued to

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Corp, Inc, 464 Mich 512, 516; 629 NW2d 384 (2001). Specifically, *Lugo* held that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id.* See also *Hoffner v Goodman*, 492 Mich 450, 460-461; 821 NW2d 88 (2012) (citation omitted) ("The possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid.").

[29] *Siegel v Detroit City Ice & Fuel, Co*, 324 Mich 205, 214; 36 NW2d 719 (1949).

[30] *Id.* at 213-214.

[31] *Id.* at 214.

recognize that a landlord owes a duty to its residential tenants and their invitees to keep areas under its control reasonably safe from physical hazards.[32] For that legal proposition, the Court cited both *Butler*, a case involving a landlord's responsibilities for its residential common area, and *Siegel*, involving as defendants both a commercial landlord and its tenant/merchant. *Lipsitz* itself involved a tenant who was walking outside her 4-story apartment building and was struck by a screen window that fell from the building. The Court reaffirmed that "the element of control is of prime importance" when determining the existence of a duty.[33] Because the defendant landlord admitted that he had secured a screen window that had fallen from the building and that the landlord's janitor occasionally removed the screens to wash them, the Court concluded that the landlord exercised control over the screen and was consequently under an obligation to remedy any defect with regard to the screen that constituted a hazard.[34]

These cases illustrate the consistency of our treatment of landlords and merchants as it pertains to the physical maintenance of the areas over which they retain control. Whether someone who controls a premises is a landlord or a merchant, the element of control forms the basis of imposing a duty to invitees. As illustrated in *Butler*, where "the landlord not having let the common portion of the property to any one tenant, he has reserved the control thereof to himself."[35] Thus, where tenants, their invitees, or a merchant's invitees lack control over certain premises, the

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[32] *Lipsitz v Schechter*, 377 Mich 685, 687; 142 NW2d 1 (1966).

[33] *Id.* at 687.

[34] *Id.* at 689.

[35] *Butler*, 193 Mich at 327 (quotation marks and citation omitted).

concomitant actor in the special relationship—the landlord or merchant—bears the burden of control and thus the duty keep such areas reasonably safe.[36]

IV. LIABILITY FOR THE CRIMINAL ACTS OF OTHERS

Traditionally, the duty imposed on a landlord or merchant had been limited to protect tenants and other invitees from physical defects in the property over which they retained control, not to protect tenants and other invitees from the criminal acts of others in those controlled areas.[37] However, in a series of cases dating from the 1970s, this Court expanded the duty of both landlords and merchants to protect their tenants and invitees from those criminal acts. The first case to do so, *Manuel v Weitzman*, held that a bar owner may be liable in common law negligence for failing to "take action to

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[36] Of course, a landlord's duty does not extend to the areas within a tenant's leasehold, because the landlord has relinquished its control over that area to the tenant. See *Williams*, 429 Mich at 499 n 10; *Lipsitz*, 377 Mich at 687 ("The lessor, absent agreement to the contrary, surrenders possession and holds only a reversionary interest. Under such circumstances, he is under no obligation to look after or keep in repair premises over which he has no control."); Prosser & Keeton, Torts (4th ed.), § 63, pp 399-400. This relinquishment of control extinguishes the landlord's duty of reasonable care over those areas.

[37] Prosser & Keeton, Torts (5th ed), § 63, p 442 ("Prior to 1970, there was no general tort duty on landlords to protect their tenants against criminal theft or attack."); *Goldberg v Housing Auth of City of Newark*, 38 NJ 578, 587; 186 A2d 291 (1962) ("The duty to provide police protection is foreign to the history of the landlord-tenant relationship."). Nationally, that duty began to expand in the context of the landlord-tenant relationship with *Kline v 1500 Mass Ave Apartment Corp*, 439 F2d 477, 481 (CA DC, 1970) ("[W]here, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.").

protect [the plaintiff] from injury" by another patron when the defendant knew that the other patron "had engaged in a fight in a bar at some time before the attack," when "the bartenders on duty did not take sufficient measures to eject him after he became obstreperous and disruptive," and when "the bartenders did not act immediately to protect [the plaintiff] from injury" once the initial assault began.[38] In doing so, this Court included for the first time the criminal acts of others being among the hazards within the scope of a merchant's duty " 'to its customers and patrons, including the plaintiff, of maintaining its premises in a reasonably safe condition and of exercising due care to prevent and to obviate the existence of a situation, known to it or that should have been known, that might result in injury.' "[39]

Similarly, in *Samson v Saginaw Professional Building, Inc*, this Court applied the same theory of liability to a commercial landlord that leased office space to an outpatient mental health clinic but that had failed "to provide some security measures or warnings for the safety of its tenants and visitors . . . ."[40] Although this case implied some duty for a landlord or merchant to take prophylactic measures to prevent third parties' criminal acts *before* they are imminent,[41] it did not

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[38] *Manuel v Weitzman*, 386 Mich 157, 166-167; 191 NW2d 474 (1971), overruled in part on other grounds *Brewer v Payless Station, Inc*, 412 Mich 673; 316 NW2d 702 (1982).

[39] *Id.* at 163, quoting *Torma v Montgomery Ward & Co*, 336 Mich 468, 476; 58 NW2d 149. Notably, *Torma* involved a merchant's duty to clear a physical defect on the property, and thus typified the traditional understanding of premises liability discussed above.

[40] *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 408-409; 224 NW2d 843 (1975).

[41] See *id*. at 411 (LEVIN, J., dissenting) ("[W]hen the landlord is informed by his tenants that a possible dangerous condition exists in the building, he has a duty to investigate and take available preventative measures."); *Manuel*, 386 Mich at 164, quoting *Windorski v Doyle*, 219

specifically articulate the measures that a landlord or merchant must take to obviate the hazard of third parties' criminal acts. Indeed, a vigorous dissent in *Samson* questioned the imposition of such an amorphous duty.[42]

Because " 'any legal standard must, in theory, be capable of being known,' "[43] this Court has since clarified the scope of the duty to prevent harm arising out of third parties' criminal acts. In *Williams v Cunningham Drug Stores, Inc*, this Court held that "a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties."[44] In doing so, this Court described the unpredictability of crime as the basis for limiting a merchant's liability toward invitees:

> [A]lthough defendant can control the condition of its premises by correcting physical defects that may result in injuries to its invitees, it cannot control the incidence of

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Minn 402, 407; 18 NW2d 142 (1945) (" 'The proprietor of such a place has the undoubted right to exclude therefrom drunken and disorderly persons, and the right to remove and expel them when they become in that condition and disorderly, and likely to produce discord and brawls. Being clothed with such power and authority, a corresponding duty to do so in the interests of law and order, and for the protection of his other guests, should be imposed as a matter of law.' ").

[42] *Samson*, 393 Mich at 421 (LEVIN, J., dissenting) ("No line is discernible to distinguish the liability sought to be imposed on [the defendant] from potential liability of landlords who rent to psychiatrists or lawyers who see persons with violent or criminal backgrounds.").

[43] *Williams*, 429 Mich at 503 n 18, quoting Holmes, The Common Law, Lecture III (1923), p 111.

[44] *Williams*, 429 Mich at 501. Although *Williams* stated in dicta that a landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees, *id.* at 502 n 17, we note that our common law has historically treated the duties of landlords and merchants similarly. Nevertheless, it is notable that, in making this distinction, *Williams* refused to apply *Samson* to the merchant-invitee special relationship.

> crime in the community. Today a crime may be committed anywhere and at any time. To require defendant to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require defendant to provide a safer environment on its premises than its invitees would encounter in the community at large. Defendant simply does not have that degree of control and is not an insurer of the safety of its invitees.[45]

In *Scott v Harper Recreation, Inc*, this Court reiterated the proposition that a merchant "ordinarily has no obligation to provide security guards or to protect customers against crimes committed by third persons" and explained that this principle remains in force "even where a merchant voluntarily takes safety precautions,"[46] such as hiring security guards or installing additional lighting. Accordingly, a merchant's undertaking of measures to *deter* the crimes of others does not create a duty to *eliminate* those crimes. Indeed, the Court recognized that the alternative rule would create a disincentive for security measures.[47] In *Mason v Royal Dequindre, Inc*, this Court clarified that "merchants

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[45] *Id*. at 502. This Court has recognized that cases involving the duties of merchants regarding criminal activity on their premises have a bearing on the similar duties of landlords. After *Williams*, we remanded to the Court of Appeals a case that involved whether a *residential landlord* had a duty to provide security guards, for reconsideration in light of *Williams*, which held that a *merchant* had no duty to provide security guards. *Bryant v Brannen*, 431 Mich 865; 428 NW2d 346 (1988); on remand 180 Mich App 87; 446 NW2d 847 (1989).

[46] *Scott v Harper Recreation, Inc*, 444 Mich 441, 451, 452; 506 NW2d 857 (1993).

[47] *Id*. at 451 ("[W]e decline to adopt a theory of law under which a merchant would be effectively obliged *not* to take such measures."). The Court also cited *Lee v Borman's, Inc*, 188 Mich App 665; 478 NW2d 653 (1991), and *Theis v Abduloor*, 174 Mich App 247; 435 NW2d 440 (1988), for the proposition that "providing a measure of security does not oblige a merchant to continue the practice." *Scott*, 444 Mich at 451 n 14.

have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties."[48] However, beyond indicating that a merchant's actions "must be reasonable," the Court did not articulate the scope of the merchant's duty.

We finally did so in *MacDonald*, holding that "the duty to respond is limited to reasonably expediting the involvement of the police and that there is no duty to otherwise anticipate and prevent the criminal acts of third parties."[49] As in *Williams*, we explained that, "[b]ecause criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere."[50] As a result, "it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties."[51] Although the element of control is essential in establishing a landlord or merchant's duty over the premises, they "do not have effective control over situations involving spontaneous and sudden incidents of criminal activity. On the contrary, control is precisely what has been lost in such a situation."[52]

In sum, *MacDonald* clarified the scope of a merchant's limited duty regarding the criminal acts of third parties:

> [G]enerally merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." The duty is triggered by

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[48] *Mason v Royal Dequindre, Inc*, 455 Mich 391, 405; 566 NW2d 199 (1997).

[49] *MacDonald*, 464 Mich at 326.

[50] *Id*. at 335.

[51] *Id*.

[52] *Id*. at 337.

> specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties. Consistent with *Williams*, a merchant is not obligated to do anything more than reasonably expedite the involvement of the police. We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences.[53]

While this duty has remained in place for merchants since clarified in *MacDonald*, we have not explicitly articulated the scope of the duty with regard to residential or commercial landlords. We do so today.

V. THE SCOPE OF A LANDLORD'S DUTY

In keeping with the traditional common-law understanding that landlords and merchants share a similar level of control over common areas that are open to their tenants and other invitees, and thus assume the same duty of reasonable care with regard to those common areas, we hold that a landlord's duty regarding criminal acts of third parties is limited to and coextensive with the duty articulated in *MacDonald*. Thus, a landlord has a duty to respond by reasonably expediting police involvement where it is given notice of a "specific situation occur[ring] on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee."[54]

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[53] *Id*. at 338, quoting *Mason*, 455 Mich at 405 (citations omitted).

[54] *MacDonald*, 464 Mich at 335.

Like a merchant, a landlord can presume that tenants and their invitees will obey the criminal law.[55] Because of the unpredictability and irrationality of criminal activity, "[t]his assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable [tenant or] invitee."[56] Only when given notice of such a situation is a duty imposed on a landlord. *Notice* is critical to determination whether a landlord's duty is triggered; without notice that alerts the landlord to a risk of imminent harm, it may continue to presume that individuals on the premises will not violate the criminal law. To the extent this holding, and the holdings of *MacDonald* and *Williams*, conflict with *Samson* we limit *Samson* to the duty clarified today and in *MacDonald* and *Williams*.[57]

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[55] *Id.*; see also *People v Stone*, 463 Mich 558, 565; 621 NW2d 702 (2001) (noting that an individual person can presume that others will obey criminal laws).

[56] *MacDonald*, 464 Mich at 335.

[57] We do not address the status of *Johnston v Harris*, 387 Mich 569; 198 NW2d 409 (1972), because it is not implicated under the facts of this case. In *Johnston*, the plaintiff was attacked in the unlocked and poorly lit vestibule of his apartment by a man who was lurking there. He alleged that the defendant landlord was liable for his injuries because of inadequate lighting in the vestibule and unlocked doors. *Johnston* held that the landlord's duty to repair physical defects in common areas applies to "provid[ing] adequate lighting and locks." *Id.* at 573. *Johnston* should be read in light of *Scott*, however, which reaffirmed *Williams*' principle that we impose no liability on premises owners for the failure of *voluntary safety precautions*. In short, there is a duty imposed on merchants or landlords to repair defects on the premises, but there is no duty to provide extraordinary safety precautions like security guards or extensive lighting. See *Williams*, 429 Mich at 502; *Scott*, 444 Mich at 452; *Stanley v Town Square Coop*, 203 Mich App 143, 150-151; 512 NW2d 51 (1993) (holding that a premises owner has a duty to remedy a condition on the physical premises that creates "an unusual risk of criminal attack," but no duty to protect from the general hazard of crime which is "inherent in the society in which we live").

We wish to make clear, however, that just as a landlord does not owe a duty of repair within a tenant's leasehold,[58] a landlord likewise does not have a duty to respond to criminal acts occurring within the leasehold of a tenant. In both situations, the landlord has surrendered possession and control of the leasehold to the tenant.[59] Because our common law has consistently imposed a duty only where a landlord or merchant exercises control over particular premises, a landlord's duty arises only when the triggering conduct occurs in those areas under the landlord's control.

If and when a landlord's duty is triggered, a reasonable response by the landlord is required. Typically, whether an actor proceeded reasonably is a question for the fact-finder. But, just as in *MacDonald*[60] and *Williams*,[61] we determine as a matter of law what constitutes reasonable care when a landlord is confronted with imminent criminal acts occurring on the premises under the landlord's control. And, like *MacDonald*, we make clear that as a matter of law, the duty to respond requires only that a landlord make reasonable efforts to expedite police involvement. Landlords, like merchants, have a low degree of control over the criminal acts of others. Our conclusion today does not expand a landlord's duty concerning third-party criminal acts; requiring more of a landlord than taking reasonable efforts to expedite police involvement would essentially result in the duty to provide police protection, a concept this Court has repeatedly rejected.[62] Consistent with our

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[58] See n 38.

[59] See *Williams*, 429 Mich at 499 n 10; *Lipsitz*, 377 Mich at 687; Prosser, Torts (4th ed.), pp 399-400.

[60] *MacDonald*, 464 Mich at 336.

[61] *Williams*, 429 Mich at 501.

[62] See, e.g., *MacDonald*, 464 Mich at 336-337; *Williams*, 429 Mich at 501.

recognition that the duty to provide police protection is vested with the government, and given the unpredictability of specific acts of crime, we decline to impose any greater obligation on a landlord.

VI. APPLICATION

Plaintiff's amended complaint alleges that plaintiff was attending a barbeque in a "common outdoor area" at Evergreen's apartment complex, where his brother was a tenant. Plaintiff alleges that during the barbeque, Schaaf entered the premises with a handgun and made threats "to kill somebody." Further, it is alleged that Laura Green, a tenant, informed the security guards, who were approximately 30 feet away from Schaaf, that "Schaaf was a non-resident, wielding a gun, [and] making threats to shoot people." It is also alleged that Green "pointed at Schaaf, identifying him" to security guards Baker and Campbell. Importantly, plaintiff alleges that the security guards failed to "notif[y] any police authorities of Schaaf's dangerous presence," even though Schaaf was "plainly observable in the immediate vicinity."

We have no doubt that plaintiff alleges sufficient facts that, if accepted as true, justify imposing a duty on defendants to notify police of the ongoing situation that was taking place at Evergreen. As the Court of Appeals accurately explained, plaintiff alleges facts indicating "the extreme nature of the ongoing situation at Evergreen," which involved "the most deadly circumstance of all" in the common area of the apartment complex: "a man brandishing a gun—apparently in full view of two security guards—who threatened to fire, and ultimately did fire, that gun with near fatal consequences."[63] The

[63] *Bailey*, 293 Mich App at 627-628.

Court of Appeals also noted that in his complaint, plaintiff characterizes the alleged relationship between the security guards and the landlord as an agency "for purposes of responding to safety issues."[64] Given the facts alleged involving the contract for security services between the security company and the landlord, we agree with the Court of Appeals that plaintiff has alleged sufficient facts that would impute to the landlord Green's notice to Baker and Campbell of the ongoing situation involving Schaaf in a common area of the premises. As a result, defendants were on notice that their invitees and tenants faced a specific and imminent harm. Furthermore, plaintiff was an identifiable victim of that harm because he was within the range of the risk of harm created by Schaaf's conduct.[65] Thus, if we accept plaintiff's allegations as true, defendants had a duty to reasonably expedite the involvement of the police, and the Court of Appeals properly held that the defendants were not entitled to summary disposition under MCR 2.116(C)(8).

VII. CONCLUSION

In line with our consistent historical treatment of merchants and landlords in the context of their duty with regard to hazards in areas under their control, we apply the *MacDonald* framework to situations involving the landlord-tenant special relationship and, thereby, render consistent our treatment of landlords' and merchants' duties when faced with imminent criminal action. Because the plaintiff alleged that defendant's hired security guards failed to contact the police when

[64] *Id.* at 641. Notably, "Green testified at her deposition that management had instructed the residents to call security to report any crimes." *Id*. at 641 n 82.

[65] See *MacDonald*, 464 Mich at 334.

clearly on notice of an imminent risk to him, we affirm this part of the Court of Appeals judgment.

However, we remand this case to the Court of Appeals for its consideration of Evergreen's and Radney's vicarious liability issues under *Al-Shimmari*,[66] including whether the issues were properly preserved for appeal. Finally, as to plaintiff's application for leave to appeal as cross-appellant, we vacate part V(E) of the Court of Appeals judgment,[67] which upheld the trial court's dismissal of plaintiff's negligence claims against defendant Hi-Tech on the basis of the contract between Hi-Tech and Evergreen because it applied *Fultz*,[68] without discussing our clarification of *Fultz* in *Loweke*.[69] We remand this case to the Court of Appeals for reconsideration of that issue in light of *Loweke* and *Hill*.[70] The application for leave to appeal as cross-appellant is denied in all other respects because we are not persuaded that the remaining question presented should be reviewed by this Court.

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

MCCORMACK, J. (*concurring*). I agree with the majority's analysis and join its opinion without qualification. I write separately only to emphasize one point in the majority's fine opinion. It is sometimes useful for courts to emphasize that common sense, as well as precedent, recommends a particular course of action.

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[66] *Al-Shimmari*, 477 Mich at 280.

[67] *Bailey*, 293 Mich App at 642-643.

[68] *Fultz*, 470 Mich at 460.

[69] *Loweke*, 489 Mich at 157.

[70] *Hill*, 492 Mich at 651.

The majority rightly shows how this Court's past precedent establishes that plaintiff states a valid claim against defendants. The principles of *MacDonald v PKT, Inc*,[1] *Williams v Cunningham Drug Stores, Inc*,[2] and the other cases the majority identifies plainly govern here. The landlord-tenant relationship is an archetypal special relationship—the law imposes a duty on a landlord to protect tenants from certain risks.[3]

Landlords and tenants are bound by a voluntary market relationship, where money is exchanged for the promise of shelter. Here, defendants Evergreen and Radney hired security guards for a practical purpose[4]—to provide some measure of protection for tenants and their social guests. Undoubtedly, the presence of those security guards gave some amount of comfort to Evergreen's residents, and made Evergreen a more attractive place to live. Of course, the overhead costs of employing security staff are borne by Evergreen and Radney and passed on to the Evergreen tenants like the other costs of any amenity, which is to say that the market will tend to provide such services only when they are needed or desired. The dissent's suggestion to the contrary notwithstanding, the question of how much security, amongst other amenities, an apartment complex should provide is one for the market to determine, not this Court.

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[1] *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).

[2] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988).

[3] See *id.* at 502 n 17.

[4] I recognize that the agency relationship between defendants Evergreen and Radney and Hi-Tech is an issue that is being remanded to the Court of Appeals for consideration, as there is some evidence to suggest that a contractual relationship may not have existed at the time of Bailey's injury. Contract or not, Hi-Tech was present on the premises not out of a selfless desire to do good; the security guards were there at Evergreen and Radney's invitation.

But the security guards' failure to alert law enforcement when notified of the possibility of imminent danger is a failure the law recognizes. It constitutes a violation of the defendants' duty because the resulting harm is foreseeable. Indeed, under the facts of this case, Hi-Tech's security guards are in the best position to reduce the risk of harm presented by Schaaf. In other words, the security guards were the cheapest cost-avoiders of the harms that Bailey suffered.[5] The defendants face liability because the harm in question was foreseeable, and the security guards failed to do their job.

CAVANAGH, J. (*concurring in part, dissenting in part*). At issue in this case is whether an apartment complex landlord owes a duty to its tenants and invitees to respond to an imminent threat of a third party's criminal act in the common area of the premises by calling the police. Specifically, we must decide whether *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001), applies to landlords. To the extent that the majority holds that landlords owe their tenants and invitees the duty established by a majority of this Court in *MacDonald*, I agree. However, I respectfully disagree with the majority's analysis, and its decision to limit the holding of *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 409; 224 NW2d 843 (1975). In my judgment, the majority fails to sufficiently analyze the nature of the relationship between a landlord and the landlord's tenants and invitees, where that relationship defines the nature of a landlord's duty.

I. PREMISES PROPRIETORS' DUTY TO PROTECT ANOTHER

A. GENERAL PRINCIPLES

Generally, the law may recognize a tort duty where

[5] See, e.g., Calabresi, *Costs of accidents: A Legal and Economic Analysis* (1970); Posner, *Economic Enalysis of Law* (7th ed).

"the relationship between the actor and the injured person gives rise to [a] legal obligation on the actor's part for the benefit of the injured person." *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977). In determining whether there is a legal obligation on the part of the actor that the law will recognize, often the question of duty will turn on a number of different factors, "including foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004) (citations and quotation marks omitted). The nature of the parties' relationship is critical in determining whether that relationship created the existence of a legal obligation because it is a basic principle of negligence law that, as a general rule, "there is no duty that obligates one person to aid or protect another." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988), citing 2 Restatement Torts, 2d, § 314, p 116. A duty to protect another may nevertheless be imposed when a special relationship exists between a defendant and a plaintiff. *Id.* at 499, citing 2 Restatement Torts, 2d, § 314A, p 118.[1]

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[1] If a legal obligation exists arising out of the parties' special relationship, other inquiries remain relevant in determining whether a *particular* duty or standard of care is owed to a plaintiff. See *Murdock v Higgins*, 208 Mich App 210, 215; 527 NW2d 1 (1994), aff'd 454 Mich 46 (1997) (citations and quotation marks omitted) ("In order to determine whether a 'special relationship' giving rise to a legal duty to act exists in a particular case, this Court has held that it is necessary to balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. . . . Other factors which may give rise to a duty include the foreseeability of the [harm], the defendant's ability to comply with the

As we stated in *Williams*, the duty to protect may impose liability from passive inaction, or nonfeasance, and "[t]he common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff." *Williams*, 429 Mich at 498. However, *Williams* further explained that "[s]ocial policy . . . has led the courts to recognize an exception to [the general rule that there is no duty to protect another] where a special relationship exists between a plaintiff and a defendant." *Id*. at 499. This Court has also held that "[d]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992) (quotation marks omitted), quoting Prosser & Keeton, Torts (5th ed), § 53, p 358.[2]

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proposed duty, the victim's inability to protect himself from the harm, the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant."). See, also, Dobbs, The Law of Torts, § 317, p 859 ("Even if a duty to take reasonable [active] action is recognized, liability is by no means a foregone conclusion. The exact conduct that reasonable care would demand may vary according to the relationship and circumstances.").

[2] See, also, Harper & Kime, *The Duty to Control the Conduct of Another*, 43 Yale L J 886, 905 (1934) (stating that the policies justifying the imposition of the duty to protect "reflect the general attitude of the community; they represent for the most part the popular notions of what constitutes proper assumptions on the part of one person when dealing with another. The common law attempts to interpret these communal reactions and to crystallize them into rules of law. As business and social relations become more and more complicated, these reactions are modified on the one hand and extended on the other. This requires modification and extension of the common law. The principles governing the duty of one person to control the conduct of another have this general elasticity which characterizes other principles of tort law. . . . If . . . the relationship of the parties appears to be, for all practical social purposes,

Despite the common law's reluctance to impose a duty to protect another, *Williams* noted that, in the past, the duty to protect may apply to a common carrier and its passengers, an innkeeper and its guests, and an employer and its employees, explaining that

> [t]he rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Williams*, 429 Mich at 499 (citations omitted).]

B. MERCHANTS AND LANDLORDS

It is true that "Michigan courts recognize a duty of care that arises solely from the possession of land . . . ." *Kessler v Visteon Corp*, 448 F3d 326, 331 (CA 6, 2006); see also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) ("Essentially, social policy imposes on possessors of land a legal duty to protect their invitees on the basis of the special relationship that exists between them."). In fact, *Williams* explained that "[o]wners and occupiers of land are in a special relationship with their invitees and compromise the largest group upon whom an affirmative duty to protect is imposed." *Williams*, 429 Mich at 499. *Williams* supported that assertion by explaining that landlords may be held liable for an unreasonable risk of harm caused by a dangerous condition of the land in the common areas of the premises, and merchants also have a duty to reasonably maintain the physical structures on their premises. *Id*. at 499-500, citing 2 Restatement Torts,

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indistinguishable from the type of cases which have been included under these general divisions [of either a special relationship or special circumstances], tort law may add another cubit to the stature which it has acquired over centuries of constant growth.").

2d, §§ 343, 360, and *Johnston v Harris*, 387 Mich 569; 198 NW2d 409 (1972). Plaintiff, on the other hand, asserts that defendant landlords owed him a duty to protect against imminent third-party criminal conduct that was *not* the result of or facilitated by the landlord's failure *to maintain the physical premises*. Specifically, the duty that plaintiff seeks to impose on defendant landlords in this case is identical to the duty that a majority of this Court imposed on the defendant merchant in *MacDonald*.[3] The *MacDonald* Court, however, only considered whether the scope of a merchant's duty established in *Mason v Royal Dequindre, Inc*, 455 Mich 391; 566 NW2d 199 (1997), remained valid and did not consider the justification for the imposition of the duty itself. In *Mason*, we held that merchants owe the duty to protect a " 'readily identifiable [invitee who is] foreseeably endangered' " from unreasonable risks of harm. *Id.* at 398, quoting *Murdock v Higgins*, 454 Mich 46, 58; 559 NW2d 639 (1997). *Mason* explained that this Court has "recognized that merchants may have a common-law duty to protect their patrons from the criminal acts of other patrons," 455 Mich at 399, citing *Manuel v Weitzman*, 386 Mich 157; 191 NW2d 474 (1971), and held that, generally, merchants have a duty to protect their invitees because of their special relationship. *Mason*, 455 Mich at 397-398, 405, citing *Williams*, 429 Mich at 498-500, and *Mason*, 455 Mich at 397 n 2, quoting 2 Restatement Torts, 2d, § 314A, p 118. See also *Mason*, 455 Mich at 398-399, quoting 2 Restatement Torts, 2d, § 344, pp 223-224.

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[3] I continue to adhere to my dissenting opinion in *MacDonald*. See *MacDonald*, 464 Mich at 346-358 (CAVANAGH, J., dissenting). However, my dissenting opinion is not implicated in this case because plaintiff only argues that a minimal duty, as defined by the *MacDonald* majority, applies to defendants.

While our prior cases involving owners and occupiers of land clearly demonstrate that merchants share a special relationship with their invitees, giving rise to the duty to protect, our caselaw is not so clear as it pertains to a landlord's duty to protect its tenants and invitees. Notably, while several Michigan cases that address the duty to protect to prevent harm to another in various circumstances have mentioned that landlords and tenants share a special relationship, we have yet to provide a justification for the duty. See, e.g., *Murdock*, 454 Mich at 55 n 11, *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 26 n 3; 780 NW2d 272 (2010), *Holland v Liedel*, 197 Mich App 60, 63; 494 NW2d 772 (1992), and *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992). Moreover, it is not clear from our prior cases involving only a *merchant's* duty to protect another from the criminal conduct of a third party that this Court has assumed that merchants and landlords have synonymous duties as premises owners. Rather, we have indicated that a landlord's relationship with its tenants may differ from a merchant's relationship with its invitees. See *Williams*, 429 Mich at 502 n 17 (explaining that landlords have *more* control over their relationships with their tenants than merchants do with their invitees); *Scott v Harper Recreation, Inc*, 444 Mich 441, 452 n 15; 506 NW2d 857 (1993) (expressly declining to address whether its holding should be extended to the landlord-tenant context).[4]

[4] The majority asserts that *Williams* "refused to apply *Samson* to the merchant-invitee special relationship." *Ante* at 611 n 44. In my view, *Williams* simply noted *Samson*'s holding to provide a similar *comparison* between merchants to landlords, and thus evidences the fact that our caselaw may not have treated the duties of all premises proprietors as coextensive.

Before *Williams* was decided, *Samson* recognized that a special relationship exists between a landlord and its tenants.[5] *Samson*, 393 Mich at 409. In *Samson*, a landlord of a commercial building leased office space to a mental health clinic. *Samson* upheld a jury verdict that imposed liability on the landlord for failing to protect against the harms posed by the mental health clinic's patients within the common areas of the building. *Id.* at 408-409. *Samson* reasoned that a landlord retains responsibility for the common areas of the premises that are not leased to tenants, and no one but the landlord remains responsible for those areas; thus, "[i]t is [the landlord's] responsibility to insure that these areas are kept in good repair and reasonably safe for the use of his tenants and invitees." *Id*. at 407.

However, *Samson*'s basis for upholding the landlord's duty is arguably unclear. Justice MARKMAN argues that *Samson* is distinguishable because it involved a commercial landlord, not a residential landlord, and *Samson* cited to § 314A(3) of the Restatement, which addresses premises owners who hold their land open to the public. *Samson*, 393 Mich at 407. Also, commentators have surmised that the duty imposed in *Samson* may be characterized as arising out of the defendant's act of leasing the premises to a potentially dangerous tenant. Dobbs, The Law of Torts, § 325, p 880 n 5 (citing *Samson* and explaining that some jurisdictions impose a duty on a landlord if the landlord helped create the danger that harmed the plaintiff).[6] Thus,

[5] Some Court of Appeals panels have cited *Samson* for the general proposition that landlords and tenants share a special relationship. See, e.g., *Holland*, 197 Mich App at 63.

[6] In my view, it is unnecessary for the majority to limit *Samson*'s holding in light of *MacDonald*'s limitation on the scope of a merchant's duty to protect its invitees. The only question that is currently before us is whether defendant landlords owed plaintiff the minimal duty as

absent clear direction from our prior caselaw, I think that the nature of the landlord-tenant relationship must be considered in deciding whether that relationship justifies the imposition of the duty established under *MacDonald*.

II. *MACDONALD* APPLIES TO LANDLORDS

I would hold that landlords share a special relationship with their tenants and invitees, which implicates a landlord's duty to protect against the conduct of third parties that poses an imminent and foreseeable risk of harm within the common areas of the premises. Specifically, I would hold that the minimal duty that *MacDonald* imposed on merchants applies to landlords on the basis of the landlord-tenant relationship.

Historically, the general rule against imposing liability on a person for failing to protect another may have precluded the existence of a landlord's duty to protect in light of the original nature of leaseholds. See *Trentacost v Brussel*, 82 NJ 214, 225; 412 A2d 436 (1980) ("Leases acquired the character of conveyances of real property when their primary function was to govern the relationship between landowners and farmers. Unlike the original, medieval tenant, the modern apartment dweller rents not for profit but for shelter."). Also, § 314A of the Restatement, which establishes a non-exhaustive list of special relationships that may serve the basis for the imposition of the duty to protect another, expressly includes the relationships between a merchant, or one who holds his land open to the public, and his invitees, and an innkeeper and his guests but is silent on the

articulated by the *MacDonald* majority. See *MacDonald*, 464 Mich at 338. Moreover, as Justice MARKMAN recognizes, the duties at issue in *Samson* and *MacDonald* appear distinguishable.

relationship between a landlord and tenant. 2 Restatement Torts, 2d, § 344(2), (3), and comment b, p 118.

However, in my judgment, the modern landlord-tenant relationship shares characteristics of both an innkeeper and a premises owner who holds his land open to the public. Landlords, particularly those of larger multi-complex properties, are analogous to innkeepers as to the common areas of the premises because of the reasonable expectation that landlords will provide some degree of supervision and control over the activities occurring within the common areas. See *Kline v 1500 Mass Avenue Apartment Corp*, 439 F2d 477, 482 (CA DC, 1970) (comparing a modern landlord to an innkeeper and noting that liability in the innkeeper-guest relationship may be based on the "innkeeper's supervision, care, or control of the premises"), and *id*. at 481 ("The landlord is no insurer of his tenants' safety, but he certainly is no bystander."). Further, both residential and commercial landlords open their land for their own pecuniary benefit, similar to a merchant's use of its land. Moreover, while the common areas of a residential landlord's premises may be restricted as to who may enter the land comparative to the public areas of a merchant's premises, that restriction is minimal considering that any tenant may bring third parties within the common areas of the property. Because landlords share a special relationship with their tenants and invitees, just as merchants share with their invitees, I would hold that the *MacDonald* duty applies to landlords.

Notably, applying *MacDonald* to the landlord-tenant context does not contravene the central holding in *Williams*—that a premises proprietor does not have a duty to essentially provide police protection. *Williams*, 429 Mich at 501-503. In *Williams*, we considered the

question "whether a merchant's duty to exercise reasonable care includes providing armed, visible security guards to protect invitees from the criminal acts of third parties." *Id*. at 500. The plaintiff in *Williams* argued that because the defendant drug store owner had not provided a security guard, as it had routinely done in the past, the defendant had breached its duty of care by not intercepting the armed robbery that occurred at the store and resulted in the plaintiff's injuries. *Id*. at 497. *Williams* held that a merchant does not have a duty to provide visible guards as a crime deterrent because that duty would amount to a duty to provide police protection. *Id.* at 501. *Williams* reasoned that a merchant is not the "insurer of the safety of his invitees" and "cannot control the incidence of crime in the community." *Id*. at 502.

As *MacDonald* recognized, "[m]erchants do not have effective control over situations involving *spontaneous and sudden* incidents of criminal activity." *MacDonald*, 464 Mich at 337 (emphasis added). However, when the facts of the case illustrate that the premises' proprietor has notice of a foreseeable risk to an identifiable tenant or invitee, the criminal activity is no longer random, as contemplated by *Williams*. See *Williams*, 429 Mich at 501 n 15 (explaining that the facts of *Williams* did not compel an application of a merchant's duty to protect its invitees against physical harm caused by the intentional acts of third parties under 2 Restatement Torts, 2d, § 344, pp 223-224). Thus, applying *MacDonald* to defendants as landlords is consistent with *Williams*'s holding, which declined to impose a general duty on a merchant to place security on the premises in the first instance to protect its invitees against *any* crime that may occur in the community. See also *Mills v White Castle Sys, Inc*, 167 Mich App 202, 208; 421 NW2d 631 (1988) (holding that *Williams*'s policy rationale did not

preclude the plaintiff's negligence claim because the plaintiff argued that the defendant merchant should have summoned the police, not that the defendant should have provided police protection).

Additionally, assuming that *Scott*, 444 Mich 441, is applicable in this case, applying *MacDonald* to the landlord-tenant context does not conflict with the underlying principles of *Scott*. The *Scott* plaintiff alleged that the defendant merchant voluntarily assumed the duty to protect the plaintiff against the criminal acts of a third party by advertising that that lot was "lighted" and "guarded" and that the defendant breached that duty by failing to provide adequate security, which resulted in the plaintiff's injuries from a criminal attack. *Id*. at 449. *Scott* held that "[s]uit may not be maintained on the theory that the safety measures are less effective than they could or should have been," reasoning that " '[s]uch a policy would penalize merchants who provide some measure of protection, as opposed to merchants who take no measures.' " *Id.* at 452, quoting *Tame v A L Damman Co*, 177 Mich App 453, 457; 442 NW2d 679 (1989). *Scott* also "reject[ed] the notion that a merchant who makes property visibly safer has thereby 'increased the risk of harm' by causing patrons to be less anxious." *Scott*, 444 Mich at 451.

However, in this case, defendants' voluntary decision to employ security guards is not the basis for the imposition of the landlords' duty. Rather, the placement of the security guards on the premises simply serves as the means by which defendants acquired notice of Schaaf's impending criminal behavior. Indeed, if it is determined that defendants are vicariously liable for the security guards' inaction, it would be as if the defendants themselves were called on to notify the

police of Schaaf's conduct.[7] Also, contrary to Justice MARKMAN's assertion, in applying *MacDonald* to defendant landlords in this case, I do not rely on the premise that tenants and invitees are lulled into a sense of safety via the placement of the security measures on the property to justify the imposition of the duty to protect on a landlord. Rather, the landlord's duty stems from the special relationship that the tenant and the landlord share, which is primarily based on the reasonable expectations that society places on the modern day landlord.

III. CONCLUSION

I would hold that *MacDonald* applies to the landlord-tenant context, which simply required defendant-landlords to call the police if they were aware of an ongoing situation that posed an imminent risk of harm to defendants' tenants and invitees. To justify the imposition of that duty, I think that the nature of the landlord-tenant relationship must be analyzed because it is the critical factor to be considered when imposing a duty to protect another. Further, in my view, our

[7] I disagree with Justice MARKMAN's prediction that by imposing on landlords the minimal duty under *MacDonald*, landlords will completely avoid the common areas of the premises. The duty to reasonably expedite police involvement when on notice of imminent harm to an identifiable invitee or tenant is not an impossible task. In fact, the burden of this duty is slight, particularly when compared to the risk of harm, i.e., the loss of life. Weighing the burden of the duty against the desirability of avoiding the harm is consistent with the factors that this Court considers when imposing any tort duty. As a practical matter, it seems quite obvious that landlords will choose to be actively present, thereby increasing the value of their rental properties, over avoiding their properties simply because they feel it is overly burdensome to potentially have to notify the police of an imminent risk of harm of which they are aware. Such a simple act is likely something that many landlords would already feel obligated to do absent the majority's holding today and why it should be an actionable wrong to avoid this duty.

caselaw regarding a merchant's duty to protect its invitees from the conduct of a third party has either been silent or expressly declined to opine as to whether a landlord has a similar duty to protect its tenants and invitees. Thus, while I agree with the majority to the extent that it holds that *MacDonald* applies to defendants in this case, I respectfully disagree with the majority's approach to this case.

MARKMAN, J. (*dissenting*). In *MacDonald v PKT Inc*, 464 Mich 322; 628 NW2d 33 (2001), this Court held that a merchant has a common-law duty under limited circumstances to "aid or protect" a patron or invitee from third-party criminal conduct. At issue in the instant case is whether this Court should now alter the common law and impose a similar legal duty on a residential landlord to "aid or protect" tenants and their social guests from third-party criminal conduct. Because longstanding common-law rules should not be altered absent compelling reasons for such alteration, and because the majority opinion has provided no such reasons in this case, I would continue to adhere to the general common-law rule in Michigan that a landlord has no legal duty to "aid or protect" tenants and their social guests from harm caused by a third-party's criminal conduct. Rather, traditional understandings of legal responsibility within our common law have made clear that it is the *criminal perpetrator* himself who is exclusively accountable for his own criminal conduct, not a third party.

This Court has created exceptions to our common-law rule and thereby imposed legal accountability on someone other than the criminal perpetrator only in exceptional circumstances where there is some "special relationship" in which one person can fairly be said to have entrusted himself to the control and protection of

another with a consequent loss of control to protect himself. But the majority opinion has not offered any persuasive argument that either tenants or their social guests bear the same "special relationship" to a residential landlord as an invitee or a patron does to a merchant, or that there is any similar entrustment of control to the landlord and consequent loss of control by tenants or their social guests to protect themselves against third-party criminal conduct. For these reasons, I respectfully dissent.

I. COMMON LAW

A. NATURE OF COMMON LAW

The common law develops through judicial decisions. *Placek v City of Sterling Hts*, 405 Mich 638, 657; 275 NW2d 511 (1979). Thus, it has been described as "judge-made-law." *Id.* In particular, "[t]he law of negligence was created by common-law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law *absent* legislative directive." *Moning v Alfono*, 400 Mich 425, 436; 254 NW2d 759 (1977). 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).

By its nature, the common law is not static; it adapts to changing circumstances. *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242; 828 NW2d 660 (2013). "The common law is always a work in progress and typically develops incrementally, i.e., gradually evolving as indi-

vidual disputes are decided and existing common-law rules are considered and sometimes adapted to current needs in light of changing times and circumstances." *Id*. at 243. 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. . . .
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> * * *
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> "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 15 A CJS, Common Law, § 2, pp 43-44.]

B. ALTERING COMMON LAW

Nevertheless, although the common law evolves, "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." *Price*, 493 Mich at 259. "[W]hen 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." *Id.* at 260 (emphasis added). Thus, because it is altering the common law, the majority bears the heavy burden to provide compelling reasons for its alteration and extension of the common law. In

my judgment, the majority presents no compelling reasons to justify its alteration of the common law. Indeed, as set forth below, a number of persuasive reasons counsel *against* such a change. I would therefore continue to adhere to our present common-law rule, one that has endured from the outset of Michigan's statehood and that faithfully reflects what has always previously been recognized as 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*, 277 Mich at 492, quoting *Kansas*, 206 US at 97.

II. COMMON LAW NEGLIGENCE

To state a cause of action for recovery under a negligence theory, certain elements must be present. These elements are: (1) that defendant owed the plaintiff a legal duty; (2) the defendant breached that legal duty; (3) that plaintiff suffered damages; and (4) that defendant's breach constituted a proximate cause of the plaintiff's damages. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). If any element is absent, a defendant is entitled to summary disposition.

The specific issue in this case concerns duty. In the absence of any relevant statute, the question of whether a legal duty exists in a given type of relationship is a question answered by the common law.[1] That is, this Court must determine whether under our common law defendant, a residential landlord who does not hold his

[1] Although it is an ordinary responsibility of a common-law judge to decide whether there is an established legal duty in a tort case, the question before this Court is a distinct one, *to wit*, whether we should create a *new* legal duty, i.e., a new basis for a negligence action by altering the common law to impose a legal duty on a residential landlord to protect a tenant and their social guests from third-party criminal conduct.

land open to the public, owed plaintiff, a social guest of a tenant, a legal duty to aid or protect him from third-party criminal conduct and, if not, whether we should now alter that common law and impose such a duty.

A. COMMON-LAW DUTY TO AID OR PROTECT ANOTHER

The general common-law rule is that a person has no legal duty to aid or protect another from harm, especially where, as here, such harm is caused by third-party criminal conduct. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988). Rather, the criminal perpetrator himself is exclusively responsible for such conduct and for the harm caused.[2] *MacDonald*, 464 Mich at 335 ("[I]t is unjustifiable to make merchants . . . effectively vicariously liable for the criminal acts of third parties."); *Williams*, 429 Mich at 503 ("The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner."); *Scott v Harper Recreation, Inc*, 444 Mich 441, 452; 506 NW2d 857 (1993) ("[M]erchants are ordinarily not responsible for the criminal acts of third persons."). There are a small number of exceptions to this rule, however, and such a legal duty may arise "by operation of the common law." *Hill*, 492 Mich at 661. As the "principal steward of Michigan's common law," *Price*, 493 Mich at 258 (quotation marks and citation omit-

[2] That one may have a *moral* duty or obligation to aid or protect is not the equivalent of having a *legal* duty to aid or protect. Thus, although a person who sees that a pedestrian is about to walk into oncoming traffic certainly possesses a *moral* obligation to intervene, a person has never been viewed as having a *legal* obligation to do so, and as a result the law will not hold him or her liable or accountable in a courtroom for the harms that occur where this moral obligation is not carried out. This is not an area of disagreement among any of the opinions in this case.

ted), this Court has been highly reluctant to modify the general common-law rule and impose a legal duty on persons to affirmatively aid or protect another from harm:

> In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff. Thus, as a general rule, there is no duty that obligates one person to aid or protect another. [*Williams*, 429 Mich at 498-499.]

Nonetheless, we have imposed a legal duty to affirmatively aid or protect another from harm in exceptional situations in which there is some special relationship. The justification for these exceptions is that in such a special relationship, one person has entrusted himself to the control and protection of another person, with a consequent loss of control to protect himself:

> Social policy, however, has led the courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. Thus, a common carrier may be obligated to protect its passengers, an innkeeper his guests, and an employer his employees. The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Id.* at 499.][3]

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[3] See also *Hill*, 492 Mich at 666 ("The rationale behind imposing a duty to protect in these special relationships is based on control. In each

As the majority and concurring opinions recognize, *Williams* sets forth what has always comprised our common-law *general rule* concerning the duty to aid or protect another, *Williams*, 429 Mich at 498-499, as well as the standard for identifying the limited range of *exceptions* to such general rule. *Id.* at 501. See *ante* at 604 ("[O]ur common law imposes a duty of care when a special relationship exists. These special relationships are predicated on an imbalance of *control*, where 'one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself.' ").

B. COMMON-LAW PREMISES LIABILITY

As the majority and concurring opinions also recognize, our common law has long recognized that a special relationship exists between "[o]wners and occupiers of land," *Williams*, 429 Mich at 499, and those who come onto the land. Accordingly, our common law imposes particular duties on the landowner that reflect the precise nature, and are a function, of this special relationship. That is, the duty imposed is tailored to the specific manner in which the person coming onto the land has entrusted himself to the control and protection of the landowner, and has consequently lost some aspect of his ability to protect himself.[4] In *Hoffner v Lanctoe*, 492 Mich 450, 459-460;

situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself.") (quotation marks and citation omitted); *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 26; 780 NW2d 272 (2010) (same); 2 Restatement Torts, 2d, § 314A(4), p 118 ("One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to [aid or protect] the other.").

[4] When such a relationship exists, the particular duty that is imposed serves to alleviate the *particular* entrustment and consequent loss of control that exists as a result of the parties "relationship." Thus,

821 NW2d 88 (2012), this Court explained the precepts of this "well-recognized" common-law duty:

> The law of premises liability in Michigan has its foundation in two general precepts. First, landowners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land. Second, and as a corollary, landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land. These principles have been used to establish well-recognized rules governing the rights and responsibilities of both landowners and those who enter their land. Underlying all these principles and rules is the requirement that both the possessors of land and those who come onto it exercise common sense and prudent judgment when confronting hazards on the land. These rules balance a possessor's ability to exercise control over the premises with the invitees' obligation to assume personal responsibility to protect themselves from apparent dangers.

The precise duty the landowner owes depends on the exact status of the other person on the land. *Hoffner*, 492 Mich at 460 n 8. There are "three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).[5] The landowner owes the following duty to invitees:

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different duties are imposed in different circumstances. See, e.g. *Takacs v Detroit United R*, 234 Mich 42, 49-51; 207 NW 907 (1926) (common carrier).

[5] "A 'trespasser' is a person who enters upon another's land, without the landowner's consent." *Stitt*, 462 Mich at 596. "A 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent." *Id*. "Typically, social guests are licensees who assume the ordinary risks associated with their visit." *Id.* "An 'invitee' is 'a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe

> With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land. Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect. [*Hoffner*, 492 Mich at 460.]

The landowner owes the following duty to licensees:

> A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Stitt*, 462 Mich at 596.]

And finally, "[t]he landowner owes no duty to the trespasser except to refrain from injuring him by 'wilful and wanton' misconduct." *Id*.

I agree with the majority that "the law of torts has treated landlords and merchants the same in the context of their [legal] duties to maintain the physical premises over which they exercise control." *Ante* at 604. It is correct that neither the "landlord" nor the "merchant" has ever been excepted from these duties. The legal duties to protect visitors from physical defects that apply generally to property-owners apply notwithstanding whether the person who owns the property happens to be a "merchant" or a "landlord." Indeed, I am unaware of *any* class of persons excepted by our common law from these legal duties in connection with their properties.

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for [the invitee's] reception.' " *Id*. at 596-597, quoting *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987).

Drawn solely from this fact, i.e., that a merchant and landlord share a common legal duty to remedy physical defects, the majority undertakes the leap in logic that the particular duty this Court has imposed on a merchant concerning third-party criminal conduct should identically be imposed on a landlord. *Ante* at 618 ("In line with our consistent historical treatment of merchants and landlords in the context of their duty with regard to hazards in areas under their control, we apply the *MacDonald* framework to [landlords] . . . ."). I respectfully disagree with such analysis because I do not see how this unremarkable and irrelevant historical "consistency" can have any logical bearing on the instant case. This "duty with regard to hazards in areas under their control" is *universally* applied to landowners, with all landowners being treated "consistently" in this regard. However, the fact that our common law has imposed this general and well-established duty regarding *physical defects* in property on both merchants and landlords tells us nothing about whether merchants and landlords should be treated equivalently when it comes to *third-party criminal conduct*. The absence of even a perfunctory analysis in this regard overlooks that the body of law that has developed concerning physical defects in property, which of course encompasses equally the property of a merchant-landowner and a landlord-landowner, has no obvious relevance in a case that concerns liability for third-party criminal conduct.[6]

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[6] Indeed, there is a corollary to the landlord's duty with regards to hazards in the common area: the tenant bears responsibility for conditions in those parts of the leasehold under the tenant's control. See *Williams*, 429 Mich at 499 n 10 ("The landlord is not liable for injuries that occur within the boundaries of the leased premises."). Why then, under the majority opinion's analysis, would a tenant, in his area of control, not bear the same obligation as a landlord to protect others from

Again, the majority provides little analysis regarding the current state of our common law as it relates to a *landlord's* distinctive liability for third-party criminal conduct. The majority does not compare the development of the common law as to a merchant's liability for third-party criminal conduct with that of the landlord. It does not attempt to compare or contrast the distinct circumstances of the merchant and the landlord in terms either of their control over their property or the resultant loss of control on the part of others to protect themselves from third-party criminals. And the majority does not take into consideration why a landlord should be treated like a merchant where, as here, the landlord, unlike the merchant, *has never held his land open to the public*. As discussed below, the body of common law that has developed as to a merchant's liability for third-party criminal conduct—a liability which is *premised* on the merchant holding his land open to the public—is irrelevant to the circumstances of a residential landlord, who has *not* held his land open to the public.

C. THIRD-PARTY CRIMINAL CONDUCT

Again, the general common-law rule is that a person has no legal duty to aid or protect another from third-party criminal conduct and cannot be held liable for

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third-party criminal conduct? Why would every landowner not owe this same duty? See *Miller v Whitworth*, 193 W Va 262, 267-268; 455 SE2d 821 (1995) (quoting *Clarke v JRD Mgt Corp*, 118 Misc2d 547, 549; 461 NYS2d 168 (1983) ("The trend toward enlarging the duty of landlords and other private parties to provide security against criminal acts, even in the absence of agreements to do so, has the potential of reaching absurd proportions. One can foresee landowners, proprietors of restaurants, stores, theaters, banks, schools and, indeed, public buildings being civilly responsible for all crimes on their premises."). I would add to the foregoing list homeowners and farmers.

failing to render aid or protection. Rather, the criminal perpetrator himself is exclusively responsible for such conduct and for the harm caused.

1. MERCHANT LIABILITY FOR THIRD-PARTY CRIMINAL CONDUCT

Traditionally, courts have held that a merchant has no duty to aid or protect invitees from criminal conduct. The merchant simply had the common-law duties related to physical defects on the merchant's premises. Rather, the criminal perpetrator himself was exclusively responsible for his criminal conduct and for the harm caused.

However, as the majority correctly notes, in a line of cases beginning with *Manuel v Weitzman*, 386 Mich 157; 191 NW2d 474 (1971), overruled in part on other grounds *Brewer v Payless Stations, Inc*, 412 Mich 673; 316 NW2d 702 (1982), this Court began to gradually erode the general common-law rule by imposing new duties to aid or protect upon "merchants" and by holding such merchants liable for an increasing array of harms caused by third-party criminal conduct. *Manuel* was a common-law negligence case in which a patron sued a "tavern keeper" for the injuries sustained when assaulted by another patron. This Court proceeded for the first time to expand the traditional scope of common law premises liability for tavern-keeper merchants from a "duty to repair physical defects" to a "duty to protect patrons from third-party criminal conduct." *Id.* at 164. From this beginning, the 'tavern keepers' common-law duty to aid or protect invitees from third-party criminal conduct was extended on a case-by-case basis to other types of merchants. See *Mason v Royal Dequindre, Inc*, 455 Mich 391, 399-403; 566 NW2d 199 (1997) (discussing such cases). Eventually, this Court clarified the scope of the now-generally-applicable merchant's duty

in a line of cases that included *Williams*, *Scott*, *Mason*, and *MacDonald*. In *MacDonald*, 464 Mich at 325-326, this Court provided the following summary regarding the development that had occurred in this line of cases and articulated the scope of the merchant's legal duties:

> Under [*Mason*], merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. We hold today that the duty to respond is limited to reasonably expediting the involvement of the police and that there is no duty to otherwise anticipate and prevent the criminal acts of third parties. Finally, consistent with [*Williams*], and [*Scott*], we reaffirm that merchants are not required to provide security personnel or otherwise resort to self-help in order to deter or quell such occurrences.

This duty to aid or protect applies to merchants: "A possessor of land *who holds it open to the public* for entry for his business purposes is subject to liability to members *of the public* while they are upon the land for such a purpose . . . ." 2 Restatement Torts, 2d, § 344, pp 223-224 (emphasis added).[7]

As discussed below, the body of common law that developed for a possessor of land who holds it open to the public for entry is inapplicable to a possessor of land who does not open his land to the public for similar entry. Indeed, in *Scott* and *Williams* this Court expressly stated that its decision did not apply with regard

[7] Although *MacDonald* rejected the argument that *Mason* adopted the *entire* "rule" set forth in § 344 and comment f to § 344 of 2 Restatement Torts, 2d, *MacDonald*, 464 Mich at 341-342, there was no indication that *MacDonald* rejected the Restatement's description of the class of people who owed this duty, or that the "merchant" duty in *MacDonald* was imposed on anyone other than those who hold property open to the public. Indeed, *MacDonald* clarified the common-law duty owed by this very class of people. *Id.* at 325-326.

to "the application, in the area of landlord-tenant law, of the principles discussed." *Scott*, 444 Mich at 452 n 15; see *Williams*, 429 Mich at 502 n 17. The majority opinion provides no convincing explanation as to why a common area that is *not* open to the public should be treated in the identical fashion as a merchant's property that *is* open to the public.

2. LANDLORD LIABILITY FOR THIRD-PARTY CRIMINAL CONDUCT

Similarly, and in accordance with the general common-law rule, courts have historically held that a landlord has no duty to aid or protect tenants or their social guests from criminal conduct. In its analysis, the majority relies on *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393; 224 NW2d 843 (1975) as the (sole) basis of support for its conclusion that this Court has "expanded" our traditional common-law rule regarding the duty imposed on a landlord such that a landlord can be held liable for the third-party criminal conduct that occurred in this case. *Ante* at 609 ("[T]his Court expanded the duty of both landlords and merchants to protect their tenants and invitees from those criminal acts."). Although *Samson* is indispensable to the overall majority argument because it provides the legal basis for its conclusion that *landlords* are under a general duty to aid or protect tenants and their social guests from third-party criminal conduct under *existing* Michigan common law, it is easy to overlook this fact because the majority opinion devotes only a single sentence to *Samson*, despite discussing general common-law premises liability for nearly six full pages, and a *merchant's* liability for the criminal conduct of a third party for nearly five full pages. This point cannot be overstated: *Samson is the one and only case on which the majority opinion relies for its assertion that the landlord has a common-law duty to aid or protect tenants and their*

social guest from third-party criminal conduct under our common law. That is, according to the majority, *Samson* recognized that a landlord and tenant have a special relationship of entrustment and control, and that the duty the landlord owes on account of this special relationship also extends to a tenant's social guests. Thus, says the majority, defendant-(landlord) owed a duty to aid or protect plaintiff (tenant's social guest) under *existing* Michigan common law and can be held liable for failing to render aid or protection.[8] The majority offers the following one sentence "analysis" of *Samson*:

> Similarly, in [*Samson*], this Court applied the same theory of liability [that it applied in *Manuel*] to a commercial landlord that leased office space to an outpatient mental health clinic but that had failed "to provide some security measures or warnings for the safety of its tenants and visitors . . . ." [*Ante* at 610 (citation omitted).]

Because the majority never explains what it believes to be the theory of liability in *Manuel*, it is unclear what exactly it believes to be the "theory of liability" this

[8] The majority opinion further makes it clear that the duty it has found under our existing Michigan common law, and then "clarified" by imposing the merchant's duty does not come from this Court's decision in *Johnston v Harris*, 387 Mich 569; 198 NW2d 409 (1972), which, according to the majority opinion, concerned "the landlord's duty to repair physical defects in common areas." *Ante* at 615 n 57 ("We do not address the status of [*Johnston*], because it is not implicated under the facts of this case."). The concurring opinion likewise agrees that this case does not concern the type of physical defects that were at issue in *Johnston*. *Ante* at 625 (concurring opinion) ("[P]laintiff . . . asserts that defendant landlords owed him a duty to protect against imminent third-party criminal conduct that was *not* the result of or facilitated by the landlord's failure to *maintain the physical premises*."). The Court of Appeals reached this same conclusion. *Bailey v Schaaf*, 293 Mich App 611, 640; 810 NW2d 641 (2011) ("[T]his case clearly does not involve a *condition on the land* that placed Bailey at a heightened risk of harm at the hands of third parties.") (emphasis in original). I agree that *Johnston* as a genuine premises-liability case is distinguishable from the instant case.

Court applied in *Samson*.[9] In any event, this Court made abundantly clear in *Samson* that it was imposing a duty on the defendant only because he had held his land open to the public.[10] Consequently, *Samson's* "theory of liability" is utterly inapplicable here because defendant did not do the same.

In *Samson*, a clinic that treated mental-health patients, including those from the Ionia State Prison, leased space on the fourth floor of a commercial office building from the defendant, the owner of the building. Tenants in the building told the defendant's representatives that they were afraid of the clinic's patients, who had to use the stairs and elevators to reach the clinic, but the defendant took no action. The plaintiff, a secretary employed by a lawyer who leased an office on

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[9] To the extent the majority is asserting that the "theory of liability" was a function of the duty owed by an owner or occupier of land, i.e., general premises liability, one might wonder why the majority opinion gives no consideration to the open-and-obvious-danger doctrine, a doctrine closely enmeshed with premises liability. Under this doctrine, a landlord's (or any other landowner's) duty to protect others from dangerous conditions "does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself." *Williams*, 429 Mich at 500. It appears that the third-party criminal conduct at issue here may well have been so obvious and apparent that an invitee may have been expected to discover them himself. Indeed, the tenants appear to have quickly and easily discovered the danger.

[10] Clearly, landlords and tenants have the special relationship of entrustment and consequent loss of control that exists between "owners and occupiers of land" and those who come onto the land, and thus a landlord owes a tenant the traditional common-law duties that pertain to address the entrustment and consequent loss of control that exist under that *particular* special relationship. See n 5. But this landlord and his tenant's social guest do not have the *particular* special relationship of entrustment and consequent loss of control that was the source of the *Samson* defendant's duty to aid or protect the plaintiff from third-party criminal conduct. Having a special relationship in one realm does not signify that parties must have a special relationship in every realm.

the fifth floor, was attacked by one of the clinic's patients in an elevator while on her way to a coffee shop located on the first floor. The plaintiff claimed that the defendant was negligent by failing to take appropriate actions to ensure that the common area of the building were reasonably safe, and the jury awarded damages. The Court of Appeals affirmed. On appeal, this Court held that it was the responsibility of the defendant to ensure that the common areas of the building were reasonably safe, and that a jury question had been presented as to whether the defendant's failure to undertake precautionary security measures in relation to the clinic constituted a breach of its legal duty to aid or protect the plaintiff.

Regarding the special relationship that provided the source of the defendant's duty, this Court explained:

> Defendant leased its premises to the Mental Health Clinic. For this act, by itself, our law imposes no liability and indeed should impose none. Whether or not the landlord retains any responsibility for actions which occur within the confines of the now leased premises is not now before this Court and need not be answered. It would appear, however, that he would not retain any responsibility for such actions except in the most unusual circumstances. However, the landlord has retained his responsibility for the common areas of the building which are not leased to his tenants. The common areas such as the halls, lobby, stairs, elevators, etc., are leased to no individual tenant and remain the responsibility of the landlord. It is his responsibility to insure that these areas are kept in good repair and reasonably safe for the use of his tenants and invitees.
>
> The existence of this relationship between the defendant and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable risk of physical harm. *2 Restatement Torts, 2d, § 314A(3)*. [*Samson*, 393 Mich at 407.]

As can be seen from the above quotation, this Court made it clear that its decision was based on 2 Restatement Torts, 2d, § 314A(3), p 118, which provides:

> A possessor of land who holds it *open to the public* is under a similar duty to [aid or protect] members of the public who enter in response to his invitation. [Emphasis added.][11]

As subsection (3) makes clear, the duty imposed on the owner of the commercial office building to aid or protect the attorney's secretary was not based on the owner being a "landlord" and leasing office space to commercial tenants, one of whom employed the plaintiff. Indeed, a "landlord-tenant" relationship could *not* have been the source of the defendant's legal duty to aid or protect the plaintiff because the plaintiff and the defendant did not even have a "landlord-tenant" relationship.[12] That is, the defendant was *not* the plaintiff's landlord and the plaintiff was *not* the defendant's tenant. Rather, the only relationship the plaintiff had

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[11] *Samson* cited 2 Restatement Torts, 2d, § 314A(3) as the sole support for its concluding sentence in the relationship and duty section, the very same sentence in which it held that that there was a relationship and duty. *Samson*, 393 Mich at 407. That this Court chose to reference a *single* citation, and to cite a specific *subsection* can be nothing other than a deliberate decision. To hold then that this Court was not genuinely applying the only legal rule that it actually cited in support of its decision is, to say the least, a considerable stretch.

[12] Black's Law Dictionary (9th ed), defines "landlord" as "[o]ne who leases real property to another," and "tenant" as "[o]ne who holds or possesses lands or tenements by any kind of right or title." *Id.* It defines "landlord-tenant relationship" as:

> The legal relationship between the lessor and lessee of real estate. The relationship is contractual, created by a lease (or agreement for lease) for a term of years, from year to year, for life, or at will, and exists when one person occupies the premises of another with the lessor's permission or consent, subordinated to the lessor's title or rights. [*Id.*]

with the defendant was that the plaintiff was employed as a secretary by one of the defendant's tenants.

However, what is most obvious and pertinent about the *Samson* analysis is that the special relationship, and attendant legal duty to aid or protect, was a function of the defendant holding his land *open to the public*.[13] Thus, in the same way that the owner of a mall leases individual storefronts to commercial tenants and invites the public into the common area over which the owner retains control (e.g., walkways, restrooms, escalators), the defendant in *Samson* leased the individual offices to commercial tenants and invited the public into the common area over which it retained control. According to 2 Restatement Torts, 2d, § 314A(3), which, again, constituted the *only* stated legal basis for our decision in *Samson*, the owner has a legal duty to aid or protect invitees because it has held these areas *open to*

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[13] The concurring opinion states:

> Justice MARKMAN argues that *Samson* is distinguishable because it involved a commercial landlord, not a residential landlord, and *Samson* cited to § 314A(3) of the Restatement, which addresses premises owners who hold their land open to the public. Also, commentators have surmised that the duty imposed in *Samson* may be characterized as arising out of the defendant's act of leasing the premises to a potentially dangerous tenant. Dobbs, The Law of Torts, § 325, p 880 n 5 (citing *Samson* and explaining that some jurisdictions impose a duty on a landlord if the landlord helped create the danger that harmed the plaintiff). [*Ante* at 627 (concurring opinion).]

First, although *Samson* involved a commercial landlord, this Court made it clear that it was imposing a duty on the defendant not because he was a commercial landlord but because he held his land *open to the public*. Second, regarding the commentator's theory of *Samson*, this Court went out of its way to make it clear that this was *not* the basis for its decision, stating:

> Defendant leased its premises to the Mental Health Clinic. For this act, by itself, our law imposes no liability and indeed should impose none. [*Samson*, 393 Mich at 407.]

the public, not because the owner happened also to be a "landlord" who leased property to commercial "tenants" in the building.

In *contrast*, and particularly relevant to this case, the common area of a residential apartment building is not open to the public, nor is the general public invited to gather there. Whether a residential common area lies within an expansive apartment complex or within a large house converted into apartments, the world is not invited into these areas. Rather, the common area of an apartment building is simply not a place of public use or gathering from which a landlord, in the same manner as a merchant or mall owner, profits from the presence of the very public that has been invited onto his property, and therefore must in fairness share in the legal risks to which public invitation may give rise. The common area of a residential apartment is by its nature private and open only to those persons invited onto the property. It is to all significant purposes the equivalent of a *home*, in which residents are generally responsible for their own protection from third-party criminal conduct. Absent some compelling explanation as to how the differences between a home and an apartment impose on residents of the latter some real diminution in the ability to protect oneself from such conduct, the legal duty to aid or protect that this Court recognized in very different circumstances in *Samson* on the basis of Restatement, § 314A(3) is inapplicable to this case, and there is no other decision of this Court that stands for the same proposition that the majority opinion erroneously attributes to *Samson*.

The majority fails to account for this Court's specific citation in *Samson* to Restatement, 2d, § 314A(3). By failing to recognize that the legal duty at issue in *Samson* was predicated on the special relationship set

forth in § 314A(3), the majority is left free to determine at its own discretion that the legal duty there was predicated on some other special relationship. In other words, by not giving consideration to the exclusive reliance in *Samson* placed on Restatement, § 314A(3), the majority is able to characterize the special relationship in *Samson* as it sees fit and to assert that the legal duty identified in that case was imposed on the basis of *that* special relationship, rather than on the basis of the special relationship that, in fact, was expressly at the heart of *Samson* and that was grounded on Restatement, § 314A(3). Although in *this* case, the majority deems that a "landlord-tenant" relationship constituted the source of the legal duty to aid or protect imposed in *Samson*, in the next case it could just as easily identify such legal duty as reposing in a "building owner-elevator rider" special relationship, or a "building owner-lawyer's secretary" special relationship, as the source of a defendant's legal duty to aid and protect. Whatever check or constraint can reasonably be derived from Restatement, § 314A(3) on the scope of exceptions to the general rule in Michigan that there is no legal duty to aid or protect another from the criminal conduct of third parties has been eroded by the free-form analysis of the majority opinion.

Given that *Samson* is inapplicable, the majority opinion lacks support for its assertion that the landlord here had a common-law duty to aid or protect a tenant's social guest from third-party criminal conduct under the *existing* common law.[14] Rather, the majority is

[14] Even if our decision in *Samson* had been predicated on the existence of a landlord-tenant special relationship, there is no such special relationship in the instant case because plaintiff, again, was not a tenant. The majority supplies no explanation as to why a landlord owes a tenant's social guest the same duty it owes the tenant himself, with whom it has

altering the common law by creating a new special-relationship exception to the common-law rule that there is no legal duty to aid or protect another from third-party criminal conduct and thus imposing on "landlords" whose property is not open to the public, new legal responsibility and accountability for the criminal conduct of third parties.[15]

3. "CLARIFYING" *SAMSON* DUTY

After firstly concluding erroneously that defendants

a landlord-tenant relationship. The majority merely labels the tenant's social guest an "invitee" without any further explanation. However, "[t]ypically, social guests are licensees who assume the ordinary risks associated with their visit." *Stitt*, 462 Mich at 596; see *Jack v Fritts*, 193 W Va 494, 499; 457 SE2d 431 (1995) (holding that a landlord owes no duty to a tenant's social guest to protect that guest from third-party criminal conduct because such a duty is predicated on the existence of a landlord-tenant special relationship and the landlord and tenant's social guest lack any such relationship).

[15] Moreover, the majority provides no definition of "landlord." It is thus unclear exactly who is now subject to this new duty and legal liability. Is a "landlord" "[o]ne who leases real property to another?" Black's Law Dictionary; see n 15. Or does the statutory definition of "landlord" provided in this state's Landlord Tenant Relationship Act apply? See MCL 554.601(c) (" 'Landlord' means the owner, lessor, or sublessor of the rental unit or the property of which it is a part and, in addition, means a person authorized to exercise any aspect of the management of the premises, including a person who, directly or indirectly, acts as a rental agent, receives rent, other than as a bona fide purchaser, and who has no obligation to deliver the receipts to another person."). Or perhaps some other definition? The majority does not say. If a child moves home after college and his parents charge him $100 a month to "rent" a room, do the parents now owe this new "landlord" duty to their child and all of his or her guests? Is a person who rents out his basement apartment now subject to this new legal duty? What of the owner of a duplex who lives in one half and rents out the other? Is he subject to this new legal duty? All that is certain is that the present opinion of the Court will yield new litigation, new creative theories of legal liability, higher insurance premiums on landlords, and that some unknown number of landlords will ultimately be held legally responsible and accountable in the courtroom for the criminal conduct of third parties.

are subject under our common law to *Samson*, the majority then, secondly, proceeds to transform the *Samson* duty as a function of "clarifying" it, and then, thirdly, it effectively overrules *Samson* by "limiting" it. The majority states that although *Samson* "implied some duty for a landlord . . . to take prophylactic measures to prevent third parties' criminal acts *before* they are imminent, it did not specifically articulate the measures that a landlord . . . must take to obviate the hazard of third parties' criminal acts." *Ante* at 610-611. The majority states that the "implied" duty in *Samson* was "amorphous," *ante* at 611, and then "clarifie[s] . . . the scope of the [*Samson*] duty," *ante* at 16, by imposing onto a landlord the entire body of common law that developed as to a *merchant*'s liability for third-party criminal conduct. See *ante* at 615 ("the duty clarified today").

This "clarified" duty imposed from the line of common-law decisions concerning a *merchant's* liability for third-party criminal conduct has no bearing on the question of what duty, if any, should be imposed on the *landlord*, at least absent compelling justification. Indeed, the majority adopts this merchant's duty despite the fact that the landlord in this case bears little resemblance to a merchant, and despite the fact our common law has in no way treated a merchant and a landlord in an equivalent fashion when it comes to third-party criminal conduct. Even if one were to overlook that in this case there is no duty to be "clarified" because the *Samson* duty does not apply to landlords, the "clarified" duty applied in lieu of the *Samson* duty is in fact a *new* duty that this Court has never before imposed. Notably, if the majority's "now-clarified" duty were to be applied in *Samson*—the very case on which the majority relies for the legal duty that it is now "clarifying"—*Samson* would be effectively overruled

because there would be no factual basis for upholding the jury verdict that imposed liability on the landlord.[16] Despite this, the majority still fails to acknowledge that it is altering the common law of this state, opining only that "[t]o the extent this holding . . . conflict[s] with *Samson*, we limit *Samson* to the duty clarified today and in *MacDonald*." *Ante* at 615.

Moreover, although the majority acknowledges that we have imposed a legal duty to affirmatively aid or protect only in exceptional circumstances in which there is some special relationship, it fails to explain how this test has been met here and how the "now-clarified" duty it imposes is designed to mitigate against the consequences of the particular entrustment and consequent loss of control that exists under these parties' special relationship. Before legal responsibility and accountability for third-party criminal conduct is apportioned and extended beyond the actual criminal perpetrator himself, this Court is obligated under its own

[16] The duty imposed in *Samson* required the landlord to "investigate" and take "available preventative measures" where tenants "voiced their concern and uneasiness over the [mental patients'] use of the elevators and stairwells of the building." *Samson*, 393 Mich at 404, 411. In contrast, under the "clarified" *Samson* duty—i.e., the *MacDonald* duty—a landlord has no obligation to "investigate" or "take any preventative measures" with regard to third-party criminal conduct. The landlord's only duty is to "make reasonable efforts to expedite police involvement," *ante* at 616, when confronted with a "specific situation occur[ring] on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee," *MacDonald*, 464 Mich at 335. The victim in *Samson* was robbed in seclusion, in an elevator. *Samson*, 393 Mich at 398-399. When the elevator "reached the ground floor, [the third-party criminal] ran away." *Id.* at 399. The landlord in *Samson* thus lacked notice of third-party criminal conduct sufficient to trigger his *MacDonald* duty to call the police. That is, he had no notice whatsoever that a crime was occurring in the elevator. See *ante* at 628 n 6 (concurring opinion) ("[T]he duties at issue in *Samson* and *MacDonald* appear distinguishable.").

"control and protect" standard to show clearly how: (a) a person can fairly be said to have *entrusted* himself to the control and protection of another; (b) such entrustment was *reasonable*; and (c) as a result of such entrustment, there has been a *consequent loss of control* by that person to protect himself. The majority opinion not only does none of these things before redefining the common-law legal duties in this case, but it also fails to answer what is invariably the ultimate and practical inquiry in a case in which the common law is to be altered—what has changed in our society, what has evolved in our customs and practices and values, what is different as to our expectations in terms of the law, that justifies imposition of a legal duty in 2013 on landlords to aid or protect tenants given that there has been no such legal duty in the past 176 years of Michigan's common law?

I have no doubt that this Court possesses the legal *authority* to undertake today's decision, and I can understand how reasonable people can differ from my own viewpoint as to the *wisdom* of the majority's course of action, but this Court today undertakes something that is significant and consequential when it redefines the *legal consequences of criminal conduct* and establishes new legal duties in that regard within our common law. This Court, in my judgment, owes a far more thorough explanation in support of why this redefinition of our legal rights and responsibilities has now become necessary.

Although I certainly agree with the majority that a landlord has a substantially higher degree of control over the *physical structures* and *architecture* of the common area, I fail to follow how that higher degree of control, which is already accounted for by the duties imposed under traditional common-law premises liabil-

ity principles, has any bearing on whether tenants or their social guests have entrusted themselves to the "control and protection" of the landlord and, in so doing, have diminished or compromised their own ability to protect themselves against *third-party criminal conduct*. According to the majority opinion, "as a matter of law, the duty to respond requires only that a landlord make reasonable efforts to expedite police involvement." *Ante* at 616. Making reasonable efforts to expedite police involvement is apparently all that is required by the majority's rule. Per the majority, the landlord is not required to modify or repair the common area in any way that makes criminal conduct less likely, he is not required to take control of these areas and actively root out criminal conduct that may be occurring or that is imminent, and he is not required to institute surveillance or any other particular security precaution. If he were *require*d to do any of these things, I might agree with the majority opinion that the landlord would be in the better, if still not exclusive, position to undertake these measures as a function of his control over the common area. But by the majority's holding, the landlord is not obligated to do such things, because that is not what the *MacDonald* legal duty requires. Indeed, the landlord is not even required to make himself available to tenants so that he may become better aware that a third party's criminal conduct may be imminent. In light of the specific legal obligations, and nonobligations, imposed on the landlord via *MacDonald*, how precisely does the landlord's greater control over the common area place the landlord in a better position to "make reasonable efforts to expedite police involvement?" And how precisely does the landlord's greater control over the common area have *any* bearing whatsoever as to whether the landlord or tenants and their social guests are in a better position to undertake such

efforts? Where a third-party criminal threat arises, and where the landlord becomes aware of that threat, what exactly is the relevance of the landlord's control over the common area of the property? How does this control assist the landlord, or hinder the tenant, in attempting to "expedite police involvement." The majority opinion does not say. To take into consideration only a single factor, would not the development of cellular-telephone technology over the past generation render tenants in 2013 even more capable of expediting such police involvement than tenants in 1983, 1903 or 1843?[17]

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[17] The concurring opinion contends that there is a "reasonable expectation that landlords will provide some degree of supervision and control over the activities occurring within the common areas." *Ante* at 629 (concurring opinion). However, it does not say how "provid[ing] some degree of supervision and control over the activities occurring within the common areas" is any different than "expecting" the landlord to provide a safer environment than that encountered in the community-at-large, the very argument this Court soundly rejected in *Williams*, 429 Mich App at 502:

> [A]lthough defendant can control the condition of his premises by correcting physical defects that may result in injuries to its invitees, it cannot control the incidence of crime in the community. Today a crime may be committed anywhere and at any time. To require defendant to provide armed, visible security guards to protect invitees from criminal acts in a place of business open to the general public would require defendant to provide a safer environment on its premises than its invitees would encounter in the community at large. Defendant simply does not have that degree of control and is not an insurer of the safety of its invitees.

Even if we assume that some tenants or their social guests may "expect" the landlord to "provide some degree of supervision and control," no explanation is provided for why such an "expectation" is reasonable or would cause responsible persons to be diminished or compromised in their own ability to protect themselves. In fact, this Court has explicitly rejected liability on the basis of a person assertedly being "induced to relax his normal vigilance," *Scott* 444 Mich at 451, yet such speculation is exactly what underlies the tenant behavior that the majority presents as justification for imposing greater legal duties on the landlord. Indeed, although a property owner can always control the condition of his

Furthermore, the tenant who believes that criminal conduct is imminent is free to make reasonable efforts on his own and to expedite police involvement, and is in no way prevented from taking such an action as a result of the landlord's higher degree of control over the common area. The tenant is in closer proximity to his home, a presumed place of safety to which he and his guests may retreat, and again is in no way prevented from undertaking such actions as a result of the landlord's higher degree of control over the common area. Indeed, in this very case, the security guards hired by the landlord themselves had no obvious place of safety or retreat.[18] Even if the landlord happens to be actually present within the common area, the tenant does not lose any ability to protect himself as a consequence of the landlord's higher degree of control.

4. *MACDONALD* DUTY AND LANDLORDS

Not only, I believe, has the majority opinion failed to present "compelling reasons" for altering the common law, but the status quo represents responsible and rational public policy, a consideration crucial to this Court's common-law decisionmaking. Indeed, extend-

premises by correcting physical defects that may result in injuries, he cannot always affect, much less control, the incidences of crime within his community. The inability of government and law enforcement officials to abolish all violent crime does not justify transferring liability to a landlord or to the security company that the landlord hires. See *Williams*, 429 Mich at 503.

[18] The security guards did not possess keys to the landlord's office/private area. One guard had a personal cell phone, and the other had no phone. Thus, only one even possessed the present ability to contact the police. Moreover, both guards lacked the threshold authority the majority deems essential to its imposition of a duty on the landlord; neither had any right to alter or control any physical structure in the common area.

ing the *MacDonald* duty advanced by the majority opinion is contrary to sound public policy, in my judgment, for several reasons.

Presence—First, to reemphasize a point made earlier, there is an important distinction between the merchant in *MacDonald* and the landlord in this case in that the merchant (or his employees and agents) almost always has to be physically present on the business premises to serve customers and otherwise conduct business. By contrast, the landlord (and his employees or agents) has no similar reason to be physically present. This is particularly true of landlords of more modest rental properties. Indeed, a landlord may have no reason at all to visit a common area of an apartment building for weeks or months on end, and even large rental properties may have their leasing and management offices off-site, far away from the common area of the actual apartment building. In other words, the merchant's presence on the premises of his property is largely obligatory, whereas the landlord's presence in the common area of his property is largely discretionary.

As a result, imposing the *MacDonald* duty on landlords will almost certainly encourage at least some landlords to take greater care in *avoiding* the common area since it is their largely discretionary presence in such area that apparently constitutes the only means by which the landlord can gain the awareness of criminal conduct in the first place that would give rise to the *MacDonald* duty.[19] In other words, a landlord who

[19] The majority opinion clearly recognizes that such awareness is crucial:

> Only when given notice of [a situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable tenant or invitee] is a duty

provides security guards or video cameras or alarms in the common area will ironically be exposed to a *greater* risk of legal liability for the criminal conduct of third parties than will a landlord who simply *fails* to take take such precautions. As a consequence, imposing the *MacDonald* legal duty can only have the effect of disincentivizing and discouraging some landlords, especially those in the high-crime neighborhoods most in need of vigilance against third-party criminal conduct, from instituting the very security measures that will trigger this duty in the first place. Compare, *MacDonald*, 464 Mich at 341 (asserting that the dissent's rule in that case, which would have allowed the character of the merchant's business and an assessment of whether prior similar conduct had occurred on the premises to be considered, "would unfairly expose merchants in high-crime areas to excessive tort liability and increase the pressure on commercial enterprises to remove themselves from our troubled urban and high-crime communities"). Imposing this new liability on landlords will do nothing to promote safety for the low-income tenants in high-crime neighborhoods who are the most in need of protection. Instead, it is likely to harm these very individuals.

Disincentives—Second, imposing the *MacDonald* legal duty on landlords runs afoul of the policies underlying this Court's decision in *Scott*, in which this Court explicitly declined to adopt a policy that "would penalize merchants who provide some measure of protection, as opposed to merchants who take no such measures." *Scott*, 444 Mich at 452 (quotation marks and citation

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imposed on a landlord. *Notice* is critical to the determination whether a landlord's duty is triggered; without notice that alerts the landlord to a risk of imminent harm, it may continue to presume that individuals on the premises will not violate the criminal law. [*Ante* at 615.]

omitted). Because only the landlords who provide security in the common area will face potential liability under *MacDonald*, the majority's new legal duty will penalize precisely those landlords who "provide some measure of protection." The landlords who do so will be held to a higher legal duty than those who do not, and those landlords who are the most compelled to undertake such protection as a result of high levels of criminal conduct within the neighborhoods in which their properties are located will be the hardest hit by potential lawsuits. Clearly in this case, the defendants' provision of security guards is the only thing that gives rise under the majority opinion to potential legal responsibility for third-party criminal conduct.

False Alarms—Third, imposing the *MacDonald* duty on landlords will result in a considerable increase of "false alarm" calls to police, since a call to the police is the principal step landlords must take to avoid liability. No landlord will risk exercising any judgment if he becomes aware by any means of a problem arising on his property—an unidentified person, a broken window, an unaccounted-for piece of personal property, a nearby fracas, or anything at all that might be viewed in hindsight as having created a "specific situation occur-[ring] on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee," *MacDonald*, 464 Mich at 335. An "identifiable invitee" is a person who is within the "range of risk of harm created by [the criminal's] conduct." *Ante* at 618; see n 21. The mere fact that a crime later occurs will almost always allow one to draw the conclusion, after-the-fact, that there was a specific situation occurring on the premises that should have prompted a reasonable person to recognize a risk of imminent harm to an identifiable invitee. As the instant case amply demonstrates, the relative costs and benefits

of *not* promptly communicating with the police under these and other circumstances are simply not compatible with the exercise of reason and judgment in deciding when to call the police. Call the police and there may be no liability at all; fail to call the police and you too can walk in the shoes of defendants in this case. Repeated "false alarms," and "crying wolf" will increasingly burden our state's police emergency systems, with all the attendant decline in efficient and timely response that such unnecessary calls can be expected to produce.

Litigation—Fourth, imposing a new legal duty on landlords will give rise to more litigation. Concerning the specific legal duty to aid or protect, there will certainly be litigation concerning: (a) whether the landlord in a sufficiently timely manner recognized the arising of a "specific situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee[;]" (b) whether the landlord's efforts to expedite police involvement were reasonable; (c) whether the landlord informed the police of the specific situation in a sufficiently timely manner; (d) whether the landlord informed the police of the specific situation in a manner thoroughly describing its circumstances and communicating its urgency; (e) whether the landlord acted reasonably in his estimation of who constituted a potentially vulnerable "identifiable invitee;" (f) whether the landlord was sufficiently proactive in acquiring knowledge concerning the specific situation; (g) whether such security measures as were employed by the landlord, such as 24-hour surveillance videos, were thoroughly and conscientiously monitored; and (h) whether security guards employed by the landlord acted responsibly in all facets of their conduct. And, of course, inevitably over time, there will be the litigation to urge

expansion of the *MacDonald* duty to contemplate security precautions the landlord *should* have undertaken that might have forestalled criminal conduct from occurring in the first place, requiring some evaluation of the *probability* of future criminal conduct on the basis of an analysis of *past* occurrences of such conduct within the relevant neighborhood. See *MacDonald*, 464 Mich at 343-344 (discussing this "relatedness test"); *id*. at 351-352 (CAVANAGH, J., dissenting). Indeed, whereas *MacDonald* was the product of an evolution of merchant-liability cases occurring over the course of three decades, the majority's decision today, imposing for the first time the same legal duty on the landlord, may well represent merely the first stage in what will surely become a similar common-law evolution over the next three decades.

Accountability—Finally, I simply do not believe that our common law is advanced when it is slowly, and step-by-step, transformed from a legal system grounded in traditional notions of personal responsibility, in which *criminal perpetrators* are fully and exclusively responsible for their own behavior, into a system in which "special relationships" are increasingly employed as vehicles by which to apportion to assorted classes of *non-criminal actors*-- in this instance, a residential landlord-- financial accountability for the consequences of criminal conduct.[20]

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[20] Even if I were to agree that the *MacDonald* duty should be imposed on landlords, I would still disagree with the majority that we are positioned to conclude that plaintiff constituted an "identifiable invitee." The provenance of the "range of risk of harm created by the criminal's conduct" test articulated by the majority opinion is unclear. No case is cited in support of this standard. However, such a test is not set forth in *MacDonald*, and it seems largely tautological. That is, a victim harmed by criminal conduct would seemingly by that fact alone be "within the range of risk of harm created by" that criminal conduct or else the victim would not have become a victim in the first place. If that is the test, I hardly see

III. CONCLUSION

The common-law analysis of the majority opinion is flawed, in my view, for the following reasons:

(1) The majority opinion grounds its analysis on a single decision of this Court, *Samson*, that has been transformed from a decision in which a legal duty was expressly predicated upon the fact that a commercial building owner held a property open to the public into a decision purportedly predicated on a previously nonexistent "special relationship" imposing on a landlord a legal duty to aid and protect tenants with regard to third-party criminal perpetrators;

(2) The majority opinion then takes the landlord duty it has erroneously imported from *Samson* and proceeds, as a function of "clarifying" *Samson*, to *replace* this nonexistent duty with the distinct and unrelated merchant duty drawn from another decision of this Court, *MacDonald*;

(3) The majority opinion then justifies this "clarification" on the basis of the unremarkable and irrelevant fact that neither landlord nor merchant has been excepted from the general premises-liability rules that apply to *all* owners of *all* types of real property;

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where reasonable minds could ever differ on this point. Compare, *MacDonald*, 464 Mich at 338 ("Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point.").

Under *MacDonald*, there is no duty "until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." *Id*. at 335. In my view, the "specific situation" here is not Schaaf brandishing a gun in the common area, but the tenant earlier informing the security guards that Schaaf was engaging in such conduct. The critical question thus is whether that "specific situation"—the tenant so-informing the security guards—would "cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." The majority opinion's conclusion that plaintiff constituted an "identifiable invitee" presupposes that the security guards immediately recognized a situation occurring in the common area that posed a risk of imminent and foreseeable harm to plaintiff. However, whether this is true or not would ordinarily pose a question of fact for the jury. *Id.* There is more than a little benefit-of-hindsight analysis in this regard.

4) The majority opinion provides no compelling reason, as it is obligated to do before altering the common law, for imposing *any* new legal duty on a landlord to protect tenants against third-party criminal conduct, much less compelling reasons why a landlord whose property is *closed* to the public should bear legal duties *identical* to those of a merchant whose property is held *open* to the public;

(5) The majority opinion engages in no assessment of public policy considerations as a precondition to its alteration of the common law, including most significantly the merits of its further departure from the general common-law principle that it is the criminal perpetrator who is exclusively accountable for his own criminal conduct, not a third party;

(6) The majority opinion does not explain how there has been "entrustment" of control to the landlord by tenants, and/or consequent loss of control by tenants, with regard to their protection from third-party criminal conduct, or how the specific legal duties imposed on a landlord by the majority opinion effectively mitigate against the consequences of such entrustment and/or consequent loss of control; and

(7) The majority opinion also does not explain why the landlord-tenant "special relationship" extends to a tenant's social guests.

Furthermore, the majority opinion fails to satisfy its burden of demonstrating "compelling" reasons for why the common law that has always existed in this state should now be altered by further apportioning among those who have perpetrated *no* criminal conduct, legal accountability and responsibility for the harms caused by third parties who *have* perpetrated such conduct. Indeed, there are a number of compelling reasons in support of maintaining the present rule that there is no legal duty to aid or protect another from third-party criminal conduct unless a special relationship has been established in which a person can be said to have

entrusted himself to the control and protection of another person with a consequent loss of control to protect himself. The majority has not offered any persuasive argument that either tenants or their social guests bear the same special relationship to a residential landlord as an invitee or a patron does to a merchant, or that there is any similar entrustment of control to the landlord, and consequent loss of control by tenants or their social guests to protect themselves against third-party criminal conduct. Accordingly, I would reverse the Court of Appeals and reinstate the trial court's judgment dismissing plaintiff's claim.

PEOPLE v SMITH-ANTHONY

Docket No. 145371. Argued April 17, 2013 (Calendar No. 8). Decided July 30, 2013.

Chandra Valencia Smith-Anthony was convicted by a jury in the Oakland Circuit Court, Michael D. Warren, Jr., J., of larceny from the person, MCL 750.357. While monitoring closed-circuit television monitors at a Macy's in Soutfield, Michigan, the store's loss-prevention officer observed defendant acting suspiciously while shopping and proceeded to follow her in person, keeping defendant within visual range. The loss-prevention officer saw defendant select a perfume box set from a display and later slip it into one of her bags. The officer kept her distance but was close enough to observe and sometimes hear defendant. Defendant was stopped by the officer when she left the store with the item in her bag. In a split opinion, the Court of Appeals, SHAPIRO, P.J., and GLEICHER, J. (WHITBECK, J., dissenting), reversed defendant's conviction, concluding that the prosecution had failed to establish the from-the-person element of larceny from a person because there was no evidence that defendant had committed the larceny within the officer's area of immediate presence or control as required by the statute. 296 Mich App 413, 418-420 (2012). The Supreme Court granted the prosecution's application for leave to appeal. 493 Mich 879 (2012).

In an opinion by Justice VIVIANO, joined by Chief Justice YOUNG, and Justices CAVANAGH, and MCCORMACK, the Supreme Court *held*:

To be convicted of larceny from the person, MCL 750.357, a defendant must take property from the physical person or immediate presence of a victim. For purposes of the larceny-from-the-person statute, the from-the-person element is satisfied when a defendant takes property that is in the physical possession of a victim or property that is in immediate proximity to a victim when the taking occurs. Although only occurring rarely in larceny-from-the-person cases, the from-the-person element is also satisfied when the property is taken from the victim's constructive presence, which occurs when the defendant or the defendant's accomplice uses force to create distance between victims and their property. The 2004 amendment to the robbery statute, MCL

750.530, as amended by 2004 PA 128, which removed the phrase "from the person of another" from its language, did not alter the meaning of "from the person" in the larceny-from-the-person statute.

1. Under MCL 750.357, a person who commits a larceny by stealing from the person of another is guilty of larceny from the person. Common-law courts interpreted the phrase "from the person" differently in robbery and larceny-from-the-person cases; in the context of robbery, common-law courts interpreted "from the person" to include takings from the victim's presence to account for the violence and intimidation that distinguishes robbery from larceny. Michigan courts originally recognized that to constitute larceny from the person, the property must have been taken from the physical person, a taking of property from the immediate presence of the owner was insufficient. This interpretation of "from the person" was later expanded to include the taking of property from the victim's immediate presence. Contrary to earlier Court of Appeals' decisions, the from-the-person element cannot be satisfied by a taking from a victim's immediate area of control absent the immediate presence of the victim, with the exception of when a defendant uses force to create distance between victims and their property. The common-law meaning of "immediate presence" in the larceny-from-the-person context is consistent with the plain meaning of the word "immediate," which means "having no object or space intervening, nearest or next." For purposes of the larceny-from-the-person statute, the from-the-person element is satisfied when a defendant takes property that is in the physical possession of a victim or property that is in immediate proximity to a victim when the taking occurs. Although only occurring rarely in larceny-from-the-person cases, the from-the-person element is also satisfied when the property is taken from the victim's constructive presence, which occurs when the defendant or the defendant's accomplice uses force to create distance between victims and their property.

2. The 2004 amendment to Michigan's robbery statute, which removed the phrase "from the person of another" from its language, did not alter the established meaning of "from the person" in the larceny-from-the-person statute.

3. In this case, the Court of Appeals properly reversed defendant's conviction because there was insufficient evidence to support it. There was no evidence that defendant took property that was in the physical possession of or immediate proximity to the loss-prevention officer and there was no evidence that defendant

used force or threats to distance the loss-prevention officer from the property at the time of the taking.

Court of Appeals judgment affirmed.

Justice KELLY, joined by Justices MARKMAN and ZAHRA, dissenting, would have reversed the Court of Appeals and reinstated defendant's conviction. She agreed that the Legislature's 2004 amendment to the robbery statute did not alter the meaning of the phrase "from the person" as applied to the larceny-from-the-person statute but she disagreed with the majority's interpretation of the phrase "from the person" to mean property taken from the person's actual physical possession or from the person's "immediate proximity," which requires that, at the time of the taking, the property must be physically next to the victim without any intervening space. She believed that the majority's interpretation (1) departs from Michigan Supreme Court jurisprudence, which, consistent with the common-law understanding of the phrase "from the person," has never required that the property be physically next to the victim without any intervening space; (2) conflicts with Michigan Supreme Court jurisprudence recognizing that the Legislature codified the common-law understanding of the language "from the person" when it incorporated this language into the robbery and larceny-from-the-person statutes; (3) conflicts with Michigan Supreme Court jurisprudence recognizing that larceny from the person was a necessarily included lesser offense of robbery; (4) recasts English and Michigan common-law history in support of its unduly narrow interpretation of the phrase "from the person;" and (5) in the context of takings from a retail establishment, effectively conflates the crime of larceny from the person with either retail fraud or robbery. Instead, Justice KELLY would have held that the phrase "from the person" must be interpreted as property that is taken from the person's "immediate presence," which is property that was taken while under the person's personal protection and control, such that a taking of such property triggers a substantial risk that a violent altercation will occur. She believed her interpretation to be consistent with the established common-law meaning of the phrase "from the person," which recognized that this phrase had the same meaning, as applied to both robbery and larceny-from-the-person cases.

1. CRIMINAL LAW — LARCENY FROM THE PERSON — ELEMENTS — FROM THE PERSON — DEFINITION.

For purposes of the larceny-from-the-person statute, the from-the-person element is satisfied when a defendant takes property that is in the physical possession of a victim or property that is in

immediate proximity to a victim when the taking occurs; although only occurring rarely in larceny-from-the-person cases, the from-the-person element is also satisfied when the property is taken from the victim's constructive presence, which occurs when the defendant or the defendant's accomplice uses force to create distance between victims and their property (MCL 750.357).

2. CRIMINAL LAW — AMENDMENTS — ROBBERY — EFFECT ON LARCENY FROM THE PERSON — FROM THE PERSON.

The 2004 amendment to Michigan's robbery statute, which removed the phrase "from the person of another" from its language, did not alter the established meaning of "from the person" in the larceny-from-the-person statute (MCL 750.350, as amended by 2004 PA 128; MCL 750.357).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas A. Grden*, Appellate Division Chief and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

Law Office of John D. Roach, Jr., PLC (by *John D. Roach, Jr.*), for defendant.

VIVIANO, J. In this case, we consider the meaning of the phrase "from the person of another" under MCL 750.357, the larceny-from-the-person statute. Until 2004, Michigan's robbery statute contained this phrase as well, so we also consider whether the 2004 amendment that removed this phrase from the robbery statute[1] altered the meaning of "from the person" in the larceny-from-the-person statute.

We hold that Michigan law requires a defendant to take property from the physical person or immediate presence of a victim to commit a larceny from the person. In rare cases, a taking outside of a victim's immediate presence may satisfy the from-the-person

[1] See MCL 750.530, as amended by 2004 PA 128.

element only if a defendant or the defendant's accomplices use force or threats to create distance between a victim and the victim's property. Because defendant in this case did not take property from the person or immediate presence of the victim, or use force or threats to separate a victim from the victim's property, we conclude that she did not commit a larceny from the person. Accordingly, we affirm the judgment of the Court of Appeals, which reversed her conviction of larceny from the person.

I. FACTS AND PROCEDURAL HISTORY

On May 31, 2010, Khai Krumbhaar was working as a plain clothes loss-prevention officer at a Macy's in Southfield, Michigan. Through one of Macy's closed-circuit television monitors, Krumbhaar observed defendant carrying two bags, which she held "very, very closely." According to Krumbhaar, defendant "appeared extremely nervous" and was "darting her eyes" in the direction of sales associates and customers.

After watching defendant select a perfume set off a display case, Krumbhaar went to the sales floor to monitor her. Krumbhaar stayed far enough away to appear as if she were just another shopper, but stayed "fairly close" to defendant, at least close enough to observe her behavior. At times, she was within earshot of defendant. As Krumbhaar followed, she saw defendant "push[] the . . . [perfume] box down into her shopping bag." After this, Krumbhaar "stayed back giving [defendant] some space," until she saw defendant "walking very quickly" out of the store into the main mall area.[2] Outside the Macy's store, Krumbhaar

[2] At trial, Krumbhaar explained that Macy's policy prohibits its loss-prevention officers from confronting suspected shoplifters until after they have left the store.

confronted defendant, identified herself as a Macy's loss-prevention officer, and asked defendant about the perfume set. Defendant began shouting and ran from Krumbhaar; Krumbhaar gave chase and captured defendant, who allegedly scratched and bit Krumbhaar as she tried to restrain defendant.

The prosecution charged defendant with unarmed robbery,[3] second-degree retail fraud,[4] and possession of marijuana.[5] On the first day of trial, the prosecution dismissed the latter two charges, although defendant objected to the dismissal of the second-degree retail-fraud charge.[6] The prosecution's only witness was Krumbhaar, who testified to the above facts. After closing argument, and upon defendant's request, the circuit court instructed the jury on the elements of larceny from the person.[7] The court explained that to find defendant guilty of larceny from the person, the jury would have to find that "property was taken from Khai Krumbhaar's *person* or from Khai Krumbhaar's *immediate area of control or immediate presence*."[8] After deliberating, the jury acquitted defendant of unarmed robbery, but found her guilty of larceny from the person.

On review, the Court of Appeals reversed defendant's conviction in a split published opinion. The majority

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[3] MCL 750.530.

[4] MCL 750.356d.

[5] MCL 333.7403(2)(d).

[6] Defendant argued that the retail-fraud charge was "more indicative of what happened on the date in question[.]"

[7] The circuit court instructed the jury on the elements of larceny from the person on the theory that this offense was a lesser included offense of robbery. As we will explain below, the court erred by giving this instruction.

[8] (Emphasis added.) This instruction was consistent with CJI2d 23.3, the model jury instruction for this offense.

concluded that the prosecution presented no evidence that defendant had committed the larceny within Krumbhaar's "area of immediate presence or control."[9] The court noted that Krumbhaar "never testified that she was even within arm's length of defendant"[10] or that "Krumbhaar was even close enough to defendant to have touched her or to have snatched the box from defendant's hands."[11] Accordingly, the court held that the prosecution had failed to prove a larceny "from the person" of Krumbhaar because "[p]roof of 'stealing from the person of another' requires more than vague proximity between the victim and the perpetrator."[12]

Writing in dissent, Judge WHITBECK disagreed. He believed that Krumbhaar's testimony that she was close enough to defendant to see her and hear her as she moved throughout the store was sufficient proof, as a matter of law, to establish that the taking occurred within her "immediate area of control or immediate presence."[13]

We granted the prosecutor's application for leave to appeal, directing the parties to address:

> (1) whether the evidence was sufficient to prove beyond a reasonable doubt that the crime of larceny from a 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

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[9] *People v Smith-Anthony*, 296 Mich App 413, 418; 821 NW2d 172 (2012).

[10] *Id*. at 419.

[11] *Id.* at 419 n 2.

[12] *Id.* at 420 (citation omitted).

[13] *Id*. at 432 (WHITBECK, J., dissenting).

(3) whether the common-law definition of the phrase "from the person" remains consistent with the common-law definition of "presence."[14]

II. STANDARD OF REVIEW

We review de novo questions of statutory interpretation.[15] Our goal in interpreting a statute is to ascertain and "give effect to the intent of the Legislature."[16] We enforce the clear and unambiguous language of the statute as written.[17] To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the prosecutor and determine "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt."[18]

III. ANALYSIS

A. INTERPRETING "FROM THE PERSON"

Under MCL 750.357, a person who commits a larceny by stealing from "the person of another" is guilty of larceny from the person.[19] To determine whether there was sufficient evidence to establish this element, we must first determine the meaning of the statutory phrase "from the person." The Legislature has instructed that any "technical words and phrases" that

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[14] *People v Smith-Anthony*, 493 Mich 879 (2012).

[15] *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

[16] *Id.* at 562.

[17] *Id.*

[18] *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (citation and quotation omitted).

[19] See MCL 750.357 ("Any person who shall commit the offense of larceny by stealing *from the person of another* shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years." [emphasis added]).

"have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."[20] And in the criminal-law context, common-law doctrine informs the meaning of a statute when the Legislature uses common-law terms.[21] Because the phrase "from the person" has an extensive history at common law, we now turn to that history to determine if the phrase has acquired a "peculiar and appropriate meaning."

Common-law courts interpreted the phrase "from the person" differently in robbery cases and larceny-from-the-person cases. The first statute to separately criminalize larceny from the person was enacted in England in 1565.[22] The purpose of this law was to punish pickpockets, so courts construed it narrowly, requiring that a thief steal an object attached to or physically possessed by the victim to satisfy the "from the person" element of larceny from the person.[23] At the same time, jurists interpreted the phrase "from the person" more broadly in robbery cases. In those cases, courts interpreted "from the person" differently to account for circumstances in which robbers used force or threats of force in the commission of a theft. As Professor Rollin Perkins has explained, "One of the illustrations of robbery, given by the early writers, is the wrongful driving off of another's horse or sheep while he, although present, is by violence or intimidation

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[20] MCL 8.3a; see also Const 1963, art 3, §7 ("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.").

[21] See *People v McDonald*, 409 Mich 110, 117; 293 NW2d 588 (1980).

[22] Anno: *What Constitutes Larceny "From a Person,"* 74 ALR3d 271, 276; 8 Eliz c 4, § 2 (1565).

[23] 74 ALR3d 271, 276-277.

prevented from interfering."[24] Thus, in robbery cases, common-law courts and scholars interpreted "from the person" to include takings from a victim's presence to account for the violence and intimidation that distinguishes robbery from larceny. In the words of Sir Edward Coke, writing about the crime of robbery in the 1700s, "that which is taken in [someone's] presence, is in law taken from his person."[25] Hence, at common law, the meaning of "from the person" depended on whether the crime at issue was robbery or larceny from the person.[26]

There is a split of authority in American jurisdictions with regard to whether larceny from a person requires a taking directly from the body of the victim or merely from the victim's immediate presence. Some states followed the common-law approach to the offense of larceny from the person and required physical contact between the stolen object and the victim.[27] But this position is now a minority view. Courts in the majority of states that criminalize this offense have adopted the

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[24] Perkins & Boyce, Criminal Law (3d ed, 1982), p 346, citing 3 Coke, The Third Part of the Institutes of the Laws of England (1797), p 68; 1 Hale, *The History of the Pleas of the Crowns*, p *533; 1 Hawkins, *A Treatise of Pleas of the Crown*, c 34, § 5 (6th ed).

[25] 3 Coke, p 69.

[26] We disagree with the premise of the third question on which we granted leave to appeal in this case. In the larceny-from-the-person context, the phrase "from the person" had a more restrictive meaning at common law than "presence."

[27] See, e.g., *People v McElroy*, 116 Cal 583, 586; 48 P 718 (1897) (holding that property "shall at the time [that it was taken] be in some way actually upon or attached to the person, or carried or held in actual physical possession"); *Terral v State*, 84 Nev 412, 413-414; 442 P2d 465 (1968) (citation omitted) (explaining that "from the beginning [larceny from the person] required 'an actual taking from the person; a taking from his presence was not sufficient as it was in robbery' "); *State v Lucero*, 28 Utah 2d 61, 63; 498 P2d 350 (1972) (following *Terral*); *Wilder v State*, 30 Ala App 107, 108; 1 So 2d 317 (1941) (following *McElroy*).

view that "from the person" includes the area within a victim's immediate presence.[28] Explaining the rationale for the evolution of the law in this area, the Supreme Court of Minnesota stated that the phrase "from the person" included the "immediate presence" of a victim because, in any taking from this area, "the rights of the person to inviolability would be encroached upon, and his personal security endangered, quite as much as if his watch or purse had been taken from his pocket."[29]

Prior to 1970, Michigan appears to have taken the minority view, requiring an actual taking from the physical person of the victim.[30] For example, in *People v Gadson*, this Court reviewed the sufficiency of the evidence for the from-the-person element in a larceny-from-the-person case.[31] At trial, there was evidence

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[28] See, e.g., *People v Pierce*, 226 Ill 2d 470, 483; 877 NE2d 408 (2007) (recognizing the split of authority on this issue and adopting the majority view); *State v Kobylasz*, 242 Iowa 1161, 1166-1168; 47 NW2d 167 (1951) (recognizing that some courts require that the property be "taken *off* the person," citing *McElroy* and *Wilder*, but declining to construe the larceny-from-the-person statute so narrowly and instead applying the immediate presence standard); *State v Jones*, 499 SW2d 236, 238-240 (Mo Ct App, 1973) (following *Kobylasz*); *Banks v State*, 74 Ga App 449, 451-452; 40 SE2d 103 (1946) (construing the phrase "from the person of another" as used in both the robbery and larceny-from-the-person statutes of that state and holding that "it is unnecessary that the taking of the property should be *directly* from one's person, but it is sufficient if it be taken while in his possession and immediate presence") (emphasis added) (quotation marks and citation omitted).

[29] *State v Eno*, 8 Minn 220, 223 (1863).

[30] The dissent disagrees with this point and relies heavily on the case of *People v Covelesky*, 217 Mich 90; 185 NW 770 (1921), superseded by statute as recognized by *People v Williams*, 491 Mich 164, 171-173; 814 NW2d 270 (2012), to explain its interpretation of "from the person." It is worth noting that *Covelesky*, like most of the authority cited by the dissent, involved a robbery. Moreover, the facts of *Covelesky* are significantly different from the larceny-from-the-person cases discussed in this opinion because that case involved a home invasion with a high degree of violence.

[31] *People v Gadson*, 348 Mich 307, 309-310; 83 NW2d 227 (1957).

presented that the defendant had taken the victim's wallet, but it was unclear whether the defendant had taken the wallet directly out of the victim's pocket or after it had fallen out of his pocket during a scuffle. This Court held that there was insufficient evidence on the from-the-person element because there was reasonable doubt regarding whether the defendant took the wallet from the victim's pocket. We emphasized that "[u]nder [MCL 750.357], an essential element of the larceny charged in the instant case . . . is that it was accomplished by 'stealing from the person of another.' "[32] Although not stated explicitly, the facts of the case make it clear that "physical possession" was the governing standard in Michigan law.

Two subsequent Court of Appeals cases took the same approach as *Gadson* and applied the physical-possession standard to the crime of larceny from the person. In *People v Stevens*, the defendant and his accomplice were convicted of robbery after they took money from a safe and from under a desk while they held a storeowner at gunpoint.[33] On appeal, the defendant claimed that the trial court erred by not instructing the jury on the lesser-included offense of larceny from the person, but the Court of Appeals disagreed. The court stated that there was "no evidence" for that offense because the "taking was from the safe and from the under the desk; there was no taking *from the person of the victim*."[34] Similarly, in *People v Johnson*, the Court of Appeals reviewed a case in which the defendant stole property from a room in the victim's home while the victim was in the bathroom.[35] The court

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[32] *Id.*

[33] *People v Stevens*, 9 Mich App 531, 532; 157 NW2d 495 (1968).

[34] *Id.* at 534 (emphasis added).

[35] *People v Johnson*, 25 Mich App 258, 264; 181 NW2d 425 (1970).

stated that this crime could not constitute a larceny from the person and openly rejected the immediate presence approach stating, "What is required is that the property in question actually be taken from the person of another; a taking of property from the immediate presence of the owner is insufficient."[36] Hence, before 1970, Michigan courts had consistently identified Michigan as a physical-possession state.[37]

However, in the 1970 case of *People v Gould*,[38] this Court adopted the immediate presence approach, holding that "the taking of property in the possession and immediate presence of the [victims] . . . was sufficient to sustain a verdict against defendant Gould of larceny from the person." Notably, this Court did not distinguish or overturn the physical-possession cases, nor did we address the text of Michigan's larceny-from-the-person statute. But *Gould*'s holding represented a decided shift to the majority, immediate presence view of larceny from the person. Since *Gould*, this Court has interpreted the phrase "from the person of another" to include takings from the possession and immediate presence of the victim.[39]

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[36] *Id.*

[37] We have found no other cases before this Court's opinion in *People v Gould*, 384 Mich 71, 80; 179 NW2d 617 (1970), that discuss the appropriate taking standard in the larceny-from-the-person context. There are cases in which Michigan courts have applied the larceny-from-the-person statute to situations in which the victim was in physical possession of his or her property. See, e.g., *People v Tucker*, 222 Mich 564, 569; 193 NW 206 (1923); *People v Newsom*, 25 Mich App 371, 374; 181 NW2d 551 (1970). In contrast, we can find no Michigan cases applying the immediate presence standard in the larceny-from-the-person context—or even using the phrase—prior to the Court of Appeals opinion in *People v Gould*, 15 Mich App 83, 87; 166 NW2d 530 (1968), aff'd in part and rev'd in part 384 Mich 71 (1970), where it was used for the first time and rejected as the proper standard.

[38] *Gould*, 384 Mich at 80.

[39] See *People v Perkins*, 473 Mich 626, 633; 703 NW2d 448 (2005); *People v Beach*, 429 Mich 450, 484 n 17; 418 NW2d 861 (1988); *People v*

Despite this Court's consistent application of the immediate presence test since *Gould*, the Court of Appeals has expanded the definition of "from the person." For example, in *People v Perkins*, the court stated that the from-the-person element could be satisfied by a taking "from the person *or* from the person's immediate area of control *or* immediate presence."[40] However, the addition of "immediate area of control" as a independent category is an incorrect statement of the law and appears to stem solely from the model criminal jury instructions.[41] The Court of Appeals' formulation erroneously suggests that the element can be satisfied by a taking from the victim's immediate area of control, regardless of whether the taking was from the victim's immediate presence. This is an expansion of the law because we have always interpreted Michigan's larceny-from-the-person statute to require the actual presence of the victim at the time of the taking, absent circumstances in which defendants use force to create distance between victims and their property. Because this expansion is not grounded in statute or the decisions of this Court, we repudiate it. In keeping with this Court's precedent, we adhere to a more restrictive definition of

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Chamblis, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002) (stating, in dicta, that "[w]e are committed to the view that . . . larceny from the person embraces the taking of property *in the possession and immediate presence* of the victim") (emphasis added).

[40] *People v Perkins*, 262 Mich App 267, 272; 686 NW2d 237 (2004), *aff'd* 473 Mich 626 (2005) (citing CJI2d 23.3 and *People v Wallace*, 173 Mich App 420, 426; 434 NW2d 422 (1988) in turn quoting CJI 23:2:01) (emphasis added).

[41] Beyond its citation to CJI2d 23.3, the Court of Appeals in *Perkins* cited to *Wallace*. However, *Wallace* provides no further guidance because it cites solely to CJI2d 23.3, which "do[es] not have the official sanction of this Court." *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

"from the person" that requires the victim to be immediately present when the property is taken.[42]

In addition to declaring that Michigan is an immediate presence jurisdiction, *Gould* also applied a doctrine that had developed in robbery cases. In this and many other states, courts have had to address the recurring problem of robbers who claim that their convictions should be reversed due to a lack of proof on the from-the-person element, even though the robbers' own use of force or threats was what created distance between victims and their property. In such circumstances, courts in nearly every American jurisdiction have invoked the rule that robbery defendants cannot negate the from-the-person element of their crimes by using force or threats to remove victims or keep them away from their property.[43] Instead,

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[42] See *Perkins*, 473 Mich at 633 ("In order to commit a larceny from the person, the defendant must steal something from a person in that person's presence."); *Gould*, 384 Mich at 80 ("[I]t is sufficient if the property be taken from the presence of the victim . . . [that is] within his area of control.") (Citations and quotation marks omitted).

[43] See, e.g., *United States v Kimble*, 178 F3d 1163, 1168 (CA 11, 1999) ("person or presence" standard in the federal carjacking statute, 18 USCA § 2119, deemed similar to standard for robbery, was met here, as had the car owner "not been in fear for his safety, he could have reached the car and prevented its taking"); *United States v Lake*, 150 F3d 269, 273 (CA 3, 1998) (rational jury could have found that the car was taken from the victim's presence where the victim "could have prevented the taking of her car if she had not been fearful that [the defendant] would shoot or otherwise harm her"); *People v Blake*, 144 Ill 2d 314, 320-321; 579 NE2d 861 (1991) (presence standard satisfied where the victims were immobilized on second floor of residence while property taken from first floor); *Commonwealth v Stewart*, 365 Mass 99, 108; 309 NE2d 470 (1974) (defendant properly convicted of robbing the victim by taking money from a safe where the victim could have prevented the taking if not intimidated by robber); *State v Calhoun*, 72 Iowa 432, 436; 34 NW 194 (1887) (affirming that "presence" standard was satisfied where the defendant took money and watch from the victim after binding victim in one room of her house and extorting from her the location of the money); *Towner v State*, 812 So2d 1109, 1113-1114 (Miss Ct App, 2002) ("presence" element satisfied where the defendant ordered two women, one

courts treat victims as constructively present with the property, presuming that a victim would have retained possession of their property "if no[t] overcome by violence or prevented by fear, [from] retain[ing] his possession of it."[44] For ease of reference, we will refer to this latter concept as "constructive presence."

In *Gould*, this Court applied the constructive-presence exception in a larceny-from-the-person case for the first time in Michigan.[45] But a careful reading of the opinion shows that the court was applying this exception within its traditional limits, not expanding the meaning of "presence" for all larceny-from-the-person cases. The prosecutor had charged all the defendants in *Gould* with robbery, and no one disputed that the defendants had used force and threats of force (one co-defendant brandished a gun) to move the victims away from the cash register. The defendants forced a waitress to lie face-down on the floor in another room, making it impossible for her to be near the cash for which she was responsible. Thus, even though this Court affirmed defendant Gould's conviction of larceny from the person, *Gould* is consistent with other precedent that prevented defendants from negating the from-the-person element of their crimes through the use of force.[46]

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employee and one co-owner, into restaurant's office at gunpoint and took money from the office, proximity and control existed as to each woman, and thus constituted two robberies); *Price v Commonwealth*, 59 Va App 764, 769-770; 722 SE2d 653 (2012) (concluding that "the items taken from [the victim's] purse located in another room of the trailer were close enough to her and sufficiently under her control that, had she not been subjected to violence and intimidation by the intruders, she could have attempted to prevent the taking of her personal items").

[44] *Commonwealth v Homer*, 235 Mass 526, 533; 127 NE 517 (1920).

[45] *Gould*, 384 Mich at 80.

[46] In *Gould*, this Court's holding has caused some confusion regarding its reach—perhaps best demonstrated by the fact that the dissent in this

In summary, *Gould* established two principles of law within the larceny-from-the-person context. First, it established Michigan as an immediate presence jurisdiction. Second, it established that the constructive-presence exception from robbery cases could apply in larceny-from-the-person cases, provided there was evidence that the defendant or an accomplice had used force or threats of force to keep a victim away from his or her property.[47]

B. THE EFFECT OF THE 2004 ROBBERY-STATUTE AMENDMENT

We next consider whether the 2004 amendments to Michigan's robbery statute had any effect on the meaning of "from the person" in the larceny-from-the-person context. We conclude that they did not.

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case and the Court of Appeals majority both believe it supports their view. We take this opportunity to clarify its holding, for which the Court appears to have given alternative rationales. To the extent the larceny supporting defendant Gould's conviction was the taking of money directly from the wallet of the customer present in the restaurant at the time of the holdup, there was an actual taking from the person. On the other hand, to the extent the larceny was the taking of money from the cash register and cigar box, after the waitress was forcibly sequestered in another room, the constructive-presence exception was applicable. We recognize that the former point could be interpreted as rendering the remainder of *Gould* as dicta. However, even if dicta, its holding is now well settled, and its continued validity is not at issue.

[47] We do not believe that *Gould* should be read as a wholesale importation of robbery doctrine into larceny-from-the-person law, such that the presence element for each offense is coextensive. As noted, *Gould* applied the constructive-presence doctrine in the larceny-from-the-person context. Although it is not entirely clear how a doctrine that expands the prohibited taking zone when force or threats are present can logically be applied to a crime that does not require force or threats as an element, it is clear that *Gould* established the outer limit of the taking zone in larceny-from-the-person cases. However, the dissent's interpretation, which expands the prohibited taking zone even in the absence of force or threats, goes well beyond the standard in *Gould* or any other case.

Before 2004, the unarmed-robbery statute prohibited using force or violence to "steal and take *from the person of another*, or in his presence[.]"[48] The 2004 amendments removed the phrase "from the person of another" from the robbery statute. As amended, the statute now prohibits anyone who is "in the course of committing a larceny of any money or other property" from using "force or violence against *any person who is present*[.]"[49]

These changes were prompted by this Court's decision in *People v Randolph*, in which we considered whether Michigan's robbery statute permitted a transactional theory of robbery.[50] This approach allows a robbery conviction even where a defendant uses force for the first time after completing a taking, and we concluded that the robbery statute then in force did not permit this.[51] In response to our decision, however, the Legislature amended the robbery statute and codified the transactional theory.[52]

At issue in *Randolph* and the subsequent statutory changes was at what point in the commission of the crime force had to be used for a theft to constitute a robbery. The meaning of "from the person" in either robbery or larceny-from-the-person cases was not at issue in the exchange between the Legislature and this Court. Consequently, there is nothing to suggest that the Legislature intended to change the meaning of "from the person" in the larceny-from-the-person statute by removing this phrase from the robbery statute.

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[48] MCL 750.530, 1931 PA 328 (emphasis added).

[49] MCL 750.530, as amended by 2004 PA 128 (emphasis added).

[50] *People v Randolph*, 466 Mich 532, 546; 648 NW2d 164 (2002), superseded by statute as recognized by *Williams*, 491 Mich at 171-173.

[51] *Id.*

[52] See *Williams*, 491 Mich at 184.

We conclude, therefore, that "from the person" in the larceny-from-the-person statute has the same meaning now as it did before the 2004 amendments.[53] The immediate presence test is still the governing standard in this area, and it is to the meaning of "immediate presence" that we now turn.

C. THE MEANING OF "IMMEDIATE PRESENCE"

Perhaps because Michigan was not an immediate presence jurisdiction until *Gould*, there is scant caselaw explaining the scope of the immediate presence standard. However, this standard has been the subject of legal commentary, and courts in many other states have applied the same standard in deciding their own larceny-from-the-person cases. Courts and commentators alike have emphasized that this standard requires *immediate* proximity between the object and the victim. As Professor Perkins has explained, "[I]f a man carrying a heavy suitcase sets it down for a moment to rest, and *remains right there* to guard it, the suitcase remains under the protection of his person."[54] Even objects that are relatively close to a person are not considered to be in the person's immediate presence unless they are *immediately* next to the person. Hence, the North Carolina Supreme Court ruled that there was

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[53] However, the 2004 amendments have affected the *relationship between* robbery and larceny from the person. We have previously held that larceny from the person is a necessarily lesser included offense of robbery. *Beach*, 429 Mich at 484. "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). Under MCL 750.530(2), a defendant who uses force in fleeing a larceny is guilty of robbery. Therefore, robbery does not require that the taking have been made in the "immediate presence" of the victim. As a result, larceny-from-the-person is no longer a necessarily included lesser offense of robbery.

[54] Perkins & Boyce, p 342 (emphasis added).

no larceny from the person where a thief stole a bank bag from a kiosk while the bank teller was 25 to 35 feet away.[55] Likewise, the Colorado Court of Appeals concluded that a person could not be convicted of larceny from the person after taking a purse out of a shopping cart because the victim was not actually holding or pushing the cart at the time of the taking.[56] In contrast, a defendant was properly convicted of larceny from the person in Virginia when he stood two feet away from a store employee but reached within inches of the victim to take cash out of a register.[57] Courts have also affirmed larceny-from-the-person convictions where a thief stole a pocketbook from trousers that the victim was using as a pillow,[58] and where a car driver's billfold was taken off the seat immediately next to her.[59] From these cases a clear rule emerges: the immediate presence test can only be satisfied if the property was in immediate proximity to the victim at the time of the taking. In other words, the common-law meaning of "immediate presence" in the larceny-from-the-person context is consistent with the plain meaning of the word "immediate," which means "having no object or space intervening, nearest or next."[60]

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[55] *State v Barnes*, 345 NC 146, 150-151; 478 SE2d 188 (1996).

[56] *People v Smith*, 121 P3d 243, 247-248 (Colo App, 2005).

[57] *Garland v Commonwealth*, 18 Va App 706, 710; 446 SE2d 628 (1994).

[58] *Banks*, 74 Ga App at 450-452.

[59] *Kobylasz*, 242 Iowa at 1166-1168.

[60] *Random House Webster's Unabridged Dictionary* (1998). The dissent interprets our opinion as saying that "only in the rare instance that property is taken by 'use of force or threats of force to create distance between a victim and the victim's property' might property that is otherwise not affixed to the victim constitute a taking 'from the person.' " *Post* at 702. Later on, the dissent states that we are essentially "equating 'immediate presence' with 'attached to the person.' " *Post* at 702 n 29. This is not true. As we explained, the immediate presence test is satisfied when a defendant takes "property from the physical person *or*

IV. APPLICATION

Even when viewed in the light most favorable to the prosecutor, the facts of this case do not satisfy the immediate presence standard, which includes actual possession, or the constructive-presence exception. In this case, the loss-prevention officer was not in possession of the property at the time that it was taken. The record established only that she was "fairly close" to defendant in Macy's. At the moment defendant actually completed the taking by putting the perfume set into her bag, the loss-prevention officer was following defendant through the store while pretending to be another shopper.[61] Even though the loss-prevention officer remained close enough to observe defendant's behavior and was also at times within earshot of her, there was ample "intervening space" between the alleged victim and the property that defendant took, such that defendant did not take the perfume set from the *immediate* presence of the victim.

Notwithstanding the intervening space between the alleged victim and the stolen property, the jury still convicted defendant of larceny from the person. This conviction was arguably reasonable under the current jury instruction, CJI2d 23.3, which contains the phrase "immediate area of control." The jury may have interpreted this phrase to mean that a larceny from the person could occur in an area that the victim was responsible for, even if the taking was not from the victim's immediate presence. However, as mentioned above, a finding that the taking occurred within the victim's "immediate area of control" does not satisfy

immediate presence of a victim." (Emphasis added.) Physical attachment is sufficient, but not necessary to satisfy the immediate presence test.

[61] In a larceny case, the crime is completed when the taking occurs. *Randolph*, 466 Mich at 543.

the from-the-person element absent a finding that the taking was from the victim's person or immediate presence.

While the Court of Appeals described the immediate presence standard using the colloquial phrase "personal space,"[62] it correctly applied the immediate presence standard. Thus, the Court of Appeals rightly concluded that because defendant did not take any property from the loss-prevention officer's immediate presence, she did not commit a larceny from the person. And although the prosecutor alleged that defendant used force to retain possession of the perfume set after she had stolen it, there was no evidence that defendant used force or threats to separate the victim from the perfume set before it was taken. Consequently, the constructive-presence doctrine does not apply in this case. For these reasons, we affirm the judgment of the Court of Appeals, which reversed defendant's conviction.

Finally, there is a related common-law doctrine that provides additional support for our conclusion. At common law, courts treated the taking of merchandise off a shelf or rack as a larceny from a building, not larceny from a person.[63] Such takings were considered larcenies from a person only if an employee had been exercising direct control over the specific property at the time of the taking. As Professor Perkins explains,

> Goods on open shelves, goods standing on the floor, goods arranged on tables or counters are normally treated as within the protection of the building. One distinction, however, is to be noted. If a jewel or other valuable thing, normally kept out of open reach of customers, is placed on the counter under the eye of the storekeeper or clerk while it is being examined by a customer, this is regarded as

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[62] *Smith-Anthony*, 296 Mich App at 418.

[63] See Perkins & Boyce, pp 340-341.

> under the personal protection of the storekeeper or clerk at the moment, rather than under the protection of the building; whereas articles placed on the counter with the expectation that they will remain there all day, unless purchased, are under the protection of the building.[64]

Here, the dissent asserts that the loss-prevention officer had "personal protection and rightful control" over the gift box because she was "[a]n employee of Macy's responsible for preventing thefts of Macy's store items."[65] While we agree that a loss-prevention officer has a specific duty to prevent theft, that duty, standing alone, does not bring the gift box within the loss-prevention officer's immediate presence. For the perfume set to be under her personal protection for the purposes of a larceny from her person, she would have had to have taken possession of the merchandise at issue before defendant pilfered it.[66] Without this act of dominion, the perfume set remained only under the "protection" of the store. As a result, defendant did not take any property from the person of the loss-prevention officer. This provides additional support for our conclusion that the Court of Appeals properly reversed defendant's conviction.

V. THE DISSENT'S RISK-OF-ALTERCATION TEST

In explaining its interpretation of the law, the dissent describes its test for whether a taking occurs in the immediate presence of a victim as whether "a taking of

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[64] *Id.*

[65] *Post* at 709.

[66] See Perkins & Boyce, p 340 (internal citation omitted) ("If property is in the pocket of some person within the building, or under his personal care at the moment in some other way, it is not regarded as within the protection of the building . . . [and t]he stealing of such property . . . [is a] larceny from the person.").

such property triggers a substantial risk that a violent altercation will occur."[67] The most significant problem with this new test is that it expands the prohibited taking zone well beyond a person's immediate presence and into a large and undefined area.[68] The limits of this new prohibited taking zone are difficult to discern and likely arbitrary. A victim could plausibly observe a thief from 100 feet away and yet still have a chance of catching up to and confronting the thief if the victim chose to do so. Hence, even a taking at this distance could trigger "a substantial risk that a violent altercation will occur." Because the typical store theft occurs well within this range, it would seem that, under the dissent's proposed standard, most routine shoplifting incidents could be charged as larcenies from the person. That result conflicts with the established limits of the immediate presence standard.[69]

VI. CONCLUSION

Michigan law requires a taking from the person or immediate presence of a victim to satisfy the from-the-person element for the crime of larceny from the person. This standard is satisfied when the defendant takes property that is in the physical possession of a

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[67] *Post* at 711.

[68] *Id.* While this Court has stated before that "larceny from the person involves a substantial risk of physical force," *Perkins*, 473 Mich at 634, that statement was merely an explanation of the Legislature's *purpose* in enacting the statute, not a description of the prohibited taking zone.

[69] Although the dissent tries to show that its test has limits by listing "[a] few non-exhaustive examples" that do not create a substantial risk of altercation, *post* at 710, it is difficult to discern how these examples fail to satisfy the dissent's own test. For example, it seems there would still be a "risk of altercation" in the case of "a security guard who observes [a theft] via closed-circuit monitor," so long as there was still a chance that the security guard could leave the monitor and confront the thief.

victim or property that is in immediate proximity to a victim when the taking occurs. Only in the rare larceny-from-the-person case in which the constructive-presence exception applies may a taking outside of a victim's immediate presence satisfy the from-the-person element. The 2004 amendments to Michigan's robbery statute did not change these established requirements.

In this case, there was no evidence that defendant took property that was in the physical possession of or immediate proximity to the loss-prevention officer, and there was no evidence that defendant used force or threats to distance the loss-prevention officer from the property at the time of the taking. As a result, there was insufficient evidence that defendant took property "from the person" of the loss-prevention officer. The Court of Appeals properly reversed defendant's conviction, so we affirm the judgment of Court of Appeals.

YOUNG, C.J., and CAVANAGH and MCCORMACK, JJ., concurred with VIVIANO, J.

KELLY, J. (*dissenting*). We granted oral argument on the application to consider the meaning of the "from the person" element of the larceny-from-the-person statute.[1] While I agree with the majority that the Legislature's 2004 amendment of the robbery statute[2] did not alter the meaning of that phrase as it applies to larceny from the person, I disagree with the majority's interpretation of that phrase to mean "immediate presence," such that there is no "space intervening" between the victim and the object taken. In adopting this new definition of "from the person," the majority today

[1] MCL 750.357.

[2] See MCL 730.530, as amended by 2004 PA 128.

recasts Michigan's common-law history to support its narrow definition of "from the person" as requiring actual physical possession at the time of the taking and effectively transforms the crime of larceny from the person into either shoplifting or robbery. Because this has never been the law of this state, I respectfully dissent and would reinstate defendant's conviction.

I. ANALYSIS

A. "FROM THE PERSON"

The phrase, "from the person," has acquired a long-settled meaning in our common law, and we thus construe this language consistent with its common-law understanding.[3] In this regard I recognize, like the majority, that the origin of larceny from the person far predates Michigan's statehood. As Sir William Blackstone recorded in 1771, the English common law distinguished between two types of larceny from the person: those accomplished by "privately stealing," like pickpockets, and those accomplished "by open and violent assault," the former of which constitutes larceny from the person and the latter of which is robbery.[4] These crimes at common law, then, shared *identical* elements, both requiring that the taking be "from the person," except that robbery involved the additional element of fear and violence.[5]

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[3] MCL 8.3a; Const 1963, art 3, § 7 ("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.").

[4] 4 Blackstone, Commentaries on the Laws of England, p *241.

[5] As Sir Edwardo Coke recognized, the crimes were exactly the same except for the element of fear specific only to robbery. 3 Coke, The Third Part of the Institutes of the Laws of England (1797), p 68 ("By putting him in fear . . . this circumstance maketh the difference between a robber

Contrary to the majority's view then, the meaning of "from the person" in the English common law, did not "depend[] on whether the crime at issue was robbery or larceny from the person."[6] Rather, in regard to the "from the person" element, both crimes required that the property taken be taken from the person or in his presence; as such, it was not necessary that the property be attached to the person, only that it be under his personal protection and control.[7] Indeed, as Sir Edward Coke noted with respect to the phrase "from the person"—which Sir Coke expressly recognized was applicable to both robbery and larceny from the person—"that which is taken in his *presence*, is in law taken from his person."[8]

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and cutpurse: both take it from the person, but this takes it [secretly and privately], without assault or putting in fear, and the robber by violent assault, and putting in fear.). See 4 Blackstone, at **242-243 (describing the additional element of fear or violence inherent in the crime of robbery as "the criterion that distinguishes robbery from other larcenies" and noting that if the taking is not "from his person or in his presence" there is no robbery).

[6] For this proposition, the majority appears to rely primarily on the *statutory* offense of larceny from the person that applied to pickpocketing and required that the property be attached to the person. See 8 Eliz, c 4, § 2 (1565). The majority assigns too much significance to this point of statutory law, as it does not inform the meaning of "from the person" at common law.

[7] As an example of a taking from "the person of another or in his presence," Blackstone referenced a man who "drives away [another person's] sheep or his cattle . . . ," which are clearly not attached to the person, but under his personal protection and control. 4 Blackstone at *243.

[8] 3 Coke at 69. Modern legal commenters are in agreement that, traditionally, the phrase "from the person of another" includes a taking of property from the person's presence, which is a taking that occurs where the property is under the person's personal protection and control at the time of the taking. See Perkins & Boyce, Criminal Law (3d ed), p 342 ("Property is stolen 'from the person,' if it was under the protection of the person at the time."); 4 Torcia, Wharton's Criminal Law (15th ed), § 458, p 15 ("[P]roperty is deemed to be within a victim's 'presence' when

Michigan's first larceny-from-the-person statute was enacted in 1838, one year after Michigan became a state, and incorporated the common-law phrase "from the person."[9] In the same tradition as the English common law, the Michigan Legislature has adopted statutes in which offenders are punished more harshly for larceny from the person than simple larceny, based on the recognition that stealing from a person's presence "involves a substantial risk of physical force . . . ."[10] In 1931, the larceny-from-the-person statute was recodified as part of the Penal Code, and since then, continues to incorporate the common-law phrase "from the person." That the Legislature has never altered the language "from the person" in the larceny-from-the-person statute, indicates that we should interpret that phrase consistent with the common-law rule at the time of enactment in 1838. Mainly, that "from the person," as understood in the context of both larceny from the person and robbery, must be interpreted as property that is taken from the person's "immediate presence," which is property that was taken while under the person's personal protection and control.

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it is within his control."); 3A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1804, p 471 ("[T]he statute defining the crime of larceny from a person protect[s] the person or immediate presence of the victim from invasion . . . .").

[9] The first version of the larceny-from-the-person statute is nearly identical to the current statute. It provided:

> Every person who shall commit the offence of larceny, by stealing from the person of another, shall be punished by imprisonment in the state prison not more than five years, or in the county jail not more than one year. [1838 RS, part 4, tit I, ch 4, § 16.]

[10] See *People v Perkins*, 473 Mich 626, 634; 703 NW2d 448 (2005) (explaining why the Legislature has chosen to subject a defendant who steals from the person of another to greater penalties than those imposed on a defendant who steals property outside a person's presence).

In recognition that "from the person" is a common-law phrase, our jurisprudence has long-adhered to the phrase's common-law meaning. Over nine decades ago, in *People v Covelesky*,[11] this Court acknowledged that the phrase "from the person" must be interpreted as having the same meaning that those terms acquired at common law at the time that the statute was enacted.[12] This Court construed the meaning of "from the person" consistent with the common law to mean property that is "taken 'in the owner's presence.' "[13] The Court then expounded on the meaning of "presence," explaining that "presence" does not necessarily contemplate that the property be " 'in actual contact with the person of the one from whom it is taken,' " but that the element is satisfied if the property taken is property that is under the person's " 'personal protection and control.' "[14] The Court explained that "personal protection," in turn, extends to "cover all one's effects within a not easily defined distance over which his presence

[11] *People v Covelesky*, 217 Mich 90, 97-98; 185 NW 770 (1921), superseded by statute as recognized by *People v Williams*, 491 Mich 164, 171-173; 814 NW2d 270 (2012). Although *Covelesky* was decided 10 years before the 1931 codification of the larceny-of-the-person statute, its discussion is relevant because, as explained, the Legislature has never departed from the phrase "from the person" in the larceny-from-the-person statute.

[12] *Covelesky*, 217 Mich at 97-98. *Covelesky* discussed the meaning of "from the person" in the context of a robbery charge. As explained, "from the person" was formerly an element of both robbery and larceny from the person and because the element has historically meant the same thing for both crimes the caselaw discussing "from the person" in the context of robbery is informative.

[13] *Id*., quoting 34 Cyclopedia of Law & Procedure, p 1798.

[14] *Covelesky*, 217 Mich at 97, quoting 23 R C L, pp 1142-1143. Implicit in the notion that the property only need be within the person's personal protection or control is the principle that the person from whom the property is taken need not be the actual owner of the property; rather, it suffices if the property is merely under the person's possession or control. See *Durand v People*, 47 Mich 332, 334; 11 NW 184 (1882) ("Neither is it necessary that the person assaulted must have been the actual owner of

may be deemed to have sway . . . ."[15] As examples, the Court indicated a taking "from the person" may occur when the defendant, by causing fear or through violence, separates a person from the immediate presence of their property, and then takes the property from another room or even from another building.[16]

Following this Court's decision in *Covelesky*, this Court affirmed the common-law meaning of "from the person" nearly ten years later in *People v Cabassa*.[17] There, the defendant robbed a gas station of which the victim was the attendant. The Court explained that the defendant took property "from the person" because the attendant, although not the actual owner of the property stolen, was in actual possession and control of the money taken.[18] In so holding, the Court again endorsed the view that "if [an object, due to the defendant's acts of violence or putting in fear,] be away from the owner, yet under his control, in another room of the house . . . it is nevertheless in his personal possession; and, if he is deprived thereof, it may well be said it is taken *from his person*."[19]

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the property intended to be taken. As against a wrong-doer, an actual possession or custody of the goods would be sufficient.").

[15] *Covelesky*, 217 Mich at 98, quoting 2 Bishop's New Crim Law (8th ed), §§ 1177-1178, p 677.

[16] *Id.* at 98-99. Therein, we quoted two examples from 2 Bishop's New Crim Law at §§ 1177-1178, which indicate that a taking from another room or building satisfies the "from the person" requirement where the defendant is the cause of the person being in the other room or building:

> 5. One who binds another in one room of his house, and compels him to tell where valuables may be found in another room; or confines another in his smokehouse fifteen steps from the dwelling house, commits robbery by feloniously taking the sought-for things from the other room or building. [*Covelesky*, 217 Mich at 98.]

[17] *People v Cabassa*, 249 Mich 543; 229 NW 442 (1930).

[18] *Id*. at 546-547.

[19] *Id*. at 547, quoting *State v Calhoun*, 72 Iowa 432; 34 NW 194 (1887) (quotation marks omitted; emphasis added).

This Court quoted this same language more recently in *People v Gould*, where we upheld the defendant's conviction for larceny from the person where he took money from a restaurant's cash register and cigar box after "forc[ing] the waitress and her sole customer to lie face down on the floor of another room . . . ."[20] We held that the money was "in the possession and immediate presence of the waitress and customer . . . ."[21] In so holding, the Court rejected the argument that a defendant must take the property from its actual owner, explaining that it is sufficient for larceny from the person that " ' "the property be taken from the presence of the victim . . . [that is,] within his area of control." ' "[22]

Five years after *Gould*, in *People v Chamblis*, this Court reaffirmed its commitment to "the view that the crime of larceny from the person embraces the taking of the property in the possession and immediate presence of the victim."[23] And, nearly fifteen years after *Chamblis*, in *People v Beach*, the Court again reaffirmed that "the crime of larceny from the person embraces the taking of property in the possession and immediate presence of the victim."[24] Thus, in an unbroken chain of caselaw dating back nearly a hundred years, this Court has continually interpreted the phrase "from the person" to mean from a person's "immediate presence" and, consistent with this common-law meaning, has defined the scope of "immedi-

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[20] *People v Gould*, 384 Mich 71, 74, 80; 179 NW2d 617 (1970).

[21] *Id*. at 80.

[22] *Id.*, quoting *Commonwealth v Subilosky*, 352 Mass 153, 166; 224 NE2d 197 (1967), in turn quoting Anderson, Wharton's Criminal Law & Procedure, § 553.

[23] *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

[24] *People v Beach*, 429 Mich 450, 484 n 17; 418 NW2d 861 (1988) (quotation marks and citation omitted).

ate presence" to extend beyond a person's physical reach. Given these precedents, "immediate presence," as that phrase has been consistently interpreted in our jurisprudence, plainly includes property that is taken while under the person's personal protection and control.

I would therefore reverse the Court of Appeals' holding that "from the person" means that property must be taken from the victim's "personal space." The Court of Appeals' interpretation, which essentially ignores the common-law meaning of "from the person," appears motivated by a concern that the threat of violence inherent in the crime of larceny from the person is absent if the taking does not occur within the victim's "personal space."[25] This policy concern is unfounded: The common-law meaning of "from the person" accounts for the reality that property taken from a person's immediate presence may pose as great (or greater) a threat to the victim's personal safety, as the threat created by a taking that occurs within arm's reach. As this Court explained in *People v Perkins*, because "[i]n order to commit a larceny from the person, the defendant must steal something from a person in that person's presence," and, thus, "[u]nless the victim submits to the theft or does not notice the theft, physical force will almost certainly be used in response," "larceny from the person is a crime that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[26] Accordingly,

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[25] The Court of Appeals, *People v Smith-Anthony*, 296 Mich App 413, 418; 821 NW2d 172 (2012), cites *People v Perkins*, 262 Mich App 267, 272; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005), in support of its view, but *Perkins* does not support the proposition that the increased risk of violence is only activated when a defendant takes the property from the victim's "personal space."

[26] *Perkins*, 473 Mich at 632-633 (quotation marks and citation omitted).

it follows that the focus of whether property is taken from a person's immediate presence and is under his personal protection and control is on whether, at the time the taking occurs, the proximity between the defendant and the victim triggers a substantial risk that a violent altercation will occur.[27] I would therefore hold that "from the person" for purposes of the larceny-from-the-person statute means property taken in the person's immediate presence, which includes property that is under the person's personal protection and control such that a taking of such property triggers a substantial risk that a violent altercation will occur.[28]

B. THE MAJORITY'S NEW "IMMEDIATE PRESENCE" STANDARD

Notwithstanding this Court's long-standing adherence to the common-law meaning of "from the person," the majority narrowly defines this phrase to require

[27] The analysis in this regard is not on the victim's conduct, i.e., whether or at what point the victim may choose to confront the thief, but simply on whether the taking occurs within a proximity that poses a substantial risk of physical altercation. While this distance cannot be defined with specificity and is dependent on the facts of each particular case, it is clear that no such risk of violence exits when a thief steals from a victim who observes the taking from a safe distance that presents no opportunity to retake the property. Accordingly, that a victim could, according to the majority, "plausibly observe a thief from 100 feet away, and yet still have a chance of catching up to and confronting the thief *if the victim chose to do so*," *ante*, at 692, unnecessarily fixates on the victim's conduct. Nor does this analysis place "difficult to discern" and "arbitrary" limitations on determining whether a taking occurs within a proximity that poses the risk of physical altercation; rather, the determinant of such proximity is simply common sense and what is objectively reasonable under the circumstances. For example, it is *implausible* that a taking, which occurs ten car lengths (approximately 100 feet) from the victim, could trigger a substantial risk that a violent altercation will occur.

[28] Contrary to the majority's assertion, this interpretation does not create an expansive "new test" for determining whether a taking occurs in the victim's immediate presence, but is plainly supported by over nine decades of our jurisprudence.

that the taking occur within the victim's "immediate proximity," meaning that there can be no "intervening space" between the victim and the property taken.[29] In fact, according to the majority, only in the rare instance that property is taken by "use of force or threats of force to create distance between a victim and the victim's property" might property that is otherwise not affixed to the victim constitute a taking "from the person." This interpretation, however, inexplicably departs from this Court's jurisprudence, which holds that "immediate presence" "cover[s] all one's effects within a not easily defined distance over which his presence may be deemed to have sway."[30] Indeed, this Court has never

[29] In concluding that "immediate presence" is established only if property is taken "immediate[ly]" from the victim's person, the majority relies exclusively on the term "immediate" while completely ignoring the term "presence," essentially equating "immediate presence" with "attached to the person." As support for its new "immediate presence" standard, the majority relies on the common dictionary definition of the term "immediate." However, as acknowledged by the majority, "immediate presence" is a "technical phrase" that has "acquired a peculiar and appropriate meaning in the law," and thus "shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a; see also Const 1963, art 3, § 7. Consequently, it is not appropriate for the majority to consult a lay dictionary in its attempt to define this phrase.

Notwithstanding its reliance on common dictionary definitions, the majority asserts that it is "not true" that it has equated immediate presence with physical possession because under its standard, property taken either "from the physical person *or* immediate presence of a victim" is sufficient. *Ante*, at 688-689 n 60. However, there is no meaningful distinction between these two circumstances given that, under the majority's interpretation, the latter requires that there be no "intervening space" between the victim and the object, or that the object be physically "next" or "nearest" to the victim. In essence, then, to satisfy "immediate presence" under the majority's standard requires that, at the time of the taking, the property be physically touching, or otherwise physically next to, the victim without any intervening space, i.e., actual physical possession.

[30] *Covelesky*, 217 Mich at 98 (citation and quotation marks omitted). Because this Court's jurisprudence does not support the majority's

held that an object must be, as the majority holds, "immediately next to the person" or effectively in the victim's actual physical possession in order for the taking to be in the person's "immediate presence." Thus, by adopting an interpretation that is incompatible with the well-established meaning of "immediate presence" as recognized in this state for nearly a century, the majority has created a "new test" that represents a sea change in Michigan's common law.

Despite adopting an immediate-presence standard that represents a vast departure from Michigan jurisprudence, the majority avoids overruling even a single case of this Court. Yet, the majority does not explain how it is able to do so where its holding conflicts with (1) all of our cases that have held that the Legislature codified the common-law understanding of the language "from the person" when it incorporated this language into the robbery and larceny-from-the-person

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interpretation of "from the person" to require that the property be "immediately next to the person at the time of the taking," the majority relies on caselaw from other jurisdictions, the factual circumstances of which (not surprisingly) support the majority's purported measure of immediate proximity, which necessarily requires that the property be attached to the victim's person. While the manner in which other states have construed their respective larceny-from-the-person statutes is entirely inapposite, I would be remiss not to note that multiple cases from other jurisdictions are also consistent with my interpretation of "from the person." See *State v Calhoun*, 72 Iowa 432; 34 NW 194, 196 (1887) (holding that "[i]f [property] be away from the owner, yet under his control, in another room of the house . . . it is nevertheless in his personal possession; and, if he is deprived thereof, it may well be said it is taken from his person."); *State v Jones*, 499 SW2d 236, 237-240 (Mo Ct App, 1973) (the defendant, who reached through the open passenger-side window and took the victim's purse off of the passenger seat as the victim was exiting her vehicle on the driver's side, was found to have taken property "from the person."); and *In re Welfare of DDS*, 396 NW2d 831 (Minn, 1986) (a radio that was not actually on the person of another but only in that person's presence was held to have been taken "from the person."). See also *Subilosky*, 352 Mass at 166.

statutes;[31] (2) all of our robbery cases that have held that "from the person" includes from the person's "immediate presence;"[32] (3) all of our larceny-from-the-person cases that have held that "from the person" includes from the person's "immediate presence;"[33] and (4) all of our cases that have held that larceny from a person was a necessarily included lesser offense of robbery (at least before 2004).[34]

Indeed, the majority reforms this state's common-law history, as well as English common law as previ-

[31] See, e.g., *Covelesky*, 217 Mich at 98-99 ("The words 'from the person of another,' found in our statutory definition of robbery, must be held to have been used in the same sense and with the same meaning that these terms had acquired at common law at the time the statute was enacted, and the offense of robbery under the statute may be committed by violence or putting in fear, and feloniously taking money or other things of value from the person or in the presence and under the immediate control and possession of the person assaulted.") (quotation marks and citation omitted).

[32] See, e.g., *Covelesky*, 217 Mich at 97 ("To constitute robbery, it is essential that there be a taking from the person. To satisfy this requirement, it is sufficient that property be taken in the owner's presence.") (quotation marks and citation omitted); *Cabassa*, 249 Mich 543.

[33] See, e.g., *Gould*, 384 Mich at 80 ("We hold that the taking of property in the possession and immediate presence of the waitress and customer in this case was sufficient to sustain a verdict against defendant Gould of larceny from the person."); *Chamblis*, 395 Mich at 425 ("We are committed to the view that the crime of larceny from the person embraces the taking of property in the possession and immediate presence of the victim."); *Beach*, 429 Mich at 485 (same); *Perkins*, 473 Mich at 633 ("In order to commit a larceny from the person, the defendant must steal something from a person in that person's presence.").

[34] See, e.g., *People v Calvin*, 60 Mich 113, 121; 26 NW 851 (1886) ("Each of these offences under our statutes and at common law, to-wit, robbery and larceny from the person, include the stealing and taking of property from the person,--one by force and violence; the other need not be with force or violence; it may be by stealth."); *Chamblis*, 395 Mich at 424 ("Larceny from the person is 'robbery' *absent* the element of force") (emphasis in the original.); *Beach*, 429 Mich at 484 n 17 ("Robbery is committed only when there is larceny from the person, with the additional element of violence or intimidation") (quotation marks and citation omitted.).

ously explained in this dissent. In particular, the majority ignores the significance of the historical relationship between larceny from the person and robbery and the fact that our jurisprudence has consistently recognized that larceny from the person constitutes a necessarily included lesser offense of robbery.[35] It follows, then, that all of the elements of robbery and larceny from the person are exactly the same, including "from the person," except for the additional element of force or violence inherent *only* in the crime of robbery. The majority, however, has interpreted "from the person" to mean something entirely different from how this phrase was understood in the context of robbery before the 2004 amendments to the robbery statute, thereby retroactively transforming larceny from the person into a cognate offense, rather than a lesser included one.[36]

Next, the majority invents a tension in the evolution of the meaning of "immediate presence," indicating that Michigan law once required actual physical possession, not merely immediate presence, to establish the

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[35] See, e.g., *Calvin*, 60 Mich 113; *Chamblis*, 395 Mich 408; *Beach*, 429 Mich 450. See also Perkins, Criminal Law (2d ed), pp 279, 281.

[36] The majority makes the pronouncement, in dicta, that as a result of the 2004 amendment of the robbery statute, larceny from the person "is no longer a necessarily included lesser offense of robbery." *Ante*, at 687 n 53. However, this issue has never been litigated in this Court. Furthermore, defendant has waived the issue whether larceny from the person remains a lesser included offense of robbery in light of the 2004 amendment because defendant requested an instruction on larceny from the person as a lesser included offense of robbery and did not raise the issue on appeal. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011) (indicating that counsel's express approval of the instructions constitutes a waiver of any instructional error). In any event, the meaning of "from the person" is unaffected by the 2004 amendment of the robbery statute, given that the majority agrees that the amendment had no effect on the meaning of "from the person" in the larceny-from-the-person context.

from-the-person element for larceny from the person.[37] The majority uses this supposed conflict in our caselaw to justify its departure from the unabated meaning of "immediate presence." However, the conflict referenced by the majority simply does not exist. For example, the majority infers from the facts in *People v Gadson*,[38] that our jurisprudence once interpreted "immediate presence" to require that the property be physically attached to the person. *Gadson*, however, provides no analysis regarding the meaning of "from the person," but simply held that larceny from the person was not established where the evidence was insufficient to prove that a theft occurred in the first instance. There is no other case from this Court that adopts a standard other than the common-law one articulated in part A of this dissent.[39]

In a similar manner, the majority recharacterizes *People v Gould* as creating a previously unrecognized "constructive presence" exception to its immediate-presence standard. Under this alleged exception, property that is not attached to the victim at the time of the taking will be deemed to have been taken "from the person," if the victim could have retained possession of the property but for the defendant's use of force or intimidation to separate the victim from his property.

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[37] This assertion is not, as the majority seems to suggest, dependent on this Court's decision in *Covelesky*, but is simply consistent with the meaning of "from the person" as that phrase was interpreted at common law. Again, this Court's caselaw does not support the majority's supposition that Michigan ever adopted the minority view and required an actual taking from the physical person of the victim. The authorities cited by the majority actually support this point.

[38] *People v Gadson*, 348 Mich 307; 83 NW2d 227 (1957)

[39] The majority's reliance on two Court of Appeals cases, *People v Stevens*, 9 Mich App 531; 157 NW2d 495 (1968), and *People v Johnson*, 25 Mich App 258; 181 NW2d 425 (2005), is also not persuasive because we are not bound by these lower court decisions.

The majority premises the creation of this exception, in part, on the idea that a defendant may not negate the from-the-person element for purposes of establishing robbery by using force or intimidation to prevent the victim from retaining possession of his property. Although such a principle itself is not objectionable, a fair reading of *Gould* indicates that it in no way stands for that principle nor did it articulate, let alone adopt, the majority's new "constructive presence" exception. Rather, as previously explained, *Gould* held that the taking of property in the victims' immediate presence and within their area of protection and control was sufficient to sustain a conviction of larceny from the person, notwithstanding that the victims were not in actual physical possession of the property at the time of the taking.[40]

Perhaps even more concerning is the result of the majority's new "immediate presence" standard, in the context of takings from a retail establishment. By holding that there can be no "intervening space" between the victim and the property taken unless its "constructive presence" exception applies, the majority essentially eviscerates the offense of larceny from the person in all instances not involving a taking where the property is physically attached to the victim. That is, if, in the absence of actual physical possession, larceny

[40] The majority "believe[s] that *Gould* should [not] be read as a wholesale importation of robbery doctrine into larceny-from-the-person law" and that the standard articulated in this dissent "expands the prohibited taking zone . . . well beyond the standard in *Gould*." *Ante*, at 685 n 47. The majority's belief, however, is premised on its use of the phrase "from the person" as having one meaning in the context of robbery and having another different meaning in the context of larceny from the person, which, of course, is unsupportable under our law. Moreover, the majority does not explain how this dissent's interpretation of "from the person" expands the "taking zone" beyond that recognized at common law.

from the person can only be established when the "constructive presence" exception applies, then the actual offense committed would be robbery because the offense would necessarily involve force or intimidation. Comparatively, if, in the absence of force or intimidation, larceny from the person can only be established when property is attached to the victim at the time of the taking, then the absence of property physically attached to the victim places the crime within the definition of retail fraud.[41] Under the majority's standard, then, the prosecutor's discretion to pursue a charge of larceny from the person in the context of a taking from a retail establishment is limited to those very rare instances in which the defendant is actually a pickpocket.

In summary, the majority's new immediate-presence standard overrules nearly one hundred years of this Court's jurisprudence, without any mention of stare decisis, recasts the historical understanding of "from the person" in both Michigan's and England's common law, and unduly narrows the crime of larceny from the person such that, effectively, it is conflated with either shoplifting or robbery. I would instead adhere to this Court's long-standing recognition of that phrase which, consistent with its meaning at common law, includes the taking of objects that are within a person's immediate presence and under that person's personal protection and control.

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[41] See MCL 750.356c and MCL 750.356d. The majority concedes that Michigan is an "immediate presence" jurisdiction rather than one that requires the victim to have actual physical possession of the property taken. Notwithstanding this concession, in adopting the constructive-presence exception the majority has transformed larceny from the person into a crime that can only be committed when the victim has actual physical possession of the property taken.

C. APPLICATION

Application of the unabated meaning of "from the person" to the facts of this case, leads to the conclusion that the evidence was sufficient to support defendant's conviction. Macy's loss-prevention officer Krumbhaar testified that defendant, after trying on a pair of shoes, completed the larceny by pushing the gift box into her grocery bag. At that time, Krumbhaar observed the taking from a distance close enough to hear defendant interact with a sales associate. As an employee of Macy's responsible for preventing thefts of Macy's store items, Krumbhaar had personal protection and rightful control over the gift box at the time of taking.[42] Taking these facts in a light most favorable to the prosecution, a reasonable jury could conclude beyond a reasonable doubt that defendant unlawfully took the gift box from Krumbhaar's immediate presence. Krumbhaar's testimony that defendant was within her "visual range" and was "fairly close," is sufficient to satisfy the meaning of "from the person," contrary to defendant's argument. Rather, as previously explained, "from the person"

[42] The majority concludes that for Krumbhaar to establish personal protection over the gift box, "she would have had to have taken possession of [it] before defendant pilfered it." However, actual possession, although sufficient, has never been required in our jurisprudence. See *People v Randolph*, 466 Mich 532, 556; 648 NW2d 164 (2002) (MARKMAN, J., dissenting), superseded by statute as recognized by *Williams*, 491 Mich at 171-173 ("[A]lthough [the] defendant had initially seized items from the shelf of the Meijer store, the security guards continued to exercise protective custody and control over that property, because they continued to monitor [the] defendant and they still had the right to take the property back. Therefore, the property was 'in [their] presence' within the meaning of MCL 750.530 when [the] defendant, by assault, attempted to unlawfully deprive the security guards of the property."). The majority in *Randolph* in no way disagreed with Justice MARKMAN's conclusion that the property was taken "in the presence" of the security guards, even though they did not actually possess the property before it was taken.

includes the taking of objects that are within a person's immediate presence and under that person's personal protection and control such that a risk of a physical altercation exists, as in the instant case. I would therefore conclude that the evidence was sufficient to support the jury's finding that the gift box was taken "from the person of another."

To reach this conclusion, and affirm this Court's adherence to the common-law meaning of "from the person," is not to say that all shopliftings constitute larceny from the person. Indeed, there are multiple scenarios where a defendant who is caught shoplifting is guilty of only retail fraud or simple larceny rather than larceny from the person. A few non-exhaustive examples of such instances include (1) a defendant who completes the larceny without being seen; (2) a defendant who completes the larceny while a security guard observes via closed-circuit monitor; (3) a defendant who is stopped by a security guard because of a suspicious bulge in the defendant's clothing or other suspicious behavior following the completed larceny; or (4) the defendant triggers the store's security alarm after the completed larceny and is stopped by a security guard.[43] While defendant suggests that she could, at most, be guilty of third-degree retail fraud, it is clear that none of these scenarios existed and the evidence, in my view, supports a jury finding that defendant took the gift box from Krumbhaar's person.[44]

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[43] Given this guidance, it is simply untrue that "most routine shoplifting incidents could be charged as larcenies from the person." *Ante*, at 692. While the majority believes that these examples "fail to satisfy th[is] dissent's own test," based on its speculation that a risk of altercation "would still" arise where a security guard observes a theft via closed-circuit monitor, the majority again misapprehends the focus of our analysis by wrongly concerning itself with the victim's conduct. *Ante*, at 692 n 69.

[44] Defendant also argues that the evidence only supports a conviction for third-degree retail fraud because Macy's, and not Krumbhaar,

IV. CONCLUSION

The majority's new rule deviates from the historical meaning of "from the person" as it has been understood in this Court's jurisprudence. By defining "immediate presence" to require that there be no "intervening space" between the person and object taken, the majority has effectively ruled that the property must be attached to the person. This Court, however, has never, until today, held that immediate presence requires that the victim have actual physical possession of the property at the time of the taking.

I would adhere to this Court's well-established jurisprudence and hold that "from the person" for purposes of the larceny-from-the-person statute means property that is taken from a person's "immediate presence," which includes property that is under the person's personal protection and control such that a taking of such property triggers a substantial risk that a violent altercation will occur. Applying the legally correct understanding of the larceny-from-the-person statute, and considering the evidence in a light most favorable to the prosecution, the evidence was clearly sufficient to support defendant's conviction. I would therefore reverse the judgment of the

owned the gift box and suggests that she was mischarged. However, as previously explained, "from the person of another" does not require a showing that the property was taken from the actual owner; the fact of custody and possession is enough. *Durand*, 47 Mich at 334; *Cabassa*, 249 Mich at 546-547. Further, that the evidence may have supported a charge of third-degree retail fraud is irrelevant; just because the evidence may have supported that charge, as well as a charge for larceny from the person, does not mean that defendant cannot be convicted of the latter. The prosecutor has broad discretion in selecting the charges it pursues against a defendant, *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998), and, notably, it was defendant who requested an instruction on larceny from the person.

Court of Appeals and reinstate defendant's conviction for larceny from the person.

MARKMAN and ZAHRA, JJ., concurred with KELLY, J.

PEOPLE v STANLEY DUNCAN

PEOPLE v VITA DUNCAN

Docket Nos. 146295 and 146296. Argued April 10, 2013 (Calendar No. 6). Decided July 30, 2013.

Stanley Duncan (Docket No. 146295) was charged in the Macomb Circuit Court with five counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and four counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a). His wife, Vita Duncan (Docket No. 146296), was charged in the Macomb Circuit Court with two counts of CSC-I, two counts of CSC-II, and with operating a daycare facility without a license, MCL 722.125(1)(b). RS was the sole complainant against Vita and one of three complainants against Stanley. The 39th District Court, Joseph F. Boedeker, J., qualified RS, who was three years old at the time, to testify at the separate preliminary examinations held for each defendant. Both defendants were bound over on the charges against them, and a joint trial before a single jury began in the circuit court on September 28, 2012. RS was called to the stand. The circuit court, Matthew S. Switalski, J., began to question RS. RS, who was visibly agitated, was unable to answer the court's questions regarding the difference between telling the truth and telling a lie and what a promise is. The circuit court ruled that RS was not competent to testify under MRE 601. The prosecution asked the court to declare RS unavailable under MRE 804(a) and moved to admit her preliminary examination testimony under MRE 804(b)(1). The court denied the motion, concluding that RS was not unavailable. The court granted a stay of the proceedings, and the prosecution sought emergency leave to appeal in the Court of Appeals. The Court of Appeals held the applications for leave to appeal in abeyance and remanded the cases to the circuit court, asking the circuit court to explain its decision. On remand, the circuit court reiterated its conclusion that RS was not unavailable because the situations identified in MRE 804(a)(1) through (5) were not applicable. The Court of Appeals subsequently denied the prosecution's applications for leave to appeal. The Supreme Court granted the prosecution's motion for immediate consideration, stayed the proceedings, and remanded both cases to the Court of Appeals for consideration as

on leave granted. 493 Mich 867 (2012). The Court of Appeals, JANSEN, P.J., and STEPHENS, J. (RIORDAN, J., concurring), affirmed the decision of the circuit court in an unpublished opinion per curiam, issued November 29, 2012 (Docket Nos. 312637 and 312638). The Supreme Court granted leave to appeal, limited to the issue whether RS was unavailable for purposes of MRE 804(a), and vacated as dicta those portions of the Court of Appeals' judgment and the trial court's opinion that discussed whether the admission of RS's preliminary examination testimony would violate defendants' Confrontation Clause rights. 493 Mich 926 (2013).

In an opinion by Chief Justice YOUNG, joined by Justices KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is generally inadmissible and may only be admitted if there is an applicable exception to the general rule prohibiting hearsay evidence. MRE 804(b) lists several types of statements that are not excluded by the general rule when the declarant is deemed unavailable as a witness under MRE 804(a). MRE 804(a) defines unavailability as including situations in which the declarant (1) is exempted from testifying on the ground of privilege, (2) refuses to testify despite court order, (3) has a lack of memory of the subject matter of the statement, (4) is unable to testify because of death or then existing physical or mental illness or infirmity, and (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means. At issue in this case was whether RS suffered from a then existing mental infirmity under MRE 804(a)(4). "Infirmity" is defined as the quality or state of being infirm, and "infirm" is defined as feeble or weak in body or health, especially because of age. "Mental" is defined as (1) of or pertaining to the mind, or (2) of, pertaining to, or affected by a disorder of the mind. Read together, the phrase "mental infirmity" encompasses weakness or feebleness of the mind, one cause of which may be an individual's age. The phrase "then existing" limits the temporal scope within which a witness's availability under MRE 804(a)(4) may be assessed. The only relevant reference point is the point at which the witness takes the stand; the mental infirmity need not be permanent or longstanding, and the fact that RS was competent and available to testify at two preliminary examinations did not affect the determination whether she was mentally capable or infirm for purposes of MRE 804(a)(4) at the time her testimony was sought at trial. While an older youth or an adult may have been able to suppress the unease of testifying in open court, as a young child, RS was susceptible to

particular challenges that must be taken into consideration when determining whether a witness is mentally infirm under MRE 804(a)(4). Under the plain language of the rule, and recognizing the unique mental and emotional limitations of youth, RS had a then existing mental infirmity because she was unable to sufficiently cope with her significant emotional distress and give testimony at trial, a result of her particularly young age. Therefore, she was unavailable within the meaning of MRE 804(a)(4), and the trial court abused its discretion when it concluded that RS was not unavailable. The nature of the inquiry under MRE 804(a)(4) is case specific, and before a court concludes that a child has a then existing mental infirmity, it should use, when appropriate, the tools available in Michigan's court rules and statutes to accommodate young witnesses.

Judgment of the Court of Appeals reversed; cases remanded to the trial court for further proceedings.

Justice MARKMAN, concurring, agreed with the majority's conclusion that RS was unavailable for purposes of MRE 804(a), but disagreed that her youth and apparent fear of testifying in the presence of the person charged with her sexual abuse were sufficient to deem as "mentally infirm" under MRE 804(a)(4) a healthy and developmentally sound four-year-old child. Instead, Justice MARKMAN would have held that RS was unavailable under the general principle of unavailability found in MRE 804(a). In this case, the trial court ruled that RS was not competent to testify under MRE 601 because she lacked a sense of obligation to testify truthfully and understandably. Thus, she was not suitable or at hand as a witness, and the court's good-faith efforts to qualify her failed. Accordingly, she was unavailable under the general principle of unavailability found in MRE 804(a).

Justice MCCORMACK, concurring, agreed with the majority opinion and wrote separately to emphasize that there was a doctrinal foundation supporting the majority's holding. Over the course of the prior decade, the United States Supreme Court had acknowledged that the criminal law must recognize that children are qualitatively different from adults. Although this caselaw involved young offenders and not young witnesses, the underlying rationale was relevant in this case. Four-year-old RS simply was not able to cope with the emotional trauma of testifying the way an adult could, and it therefore made sense that a court might find that she had a then existing mental infirmity under MRE 804(a)(4), even if a similarly situated adult declarant might not be found unavailable under the same subrule.

Justice CAVANAGH, dissenting, agreed with Justice MARKMAN that RS could not be properly categorized as suffering from an

infirmity, and would have affirmed the result reached by the Court of Appeals. Accepting, for purposes of this appeal, Justice MARKMAN's conclusion that the use of the word "includes" within MRE 804(a) indicates that the definition of "unavailability as a witness" contains a general principle of unavailability, Justice CAVANAGH concluded that more rigorous attempts than were made in this case should occur before declaring a child witness unavailable. Justice CAVANAGH suggested that the rule concerning unavailability should be reexamined in light of the unique issues involving child witnesses.

EVIDENCE — HEARSAY — UNAVAILABILITY OF THE DECLARANT — MENTAL INFIRMITY — CHILD WITNESSES.

MRE 804(a)(4) defines unavailability as including situations in which the declarant is unable to testify because of death or then existing physical or mental illness or infirmity; the phrase "mental infirmity" encompasses weakness or feebleness of the mind, one cause of which may be an individual's age; the phrase "then existing" limits the temporal scope within which a witness's availability under MRE 804(a)(4) may be assessed; the only relevant reference point is the point at which the declarant takes the stand; a young child may be found to be unavailable because of a then existing mental infirmity if the child is unable to sufficiently cope with the significant emotional distress of testifying as a result of the child's age.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, and *Joshua D. Abbott*, Assistant Prosecuting Attorney, for the people.

Martin J. Beres for Stanley Duncan.

Frank D. Eaman, PLLC (by *Frank D. Eaman*), for Vita Duncan.

Amicus Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Anica Letica*, Assistant Attorney General, for the Department of the Attorney General.

YOUNG, C.J. While hearsay is generally inadmissible,[1] the Michigan Rules of Evidence permit certain prior out-of-court statements to be admitted into evidence when a witness is unavailable.[2] MRE 804(a) enumerates five situations when a witness is unavailable, including when the witness is unable to testify because of a then existing physical or mental illness or infirmity.[3] We hold that when a child attempts to testify but, because of her youth, is unable to do so because she lacks the mental ability to overcome her distress, the child has a "then existing . . . mental . . . infirmity" within the meaning of MRE 804(a)(4) and is therefore unavailable as a witness. Accordingly, we reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion. On remand, the trial court must determine whether the complainant's preliminary examination testimony satisfies the requirements of MRE 804(b)(1)[4] and, if so, whether admission of that testimony would violate defendants' rights under the Confrontation Clause.[5]

I. FACTS AND PROCEDURAL HISTORY

Defendant Stanley Duncan was charged in the Macomb Circuit Court with five counts of first-degree criminal sexual conduct (CSC-I)[6] and four counts of second-degree criminal sexual conduct (CSC-II).[7] Stanley's wife, defendant Vita Duncan, was charged with

[1] MRE 802.

[2] MRE 804(b).

[3] MRE 804(a)(4).

[4] We express no opinion regarding the admissibility of this preliminary examination testimony pursuant to MRE 804(b).

[5] US Const, Am VI.

[6] MCL 750.520b(1)(a).

[7] MCL 750.520c(1)(a).

two counts of CSC-I, two counts of CSC-II, and with the misdemeanor offense of operating a daycare facility without a license.[8] The alleged victim in this case, RS, is the sole complainant against Vita and one of three complainants against Stanley.

Separate preliminary examinations were held for each defendant. At Stanley Duncan's preliminary examination on October 17, 2011, then three year old RS correctly answered the trial court's questions about her age, her birthday, and her dog's name, among others. The judge then asked RS if she knew the difference between telling the truth and not telling the truth, to which she responded, "Yes." She also affirmed that she would honestly answer the questions of the attorneys. The court therefore qualified RS as competent to testify, determining that she had sufficient mental intelligence to communicate and had a sense of obligation to testify honestly.[9]

RS testified that on at least three occasions, Stanley Duncan touched her "private," indicating her vaginal area, and "blew raspberries" on her vaginal area while her pants and underwear were off. The raspberries hurt "a little bit," and his touching "really hurted." She testified that the acts occurred in the bathroom of defendants' home, where RS attended daycare.

On December 2, 2011, at the preliminary examination concerning the charges against Vita Duncan, RS was qualified as competent after she correctly answered questions about her birthday, her dog's name, and the name of her schoolteacher. RS affirmed her understand-

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[8] MCL 722.125(1)(b).

[9] See MRE 601 ("Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.").

ing of what telling the truth means, and promised to do so. RS repeated substantially the same answers that she previously gave regarding Stanley Duncan, and also stated that she told Vita more than once that Stanley had touched her. RS also testified that, on at least one occasion while Stanley was touching her, Vita was just outside the bathroom, and that RS could see Vita.

Both defendants were bound over on the charges against them, and a joint trial before a single jury began on September 28, 2012. RS was called to the stand and was first questioned by the court. When asked whether she knew the difference between the truth and a lie, RS responded, "No," and was unable to explain what a promise means. After RS struggled to answer questions similar to those answered at the preliminary examinations, the trial court excused the jury, and met with counsel, RS, and RS's parents in chambers. Afterward, RS was again put on the stand, and again answered, "No" to the questions regarding whether she knew what the truth is, what a lie is, and what a promise is. RS was clearly agitated. Throughout the court's questioning, RS had tears in her eyes and was wringing her hands. RS began crying in earnest just before the court excused her. The court ruled that she was not competent to testify pursuant to MRE 601.

The prosecution immediately asked the court to declare RS unavailable, arguing that RS lacked memory of the events giving rise to the charges,[10] and moved to admit her preliminary examination testimony pursuant to MRE 804(b)(1), a hearsay exception for unavailable

[10] The prosecution initially argued that RS was unavailable pursuant to MRE 804(a)(3) (stating that unavailability as a witness includes situations in which the declarant "has a lack of memory of the subject matter of the declarant's statement"). In this Court and the Court of Appeals, the prosecution has relied on MRE 804(a)(4), arguing RS suffered from a mental illness or infirmity.

witnesses.[11] The trial court considered each of the five situations of unavailability enumerated in MRE 804(a),[12] but held that none of them applied to RS.[13]

After the trial court granted a stay of the trial proceedings, the prosecution sought emergency leave to appeal in the Court of Appeals and moved for immediate consideration of the trial court's ruling that RS was not unavailable. The Court of Appeals granted the prosecution's motion for immediate consideration, held the applications for leave to appeal in abeyance, and remanded the cases to the trial court with instructions to issue an opinion explaining its decision.

In its opinion on remand, the trial court reiterated its holding that RS was not unavailable because her failure to take the equivalent of the oath did not trigger any of the scenarios enumerated in MRE 804(a). Without much discussion, the court ruled that MRE 804(a)(4), which renders a declarant unavailable if she is dead or

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[11] If a declarant is unavailable pursuant to MRE 804(a), the following is not excluded as hearsay: "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1).

[12] MRE 804(a) lists five situations in which a declarant is considered unavailable: when the declarant is exempted from testifying by operation of a privilege; when the declarant refuses to testify; when the declarant has a lack of memory of the subject of a prior statement; when the declarant cannot testify because of death or a then existing physical or mental illness or infirmity; and when the declarant is absent notwithstanding due diligence to procure the declarant's attendance by the proponent of the statement.

[13] The trial court also declined to rule on the claim, raised by Stanley Duncan's defense counsel, that admission of RS's preliminary examination testimony would violate his right "to be confronted with the witnesses against him . . . ." US Const, Am VI. Because this issue is not before us, we decline to address any potential issues concerning the Confrontation Clause.

has a physical or mental infirmity or illness, did not apply because RS's situation did not include any of these circumstances. The court stressed that RS was even younger at the preliminary examination than at trial and suggested that this fact lent support to its ruling that she was not unavailable at the later trial date.[14]

The Court of Appeals denied the prosecution's applications for leave to appeal. This Court granted the prosecution's motion for immediate consideration, stayed the proceedings, and remanded both cases to the Court of Appeals for consideration as on leave granted.[15]

In its opinion, the Court of Appeals affirmed the trial court's finding that RS was not unavailable within the meaning of MRE 804(a) generally and that RS did not meet the specific circumstance of having a "then existing physical or mental illness or infirmity" within the meaning of MRE 804(a)(4).[16] Distinguishing this case from past cases in which witnesses were held both incompetent and unavailable,[17] the Court of Appeals reasoned that the fact that some witnesses are both incompetent and unavailable does not mean that all

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[14] Because the trial court ruled that RS did not qualify as an unavailable witness, it did not determine whether RS's preliminary examination testimony satisfied the requirement that "the party against whom the testimony is now offered" have had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" to be admissible under the hearsay exception for former testimony. MRE 804(b)(1).

[15] *People v Duncan*, 493 Mich 867 (2012).

[16] *People v Duncan*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2012 (Docket Nos. 312637 and 312638).

[17] See *People v Karelse*, 143 Mich App 712; 373 NW2d 200 (1985), rev'd 428 Mich 872 (1987) (adult complainant held unavailable under MRE 804(a)(4) because she was mentally disabled); *People v Edgar*, 113 Mich App 528; 317 NW2d 675 (1982) (four-year-old complainant's unavailability at trial was attributed to her failure of memory under MRE 804(a)(3)).

incompetent witnesses are unavailable. Under MRE 601, a witness is not competent to testify if she "does not have sufficient physical or mental capacity . . . to testify truthfully . . . ." By comparison, MRE 804(a)(4) renders a declarant unavailable as a witness if she "is unable . . . to testify . . . because of . . . then existing physical or mental illness or infirmity[.]" Because the use of distinct language in the two provisions suggests distinct requirements to meet each rule, the Court concluded that RS was not mentally ill or infirm even though she may have lacked the mental capacity to qualify as competent.[18]

We granted the prosecution's motion for immediate consideration and application for leave to appeal, limited "to the issue whether the witness was 'unavailable' for the purposes of MRE 804(a)."[19]

II. STANDARD OF REVIEW

The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion.[20] A trial court

[18] The Court also held that the prosecution had failed to demonstrate that MRE 804(a) supplies an illustrative, rather than exhaustive, list of situations in which a witness may be unavailable, foreclosing the possibility that RS was unavailable because of a reason that is not specifically listed in MRE 804(a)(1) through (5).

Moreover, even though the Court of Appeals recognized that it need not determine whether the requirements under MRE 804(b)(1) were met given that Court's conclusion that RS was not unavailable, it analyzed the issue nonetheless. The Court noted that defense counsel did not have the benefit of discovery when cross-examining RS at the preliminary examination, and that, because there were two separate preliminary examinations, one for each of the defendants, counsels' motives differed.

[19] *People v Duncan*, 493 Mich 926 (2013). This Court also vacated as dicta portions of the Court of Appeals' judgment and the trial court's opinion discussing application of the Confrontation Clause.

[20] *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.[21] Decisions concerning the admission of evidence often involve preliminary questions of law that are reviewed de novo.[22] These preliminary questions of law include questions involving the interpretation of rules of evidence.[23] A trial court necessarily abuses its discretion when it makes an error of law.[24]

III. ANALYSIS

When construing court rules, including evidentiary rules, this Court applies the same principles applicable to the construction of statutes.[25] Accordingly, we begin with the rule's plain language.[26] When the language of the rule is unambiguous, we enforce the plain meaning without further judicial construction.[27] The Court may refer to dictionaries to aid in discerning the plain meaning of a rule.[28]

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[21] *People v Blackston*, 481 Mich 451, 460, 467; 751 NW2d 408 (2008).

[22] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[23] *People v Barrett*, 480 Mich 125, 130; 747 NW2d 797 (2008).

[24] *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012); accord *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."). See also *Lukity*, 460 Mich at 488 (stating that when "preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law").

[25] *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

[26] *Danse Corp v City of Madison Heights*, 466 Mich 175, 181-182; 644 NW2d 721 (2002).

[27] *Id.* at 182.

[28] *Fremont Ins Co v Izenbaard*, 493 Mich 859, 859; 820 NW2d 902 (2012); *Gursky*, 486 Mich at 608.

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[29] "Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule."[30] MRE 804(b) enumerates several exceptions to the rule prohibiting hearsay evidence that apply when a declarant is deemed "unavailable as a witness" pursuant to MRE 804(a). Consequently, if a witness is determined to be unavailable, certain evidence that would otherwise be inadmissible may be admitted at trial so long as it meets the requirements of MRE 804(b) and is not otherwise excluded by another rule of evidence.[31]

With regard to hearsay, a witness's unavailability to testify is governed by MRE 804(a), which provides:

> *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant–
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

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[29] MRE 801(c).

[30] *Gursky*, 486 Mich at 606; see also MRE 802 ("Hearsay is not admissible except as provided by these rules.").

[31] See, e.g., MRE 402 ("Evidence which is not relevant is not admissible."); MRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); MRE 404(a) (stating that generally "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion").

> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

We focus on MRE 804(a)(4), which defines "unavailability" to include a declarant who lacks the physical or mental capability to testify. MRE 804(a)(4) provides that unavailability as a witness includes situations in which the declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity[.]" We focus solely on the phrase "then existing . . . mental . . . infirmity," which provides the basis for our decision. First, we address the term "infirmity." "Infirmity" is defined as "the quality or state of being infirm; lack of strength."[32] In turn, "infirm" is defined as "feeble or weak in body or health, [especially] because of age."[33] Of note, age is specifically designated as a factor that may give rise to an infirmity.

MRE 804(a)(4) contemplates both physical and mental infirmities, though we focus only on whether a

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[32] *Random House Webster's College Dictionary* (1995).

[33] *Id.*

mental infirmity existed in this case.[34] The term "mental" modifies "infirmity" and is defined as "**1.** of or pertaining to the mind. **2.** of, pertaining to, or affected by a disorder of the mind[.]"[35] Thus, read together, the phrase "mental infirmity" as used in MRE 804(a)(4) encompasses weakness or feebleness of the mind—one cause of which may be an individual's age.[36]

Furthermore, the language of the rule establishes that the mental infirmity need not be permanent, or even longstanding. The phrase "then existing" specifically limits the temporal scope within which a witness's availability under MRE 804(a)(4) may be assessed; the only relevant reference point is the point at which the witness takes the stand. As a result, the declarant need not suffer from a permanent illness or infirmity. Thus, the fact that RS was competent and available to testify at two preliminary examinations does not affect the determination whether she was mentally capable or infirm for purposes of MRE 804(a)(4) at the time her testimony was sought at trial. Rather, the only relevant inquiry is her condition at the time she was called to testify.

In holding that a child may be mentally infirm in the type of extraordinarily stressful trial situation like the one that existed here, we recognize the obvious truth

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[34] The prosecution has not advanced the argument that RS suffered a physical infirmity, nor is there any record evidence suggesting that she did. MRE 804(a)(4) also contemplates physical and mental illness, though neither of these conditions are considered here.

[35] *Random House Webster's College Dictionary* (1995).

[36] Though this Court has never addressed the ambit of MRE 804(a)(4) with regard to age, the Court of Appeals has recognized that an 84-year-old woman was unavailable because she was "physically or mentally infirm . . . ." *People v Murry*, 106 Mich App 257, 260; 307 NW2d 464 (1981). However, that decision appears to have been based more on the declarant's physical illnesses, which made her attendance at court "detrimental to her health." *Id.*

that children lack the same level of mental maturity as that exhibited by and expected of most adults. Legal and psychological research confirms this uncontroversial proposition.[37] As a result of these limitations, young children are less mentally equipped to cope with severe emotional distress.[38] Testifying in open court can be a harrowing experience for anyone, and young children are much more susceptible to emotional breakdowns than adults.[39] Indeed, testifying in open court "can make some children tearful, ill, or inarticulate in the courtroom. . . . Under the stress of testifying, some children may regress to a more immature level of behavior."[40] When these emotional terrors are severe and a child has not developed the mental capacity to overcome this distress, an emotional breakdown may eliminate any possibility of securing testimony from the young child.

RS was four years old at the time she was called to testify at trial. She demonstrated an inability to overcome her distress when she was unable to answer the trial court's questions. When asked whether she knew the difference between the truth and a lie, RS responded, "No," and was unable to explain what a

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[37] Schuman, Bala & Lee, *Developmentally appropriate questions for child witnesses*, 25 Queen's L J 251, 255 (1999) (recognizing that "[c]hildren are not just short adults"). See also *infra* notes 38-40.

[38] Patton, *Viewing child witnesses through a child and adolescent psychiatric lens: How attorneys' ethical duties exacerbate children's psychopathology*, 16 Widener L R 369 (2010) ("Many child abuse victims are the most psychologically fragile witnesses in the legal system.").

[39] Schuman, Bala & Lee, at 255, 297 (stating that testifying in court can be "deeply upsetting" for young children and "can cause them considerable anxiety, even terror").

[40] Myers, Saywitz & Goodman, *Psychological research on children as witnesses: Practical implications for forensic interviews and courtroom testimony*, 28 Pac L J 3, 70 (1996-1997) (citation and quotation marks omitted).

promise means. Furthermore, she answered, "No" to whether she knew what the truth is, what a lie is, and what a promise is. Importantly, throughout her examination RS had tears in her eyes, was wringing her hands, and ultimately began to cry, rendering her unable to answer counsels' questions. While an older youth or an adult may have been able to suppress the unease of testifying in open court, RS, as a young child, was susceptible to particular challenges that must be taken into consideration when determining whether a witness is mentally infirm under MRE 804(a)(4). As could be expected from a young child, especially in the context of alleged criminal sexual conduct, RS simply did not have the mental maturity to overcome her debilitating emotions while on the stand.[41]

Under the plain language of the rule, and with our recognition of the unique mental and emotional limitations of youth, we hold that RS had a then existing mental infirmity in this case because the facts show that she was unable to sufficiently cope with her significant emotional distress and give testimony at trial, a result of her particularly young age. Therefore, she was unavailable within the plain meaning of MRE 804(a)(4).

We recognize the case-specific nature of the inquiry into whether a witness suffers from a "then existing mental infirmity." In this case, the severity of RS's emotional distress made it impossible for her to testify. This is highlighted by the fact that she had previously

[41] Though the inquiries may be similar, our holding today does not mean that a finding of incompetence pursuant to MRE 601 necessarily renders a witness unavailable to testify under MRE 804(a)(4). While the definitions of the concepts undoubtedly have some overlap, as they do in the instant case, the two rules employ different language, and therefore require different inquiries. It is unnecessary for us to explicate the exact parameters of the overlap in this case.

been able to give testimony about the alleged sexual contacts at issue in this case. Before trial courts hold that a child has a then existing mental infirmity, we urge them to use, when appropriate, the tools in our court rules and statutes to accommodate young witnesses. For example, MCL 600.2163a enables the use of dolls or mannequins to aid children in their testimony. Moreover, in certain circumstances, the statute allows for witness accompaniment by a "support person," use of videorecorded statements, and testimony via closed-circuit television.[42]

The Court of Appeals concluded that RS did not demonstrate a mental infirmity, characterizing her conduct merely as an inability to provide the trial court with assurances that she was able and willing to testify truthfully. While the Court of Appeals may be correct that she was unable to testify truthfully at the time of trial, this fact does not foreclose the possibility that RS's mental infirmity caused this inability, which ultimately rendered her unavailable. In fact, as discussed, RS clearly demonstrated that, at the time of her trial testimony, she was emotionally overwhelmed and was mentally incapable of overcoming this distress and was therefore unable to affirm that she could testify truthfully. Therefore, the Court of Appeals erred when it failed to examine the reason for RS's inability to testify.

We conclude that the trial court abused its discretion in ruling that RS was not unavailable. As discussed, by using the word "infirmity," MRE 804(a)(4) plainly contemplates that a declarant is unavailable for hearsay purposes when she is unable to overcome severe emotional trouble resulting from the limitations of her young age. Though this is an issue of first impression,

[42] See also MRE 803A (hearsay exception for a child's statement about sexual acts).

the trial court committed a legal error in its interpretation of the rule when it held that RS was not infirm when she was unable to give testimony. The trial court's decision not to admit RS's preliminary examination testimony on the basis of its erroneous legal interpretation necessarily constitutes an abuse of discretion.

IV. CONCLUSION

The language of MRE 804(a)(4) includes within its list of individuals who are unavailable those witnesses who are mentally infirm at the time they are called to give testimony. In this case, RS was unable to testify because she could not overcome her significant emotional distress, a result of the unique limitations of her youth and, therefore, she was mentally infirm at the time of her trial testimony. Thus, the lower courts erred by concluding that RS was not unavailable under MRE 804(a)(4).[43] We reverse the judgment of the Court of Appeals and remand this matter for further proceedings consistent with this opinion. On remand, the trial court must determine whether RS's preliminary examination testimony satisfied the requirements of MRE 804(b)(1) and, if so, whether admission of that testimony would violate defendants' rights under the Confrontation Clause.

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

MARKMAN, J. (*concurring*). I concur in the majority's conclusion that RS was unavailable for purposes of

[43] Because RS falls within the ambit of a term listed in MRE 804(a)(4), this Court need not address whether MRE 804(a) provides an exhaustive or an illustrative list of situations in which a witness's testimony is unavailable.

MRE 804(a). I respectfully disagree with the majority, however, that the facts of her youth and apparent fear of testifying in the presence of the person charged with her sexual abuse are sufficient to deem her "mentally infirm" under MRE 804(a)(4). Instead, I would hold that RS was unavailable under the general principle of unavailability found in MRE 804(a). That rule, in full, provides:

> *"Unavailability as a witness" includes* situations in which the declarant—
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
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> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or *then existing physical or mental illness or infirmity*; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. [MRE 804(a) (emphasis added).]

I agree with the majority that the language relevant to analysis under MRE 804(a)(4) is the phrase "then existing . . . mental . . . infirmity[.]" But in my view, a four-year-old child who, so far as we know, does not

suffer from any sort of developmental disability, and who appears in all respects to be an entirely normal child of this age, simply cannot be properly categorized as suffering from a mental infirmity.

The majority is correct, of course, that at least one prominent dictionary, *Random House Webster's College Dictionary* (1995), defines "infirmity" as "the quality or state of being infirm; lack of strength." This is the second definition of "infirmity" listed by *Random House Webster's*. Notably, however, the first definition specifies "a physical weakness or ailment: *the infirmities of age*." *Id.* Of course, in the present case, "mental" modifies infirmity, so that a definition of the term as "mental weakness or ailment," including the contextual example, "the infirmities of age," is appropriate. This first definition of "infirmity" matches up, unsurprisingly, with *Random House Webster's* first definition of "infirm": "feeble or weak in body or health, esp[ecially] because of age." *Id.* The majority seizes on this last phrase, "especially because of age," pointing out that one "cause" of "weakness or feebleness of the mind" "may be an individual's age." *Ante* at 726. The majority then ultimately holds that "MRE 804(a)(4) plainly contemplates that a declarant is unavailable for hearsay purposes when she is unable to overcome severe emotional trouble resulting from the limitations of her *young age*." *Ante* at 729 (emphasis added).

This analysis is far too strained, in my judgment. The dictionary references to "especially because of age" and "the infirmities of age" plainly refer not to *youth* but to *old age*. When one speaks of a person who suffers from weakness or a state of feebleness because of that person's age, or when we lament the "infirmities of age," I believe that the reasonable reader or listener understands such references to be to *advanced* age. I do

not believe that a reasonable person would characterize a perfectly healthy and developmentally sound four-year-old child as mentally infirm, or as suffering from the infirmities of age. This interpretation is also borne out by other dictionary definitions of "infirm." The *American Heritage Dictionary* (2d College ed), for instance, defines "infirm" as "[w]eak in body,[1] esp[ecially] from *old* age; feeble." (Emphasis added.) Similarly, *Webster's Third New International Dictionary* (1966) defines the term as "not strong or sound physically[2] : of poor or *deteriorated vitality*, esp[ecially] *as a result of age* : FEEBLE[.]" (Emphasis added.) An especially young individual cannot be said to have experienced "deteriorated vitality" as a result of age, as deterioration assumes a previous, more robust state. Thus, "deteriorat[ion] . . . as a result of age" must reasonably refer to old age. Accord *People v Murry*, 106 Mich App 257, 260; 307 NW2d 464 (1981) (*84-year-old* witness found to be "physically or mentally infirm").

Though, for these reasons, I cannot join in the majority's conclusion that RS was unavailable under MRE 804(a)(4) because of a "mental infirmity," I do conclude that she was in fact unavailable under the general principle of unavailability set forth in MRE 804(a). The rule begins, " 'Unavailability as a witness' *includes* [the five situations listed in MRE 804(a)(1) through (5)]." MRE 804(a) (emphasis added). Use of the word "includes," of course, indicates that the list of five situations is not exhaustive or all-encompassing. See *Random House Webster's* ("include" means "to contain or encompass as *part of* a whole") (emphasis added).

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[1] Or, given the modifier "mental" in MRE 804(a)(4), read "mind" rather than "body."

[2] Again, because we are dealing with "mental infirmity," "mentally" should be substituted for "physically" here.

This rather obvious proposition is bolstered by our caselaw. In *People v Meredith*, 459 Mich 62, 65; 586 NW2d 538 (1998), we held that a would-be witness who intended to assert her Fifth Amendment right and not testify at trial was "unavailable" as a witness for purposes of MRE 804(a), even though the situation was "not expressly treated in MRE 804(a) . . . ." We stated that invocation of the Fifth Amendment right "is of the same character as the other situations outlined in the subrule." *Id.* at 65-66. The Court of Appeals has reached a similar conclusion in a case in which the would-be witness appeared at court the day of trial but abruptly left the courthouse before testifying. "[W]hile [the would-be witness's] eleventh-hour decision to leave the courthouse rather than testify at trial is not expressly addressed under MRE 804(a)," the Court said, "it is also of the same character as other situations outlined in that rule of evidence." *People v Adams*, 233 Mich App 652, 658; 592 NW2d 794 (1999), citing *Meredith*, 459 Mich at 65-66.

"[W]hile 'unavailability' is a term of art under MRE 804(a), it also bears a close nexus to the ordinary meaning of the word." *Meredith*, 459 Mich at 66. *Random House Webster's* defines "available" first as "suitable or ready for use; at hand" and second as "readily obtainable; accessible[.]" *American Heritage* likewise defines the term first to mean "[a]ccessible for use; at hand." Examination of MRE 804(a)(1) through (5) suggests that, in addition to not being "suitable or ready for use; at hand," in order for a would-be witness to be deemed "unavailable" under MRE 804(a), it must also be the case that efforts to render the would-be witness "suitable or ready for use; at hand" or "accessible for use": (1) are impermissible (as in the case of MRE 804(a)(1)); (2) have failed to yield availability (as

in the cases of MRE 804(a)(2) and (5)); or (3) would be futile (as in the cases of MRE 804(a)(3) and (4)).

In this case the trial court separately ruled that, under MRE 601, RS was not competent to testify. That rule provides that a person is competent to testify unless she "does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably . . . ." Thus, in order to be found incompetent to testify, an individual must either: (1) lack sufficient mental or physical capacity or (2) lack a sense of obligation to testify truthfully and understandably. In this case, there was no indication of physical incapacity on RS's part, and the trial court found that RS was not lacking in mental capacity. Further, the trial court found that RS was "able to testify if she [could have taken] the equivalent of the oath." These facts, taken together, clearly demonstrate that the trial court found RS incompetent not because of a lack of "sufficient physical or mental capacity," but because RS lacked a "sense of obligation to testify truthfully and understandably." Indeed, when the trial court attempted to qualify her as a witness, RS indicated that she did not know the difference between the truth and a lie.

Further, as the facts set forth by the majority indicate, two good-faith efforts to qualify RS as a witness were made and failed. When RS was called as a witness at trial, the judge asked RS a lengthy and specially tailored set of questions designed to determine whether RS was able to distinguish between the truth and a lie, and she did not respond satisfactorily. After this effort failed, the judge had RS return to her parents for several minutes, presumably to calm her down. Counsel, RS's parents, and a police officer then met together in the judge's chambers during a 40-minute recess.

Following this recess, a second effort to qualify RS was made, with the judge again carefully questioning RS in a manner sensitive to her youth. This effort also failed. When the prospect of having the parties' attorneys ask RS questions regarding her ability to testify was raised, Stanley Duncan's counsel responded, "I have [no questions]," and Vita Duncan's counsel said nothing.

In summary, the trial court found that RS lacked a sense of obligation to tell the truth. She therefore was not "suitable or ready for use; at hand" as a witness. Repeated good-faith attempts to qualify RS (and thus render her *available*) were unsuccessful. Because the trial court found that RS lacked a sense of obligation to tell the truth, and because good-faith efforts to qualify her as a witness were made yet failed, RS was genuinely "unavailable" under the general principle of unavailability found in MRE 804(a), and I would hold accordingly.

MCCORMACK, J. (*concurring*). I concur in the majority opinion and write separately because I believe that there is a doctrinal foundation supporting the proposition that the criminal law should recognize that children are qualitatively different from adults, which is relevant to our decision in this case. Over the course of the past decade, the United States Supreme Court has acknowledged that, as in many other areas of the law, the criminal law must recognize that the unique characteristics of children render them inherently different from adults.[1] Indeed, the Supreme Court has noted that in certain circumstances, children are *constitutionally* different from adults.[2] Although this caselaw has in-

[1] See, e.g., *JDB v North Carolina*, 564 US ___, ___; 131 S Ct 2394, 2404 n 6; 180 L Ed 2d 310 (2011).

[2] *Miller v Alabama*, 567 US ___, ___; 132 S Ct 2455, 2464; 183 L Ed 2d 407 (2012).

volved young offenders and not young witnesses, I believe that the underlying rationale is relevant here.

In *Roper v Simmons*,[3] the Supreme Court held that the Eighth Amendment prohibits capital punishment for crimes committed while a defendant was under the age of 18. In *Graham v Florida*,[4] the Court held that juvenile offenders cannot be sentenced to life imprisonment without parole for nonhomicide offenses. In so finding, the Court stated that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[5] Most recently, in *Miller v Alabama*,[6] the Court held that mandatory sentences of life without the possibility of parole are unconstitutional when applied to minors. *Miller* noted that children are constitutionally different from adults when it comes to sentencing and stated that the social science and cognitive science studies supporting the Court's decisions recognizing children as different from adults in *Roper* and *Graham* have only become more robust in the intervening years.[7]

Admittedly, this caselaw is limited to sentencing theory and juvenile culpability, concerns that are not implicated here. In *JDB v North Carolina*,[8] however, the Supreme Court extended its consideration of minors in the criminal justice system outside the context of sentencing.[9] The Court addressed the differences

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[3] *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

[4] *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

[5] *Id.* at ___; 130 S Ct at 2026.

[6] *Miller*, 567 US ___; 132 S Ct 2455.

[7] *Id.* at ___; 132 S Ct 2464 n 5.

[8] *JDB*, 564 US ___; 131 S Ct 2394.

[9] See also *Haley v Ohio*, 332 US 596, 599; 68 S Ct 302; 92 L Ed 224 (1948) (opinion by Douglas, J.) ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is

between children and adults more generally, noting that "[a] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself . . . ."[10] The Court further acknowledged that "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them," and that the legal disqualifications placed on children as a class "exhibit the settled understanding that the differentiating characteristics of youth are universal."[11]

The majority correctly holds that a child declarant may be declared unavailable as a witness if, as a result of his or her youth, the declarant's mental distress rises to the level of a then existing mental infirmity. I agree with the majority opinion that the legal literature supports the conclusion that children are not merely "miniature adults."[12] Four-year-old RS simply was not able to cope with the emotional trauma of testifying the

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the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest."); *Gallegos v Colorado*, 370 US 49, 54; 82 S Ct 1209; 8 L Ed 2d 325 (1962) ("But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police."); *People v White*, 493 Mich 187, 232; 828 NW2d 329 (2013) (KELLY, J., dissenting) (stating that "[g]iven 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," and that "[i]n the custodial-interrogation context, the unique attributes of minors require courts to exercise 'special care' in their scrutiny of the record").

[10] *JDB*, 564 US at ___; 131 S Ct at 2403 (citations and quotation marks omitted).

[11] *Id.* at ___; 131 S Ct at 2403-2404.

[12] *Id.* at ___; 131 S Ct at 2397.

way an adult could, and it therefore makes sense that a trial court might find that RS had a then existing mental infirmity under MRE 804(a)(4), even if a similarly situated adult declarant might not be found unavailable under the same subrule. In my view, the Supreme Court's acknowledgement that the criminal law must recognize that children are different from adults underscores the majority's holding in this case.

CAVANAGH, J. (*dissenting*). I would affirm the result reached by the Court of Appeals. I do not join the majority opinion because, in my view, Justice MARKMAN raises a persuasive point that RS cannot properly be categorized as suffering from an infirmity in this case.

Nevertheless, I disagree with the result reached in Justice MARKMAN's opinion, and in the majority opinion, even accepting for purposes of this appeal Justice MARKMAN'S conclusion that the use of the word "includes" within MRE 804(a) indicates that the definition of "unavailability as a witness" contains a "general principle of unavailability." Given the "importance accorded unavailability in the scheme of hearsay exceptions," 2 McCormick, Evidence (7th ed), § 253, p 244, and because "our legal system makes public testimony in front of the fact finder an important element of the truth-seeking process," *People v Johnson*, 118 Ill 2d 501, 510; 517 NE2d 1070 (1987), in my judgment, more rigorous attempts than were made in this case should occur before declaring a child witness unavailable.

In my view, the facts of this case illustrate the tension created in our courts by attempting to apply the rule of evidence to the "unique situation of a child witness in an alleged sexual abuse case." *People v Straight*, 430 Mich 418, 422; 424 NW2d 257 (1988). Specifically, "[t]he tension originates from the conflict between two

underlying policies: a desire to protect the most vulnerable of our citizens from heinous and damaging exploitation, and a need to protect the accused individual against both erroneous conviction and the devastating consequences that can follow." *Id.* at 422-423. Because I question whether our existing rule of evidence was drafted with the unique issues involving child witnesses in mind, I would consider reexamining our rule concerning unavailability, as other jurisdictions have done.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Leave to Appeal Denied May 17, 2013:

In re MORRIS, No. 146993; reported below: 300 Mich App 95.

PEOPLE v RYAN, No. 147050; Court of Appeals No. 315192.

Order Dismissing Appeal on Stipulation Entered May 17, 2013:

CHERRYLAND ELECTRIC COOPERATIVE v BLAIR TOWNSHIP, No. 145340, 145341, and 145342; Court of Appeals No. 296829, 296830, and 296856.

Leave to Appeal Denied May 21, 2013:

PEOPLE v BOWMAN, No. 146968; Court of Appeals No. 314537.

Leave to Appeal Granted May 22, 2013:

NACG LEASING v DEPARTMENT OF TREASURY, No. 146234; Court of Appeals No. 306773. The parties shall address the applicability of the use tax to a transaction where tangible personal property is purchased by one party and leased to another party when the purchaser/lessor does not obtain actual possession of the property.

PEOPLE v LAFOUNTAIN, No. 146496; Court of Appeals No. 306858. The parties shall address: (1) whether the presence of a firearm in a room that was accessed by the defendant is sufficient to prove a charge under MCL 333.7401c for a violation that "involves the possession, placement or use of a firearm" if the defendant occupied another room where methamphetamine was manufactured within a residence owned and possessed by another; and (2) whether points may be assessed for prior record variable 7 (PRV 7), MCL 777.57, where the defendant was convicted by a jury of charges that were subsequently vacated by the trial court.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 22, 2013:

PEOPLE v JOEL GOMEZ, No. 146235; Court of Appeals No. 301706. CAVANAGH, J., would grant leave to appeal.

PEOPLE v MARK JONES, No. 146288; Court of Appeals No. 308482.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v CONLEY, No. 146312; Court of Appeals No. 304309.

PEOPLE v FREDERICK WILLIAMS, No. 146344; Court of Appeals No. 311602.

PEOPLE v RAND, No. 146515; Court of Appeals No. 305493.

PEOPLE v DANIELAK, No. 146518; Court of Appeals No. 305491.

PEOPLE v MONTANEZ, No. 146630; Court of Appeals No. 305358.

Summary Disposition May 23, 2013:

In re BOYNTON, No. 145868; Court of Appeals No. 310889. 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.

Summary Disposition May 24, 2013:

KENNEY v BOOKER, No. 145116; Court of Appeals No. 304900. On order of the Court, the briefs and oral arguments of the parties having been considered by the Court, we affirm the April 3, 2012 judgment of the Court of Appeals. Save for limited exceptions, "[a]n action for habeas corpus . . . may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever." MCL 600.4307. Habeas relief is appropriate only where a habeas petitioner can show a radical defect that renders a proceeding or judgment void. *In re Stone*, 295 Mich 207, 209 (1940). Habeas corpus does not function as a writ of error, *In re Joseph*, 206 Mich 659, 661-662 (1919), and it "is not available to test questions of evidence," *In re Stone* at 212. The plaintiff here challenges the legal standard employed by the Parole Board to revoke his parole and claims that the evidence was insufficient to establish an actual violation of parole. These alleged errors do not constitute radical defects that render void the proceedings of the Parole Board. Accordingly, the plaintiff is not entitled to habeas relief.

CAVANAGH, J., concurs in the result only.

ADAIR v STATE OF MICHIGAN, No. 146371; reported below: 298 Mich App 383. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment denying all attorney fees for Phase II of the plaintiffs' Headlee Amendment litigation. As explained by the special master, the plaintiffs established that their attorneys performed reasonable and necessary work relating to the record keeping claim for which they are entitled to attorney fees. *Adair v Michigan*, 486 Mich 468, 493-494 (2010). We remand this case to the Court of Appeals to articulate on the record specific factual findings regarding the amount of attorney fees that are properly compensable for Phase II and enter an award consistent with those findings, bearing in

mind that the burden of proof to establish the attorney time devoted to the record keeping claim and the reasonableness of the requested fees rests on the plaintiffs. See *Smith v Khouri*, 481 Mich 519, 528-529 (2008) (opinion by TAYLOR, C.J.). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

In re GORALEWSKI ESTATE, No. 146831; Court of Appeals No. 312575. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the May 17, 2012 order of the Grand Traverse Probate Court determining that the petitioner lacked standing, and we remand this case to the probate court for consideration of the issues regarding the ripeness of the petitioner's claim in light of MCL 700.7604. The probate court shall also address the alleged conflict of interest by respondent attorney Terry C. Rogers. We direct the probate court to decide all outstanding issues in this case on an expedited basis.

We do not retain jurisdiction.

Leave to Appeal Granted May 24, 2013:

PEOPLE v DWAYNE WILSON, No. 146480; Court of Appeals No. 311253.

Leave to Appeal Denied May 24, 2013:

PEOPLE v DWAYNE WILSON, No. 145497; Court of Appeals No. 309493.

Summary Disposition May 28, 2013:

PEOPLE v HOGAN, No. 143004; Court of Appeals No. 302402. pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court, and we remand this case to the trial court for resentencing. The trial court erred in assessing 10 points for Offense Variable 13, MCL 777.43(1)(d), because the sentencing offense was not part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v RODELL BROWN, No. 146614; Court of Appeals No. 309499. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's claim of appeal, filed in Docket No. 307163, as having been timely filed and shall reinstate the appeal. The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing and admits his sole responsibility for the error. Accordingly, the defendant was deprived of his appeal of right as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US

470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999).

Costs are imposed against the attorney, only, in the amount of $250, to be paid to the clerk of this Court.

We do not retain jurisdiction.

CITIGROUP GLOBAL MARKETS REALTY CORP v SCHMITZ, No. 146744; Court of Appeals No. 309019. 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 KREISER, No. 146825; Court of Appeals No. 311560. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied May 28, 2013:

WOODWARD NURSING CENTER, INC v MEDICAL ARTS, INC, No. 144857; Court of Appeals No. 295297.

PEOPLE v DODD, No. 145979; Court of Appeals No. 310960.

PEOPLE v POUNCY, No. 145994; Court of Appeals No. 306257.

PEOPLE v DIXON, No. 146097; Court of Appeals No. 309468.

PEOPLE v MARCEL MILLS, No. 146126; Court of Appeals No. 310299.

PEOPLE v SOULE, No. 146168; Court of Appeals No. 309289.

PEOPLE v TIMOTHY ROBINSON, No. 146179; Court of Appeals No. 312120.

PEOPLE v PATILLO, No. 146181; Court of Appeals No. 308209.

PEOPLE v BRZEZINSKI, No. 146204; Court of Appeals No. 311687.

PEOPLE v BUIE, No. 146240; reported below: 298 Mich App 50.

PEOPLE v GIBSON, No. 146244; Court of Appeals No. 310582.

PEOPLE v CRAWFORD, No. 146259; Court of Appeals No. 312047.

PEOPLE v RODGERS, No. 146270; Court of Appeals No. 307896.

PEOPLE v WESTEIN, No. 146275; Court of Appeals No. 309944.

PEOPLE v HOWARD, No. 146277; Court of Appeals No. 308544.

PEOPLE v GREENLEE, No. 146290; Court of Appeals No. 310482.

PEOPLE v YOUNG, No. 146291; Court of Appeals No. 311973.

PEOPLE v MOTT, No. 146303; Court of Appeals No. 310298.

PEOPLE v THOMAS, No. 146305; Court of Appeals No. 310629.

PEOPLE v BOMAR, No. 146306; Court of Appeals No. 310546.

PEOPLE v WELLS, No. 146337; Court of Appeals No. 310001.

PEOPLE v TAYLOR, No. 146338; Court of Appeals No. 306567.

PEOPLE v KALAK, No. 146341; Court of Appeals No. 310410.

PEOPLE v PETUSH, No. 146343; Court of Appeals No. 312446.

PEOPLE v ANDERSON, No. 146345; Court of Appeals No. 310344.

PEOPLE v ANTHONY WILLIAMS, No. 146347; Court of Appeals No. 305348. CAVANAGH, J., would grant leave to appeal.

PEOPLE v MOSS, No. 146348; Court of Appeals No. 310364.

PEOPLE v RUSSELL JONES, No. 146349; Court of Appeals No. 311913.

PEOPLE v FOSTER, No. 146358; Court of Appeals No. 311469.

PEOPLE v BIRGE, No. 146360; Court of Appeals No. 309470.

PEOPLE v MORRIS MILLS, No. 146365; Court of Appeals No. 310290.

PEOPLE v BOYKINS, No. 146374; Court of Appeals No. 310158.

PEOPLE v CLAY, No. 146397; Court of Appeals No. 309931.

SWEEZER v DEPARTMENT OF CORRECTIONS, No. 146422; Court of Appeals No. 310042.

GREER v DETROIT PUBLIC SCHOOLS, No. 146426; Court of Appeals No. 304197.

PILLETTE v DEPARTMENT OF CORRECTIONS, No. 146454; Court of Appeals No. 312690.

MIDWEST BUSINESS CREDIT, LLC v TTOD LIQUIDATION, INC, No. 146462; Court of Appeals No. 305569.

PEOPLE v HOLLINS, No. 146494; Court of Appeals No. 312852.

PEOPLE v HENIX, No. 146507; Court of Appeals No. 312957.

In re NOWAK REVOCABLE LIVING TRUST, No. 146538; Court of Appeals No. 298212.

PEOPLE v JULIAN, No. 146549; Court of Appeals No. 306044.

PEOPLE v RIVERA, No. 146550; Court of Appeals No. 307315. CAVANAGH, J., would grant leave to appeal.

PEOPLE v HOEFLING, No. 146551; Court of Appeals No. 303097.

PEOPLE v STACKPOOLE, No. 146552; Court of Appeals No. 307316. CAVANAGH, J., would grant leave to appeal.

PEOPLE v SEAN CLARK, No. 146556; Court of Appeals No. 307134.

PEOPLE v DONTYA JOHNSON, No. 146557; Court of Appeals No. 305488.

PEOPLE v ROZEMA, No. 146571; Court of Appeals No. 308760.

ANDERSON v DAVIS, No. 146576; Court of Appeals No. 306342.

PEOPLE v PADILLA, No. 146579; Court of Appeals No. 301665.

PEOPLE v MARTEZ MILLER, No. 146580; Court of Appeals No. 306241.

PEOPLE v LIVINGSTON, No. 146589 and 146590; Court of Appeals No. 306614 and 306857.

PEOPLE v SHAW, No. 146591; Court of Appeals No. 306273.

PEOPLE v JERRELL MOORE, No. 146597; Court of Appeals No. 298682.

ZEHNDER v ZEHNDER, No. 146602; Court of Appeals No. 305691.

BANK OF NEW YORK MELLON v BREZZELL, No. 146605; Court of Appeals No. 309899.

PEOPLE v CALVIN JOHNSON, No. 146606; Court of Appeals No. 305333.

PEOPLE v IRELAND, No. 146612; Court of Appeals No. 307155.

PEOPLE v RODRIGUEZ, No. 146620; Court of Appeals No. 307892.

PEOPLE v ATKINSON JACKSON, No. 146623; Court of Appeals No. 304161.

PEOPLE v WOOD, No. 146632; Court of Appeals No. 303390.

PEOPLE v HARDAWAY, No. 146633; Court of Appeals No. 304814.

THOMAS v FERGUSON, No. 146638; Court of Appeals No. 292445.

MCKEOWN v STELKIC, No. 146654; Court of Appeals No. 303524.

PEOPLE v COSS, No. 146663; Court of Appeals No. 310119.

PEOPLE v WINGFIELD, No. 146664; Court of Appeals No. 303559.

CITY OF LANSING v RAPP, No. 146667; Court of Appeals No. 309426.

PEOPLE v GONZALES, Nos. 146671 and 146673; Court of Appeals Nos. 313596 and 313595.

PEOPLE v LOCKHART, No. 146676; Court of Appeals No. 311322.

PEOPLE v MULDER, No. 146677; Court of Appeals No. 307782.

PEOPLE v AARON SMITH, No. 146678; Court of Appeals No. 310022.

PEOPLE v DURR, No. 146682; Court of Appeals No. 311305.

PEOPLE v HOYT, No. 146683; Court of Appeals No. 308062.

PEOPLE v KING, No. 146688; Court of Appeals No. 306480.

PEOPLE v MALONE, Nos. 146690 and 146691; Court of Appeals Nos. 304650 and 304651.

PEOPLE v WITHERELL, No. 146692; Court of Appeals No. 312335.

PEOPLE v STOKES, No. 146693; Court of Appeals No. 307529.

PEOPLE v BURLEW, No. 146695; Court of Appeals No. 306696.

PEOPLE v COLSTON, No. 146704; Court of Appeals No. 306459.

PEOPLE v RICHARD ALLAN, No. 146705; Court of Appeals No. 313180.

PEOPLE v ROSS, No. 146706; Court of Appeals No. 313229.

PEOPLE v HERZIG, No. 146707; Court of Appeals No. 313614.

GRIEVANCE ADMINISTRATOR v MONROE, No. 146709.

PEOPLE v MACUGA, No. 146710; Court of Appeals No. 314122.

PEOPLE v OTERO, No. 146716; Court of Appeals No. 310274.

PEOPLE v ELLIS MILLS, No. 146717; Court of Appeals No. 293378.

PEOPLE v SAUNDERS, No. 146730; Court of Appeals No. 307108.

PEOPLE v CROSS, No. 146736; Court of Appeals No. 311331.

PEOPLE v HOPWOOD, No. 146738; Court of Appeals No. 312965.

PEOPLE v DIXON, No. 146739; Court of Appeals No. 312154.

PEOPLE v JACQUES WILLIAMS, No. 146742; Court of Appeals No. 313904.

PIRATE LOGISTICS, INC v CITY OF ROMULUS, No. 146745; Court of Appeals No. 307262.

BATTLES v BATTLES, No. 146747; Court of Appeals No. 306606.

PEOPLE v BRYANT WILLIAMS, No. 146749; Court of Appeals No. 302154.

WATTS v CITY OF FLINT, No. 146754; Court of Appeals No. 307686. CAVANAGH, J., would grant leave to appeal.

KNIGHT ENTERPRISES, INC v RPF OIL COMPANY, No. 146757; reported below: 299 Mich App 275.

PEOPLE v STEWART, No. 146762; Court of Appeals No. 307514.

FARM BUREAU INSURANCE COMPANY v CHUKWUEKE, No. 146765; Court of Appeals No. 306827.

PEOPLE v ROBERT GAINES, No. 146767; Court of Appeals No. 308378.

GULLEY v SMITH, No. 146769; Court of Appeals No. 304291.

PEOPLE v BULL, No. 146771; Court of Appeals No. 313164.

PEOPLE v PURCHASE, No. 146772; Court of Appeals No. 309836.

PEOPLE v CORNELL, No. 146780; Court of Appeals No. 306825.

PEOPLE v BRYANT, No. 146781; Court of Appeals No. 304458.

PEOPLE v MICSAK, No. 146782; Court of Appeals No. 308317.

PEOPLE v GRAHAM, No. 146784; Court of Appeals No. 308661.

CROMIE v CROMIE, No. 146790; Court of Appeals No. 308271.

PEOPLE v ESCH, No. 146800; Court of Appeals No. 313358.

PEOPLE v ROBERT HOWELL, No. 146804; Court of Appeals No. 306186.

PEOPLE v ANDRE, No. 146808; Court of Appeals No. 313425.

PEOPLE v DAWSON, No. 146810; Court of Appeals No. 314092.

PEOPLE v HUBBERT, No. 146813; Court of Appeals No. 302655.

PEOPLE v FRAZIER, No. 146817; Court of Appeals No. 310088.

PEOPLE v CARTER, No. 146874; Court of Appeals No. 312515.

MERCANTILE BANK MORTGAGE COMPANY, LLC v MONROE APARTMENTS, LLC, No. 146880; Court of Appeals No. 309884.

MCCORMICK v LELAND, No. 146907; Court of Appeals No. 314086.

CITIZENS UNITED AGAINST CORRUPT GOVERNMENT v CITY OF DETROIT FINANCIAL REVIEW TEAM, No. 147002; Court of Appeals No. 314639.

Superintending Control Denied May 28, 2013:

WADE-KNIGHT v ATTORNEY GRIEVANCE COMMISSION, No. 146621.

BENTON v ATTORNEY GRIEVANCE COMMISSION, No. 146658.

KNIGHT v ATTORNEY GRIEVANCE COMMISSION, No. 146679.

BEAUCHEMIN v ATTORNEY GRIEVANCE COMMISSION, No. 146726.

ROSS v ATTORNEY GRIEVANCE COMMISSION, No. 146743.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 146864.

COPAS v BOARD OF LAW EXAMINERS, No. 146914.

Reconsideration Denied May 28, 2013:

THE CITY OF BLOOMFIELD HILLS v FROLING, No. 145727; Court of Appeals No. 299721. Leave to appeal denied at 493 Mich 938.

PEOPLE v EDDIE SMITH, No. 145724; Court of Appeals No. 310754. Leave to appeal denied at 493 Mich 918.

PEOPLE v KELLMAN, No. 145756; Court of Appeals No. 307345. Leave to appeal denied at 493 Mich 897.

VITTIGLIO v VITTIGLIO, No. 145825 and 145826; Court of Appeals No. 303724 and 304823. Leave to appeal denied at 493 Mich 936.

PEOPLE v ARMSTRONG, No. 145856; Court of Appeals No. 308991. Leave to appeal denied at 493 Mich 923.

BONNER v BALLY TOTAL FITNESS OF THE MIDWEST, INC, No. 145893; Court of Appeals No. 302782. Leave to appeal denied at 493 Mich 938.

PEOPLE v SPENCER, No. 145945; Court of Appeals No. 308103. Leave to appeal denied at 493 Mich 939.

PEOPLE v RICHARD ROBINSON, No. 145983; Court of Appeals No. 310963. Leave to appeal denied at 493 Mich 921.

PEOPLE v NELSON, No. 146024; Court of Appeals No. 301253. Leave to appeal denied at 493 Mich 933.

Summary Disposition May 29, 2013:

CARSON v HOME-OWNERS INSURANCE COMPANY, No. 146183; Court of Appeals No. 308291. 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 TYNER, No. 146639; Court of Appeals No. 309729. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and remand this case to the Court of Appeals for plenary consideration.

We do not retain jurisdiction.

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a party.

PEOPLE v BOROM, No. 146714; Court of Appeals No. 313750. 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 a parent's failure to act to prevent harm to his or her child satisfies the requirement for a knowing or intentional act under the first-degree child abuse statute, MCL 750.136b(2), in light of MCL 750.136b(3) that separately punishes omissions and reckless conduct as second-degree child abuse; (2) if so, whether the failure to prevent a person who may be dangerous to the child to have contact with the child violates the first-degree child abuse statute; (3) whether there is a common law duty of a parent to prevent injury to his or her child; and, (4) assuming that there is such a duty under the common law, whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime.

Leave to Appeal Denied May 29, 2013:

PEOPLE v DANIELS, No. 146098; Court of Appeals No. 300354.

PEOPLE v STRANDBERG, No. 146223; Court of Appeals No. 305381. CAVANAGH, J., would grant the application for leave to appeal.

PEOPLE v ROLLAND, No. 146298; Court of Appeals No. 300067.

GRAY v CHROSTOWSKI, No. 146533; reported below: 298 Mich App 769.

PEOPLE v BICKHAM, No. 146666; Court of Appeals No. 300952.

Summary Disposition June 5, 2013:

STREET v GLEESON, Nos. 146319 and 146321; Court of Appeals Nos. 306162. 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 order of the Calhoun Circuit Court dismissing the complaint. Contrary to the Court of Appeals opinion, the trial court did consider the factors listed in *Vicencio v Ramirez*, 211 Mich App 501 (1995), and the plaintiff's failure to comply with discovery requests in the 2008 case was relevant to the court's decision under factor 2. When all of the facts of this case are considered, the trial court's decision was within the range of principled outcomes.

KRANZ v STAMATS, No. 146436; Court of Appeals No. 305198. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate those portions of the Court of Appeals and Lenawee Circuit Court judgments holding that the defendants established a prescriptive easement to construct and maintain a dock at the terminus of the easement, and to moor boats to the dock. The affidavit of the plaintiff-appellant's predecessor in interest averred that from 1990 until 2003, when she and her husband sold Lot 1 to the plaintiff-appellant, "any use of a dock or boat moorings on or at the easement was done with our permission and consent." We remand this case to the Lenawee Circuit Court for further consideration in light of this affidavit and this Court's decision in *Fractional School Dist No 9 in Waterford and Pontiac Twps, Oakland Cty v Beardslee*, 248 Mich 112, 116 (1929) (holding that a period of permissive occupancy cannot be tacked onto a period of hostile occupancy, to show adverse possession).

DEPARTMENT OF ENVIRONMENTAL QUALITY v WORTH TOWNSHIP, No. 146563; reported below: 299 Mich App 1. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the language bolded in the following passages of the Court of Appeals opinion, because it can be read to suggest that in a case such as this one, in which the question is whether imposing a duty to remediate on the township violates the prohibition against unfunded mandates contained in the second sentence of Const 1963, art 9, § 29, it is also necessary to show that the state has shifted to a local unit of government a cost formerly borne or funded by the state, contrary to the first sentence of § 29. See *Durant v State Bd of Ed*, 424

Mich 364, 378-379 (1986) ("The first sentence . . . is aimed at existing services or activities already required of local government. The second sentence addresses future services or activities."); *Schmidt v Dep't of Education*, 441 Mich 236, 254 (1992).

In sum, Headlee applies whenever legislation enacted on or after December 23, 1978 (the date the Headlee Amendment went into effect) *requires* a unit of local government to increase its level of activity or service. [*Livingston Co v Dep't of Mgt & Budget*, 430 Mich 635] at 648 [(1988)] ("Art 9 § 29 refers only to required, not optional, services or activities."). **Furthermore, Headlee applies only when a statutory requirement lessens the state's burden by shifting to units of local government the responsibility of providing services once provided or funded by the state**. *Id*. at 645. [299 Mich App at 7 (emphasis added).]

* * *

In sum, we hold that requiring defendant's compliance with MCL 324.3109(2) does not violate the Headlee Amendment **because, although it may financially burden the defendant, it does not shift the financial burden from the state to a unit of local government**. [*Id*. at 11 (emphasis added).]

In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v OSBORNE, No. 146776; Court of Appeals No. 307054. 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 Court of Appeals for consideration of the merits of the defendant's challenges to Offense Variable (OV) 9, MCL 777.39; OV 11, MCL 777.41; and OV 13, MCL 777.43. The plea hearing transcript shows that the defendant did not agree to a specific minimum-sentence range of 42 to 70 months. Rather, the prosecutor agreed to recommend a sentence within this range. As a result, the defendant did not bind himself to a particular guidelines range as part of his plea agreement and did not waive his challenges to the offense variable scoring.

Leave to Appeal Granted June 5, 2013:

MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INC, No. 145052; reported below: 296 Mich App 56. The application for leave to appeal the March 22, 2012 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether the indemnification clause in the plaintiff's contract with defendant Ahrens applies to this case; (2) if so, whether the plaintiff's action for breach of that provision was barred by the statute of limitations, MCL 600.5807(8); and (3) whether the plaintiff adequately proved that any breach of the indemnification clause caused its damages, including the issue whether the trial court clearly

erred in concluding that defendant Ahrens' performance of nonconforming work caused the natatorium moisture problem.

WURTZ v BEECHER METROPOLITAN DISTRICT, No. 146157; reported below: 298 Mich App 75. The parties shall address: (1) whether the plaintiff suffered an adverse employment action under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq*., when the defendants declined to renew or extend the plaintiff's employment contract, which did not contain a renewal clause beyond the expiration of its ten-year term; and (2) whether there was a fair likelihood that additional discovery would have produced evidence creating a genuine issue of material fact, MCR 2.116(C)(10), if the defendants' motion for summary disposition had not been granted prior to the completion of discovery.

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.

MADUGULA v TAUB, No. 146289; Court of Appeals No. 298425. The parties shall include among the issues to be briefed: (1) whether claims brought under MCL 450.1489 are equitable claims to be decided by a court of equity; (2) whether the provisions of a stockholders' agreement can create shareholder interests protected by MCL 450.1489; and (3) whether the plaintiff's interests as a shareholder were interfered with disproportionately by the actions of the defendant-appellant, where the plaintiff retained his corporate shares and his corporate directorship. The motion to increase stay bond and the motion to strike are denied.

The Business Law Section of the State Bar of Michigan and the Michigan Chamber of Commerce are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v CHENAULT, Nos. 146523 and 146524; Court of Appeals Nos. 309384 and 310456. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals' decision in *People v Lester*, 232 Mich App 262, 281 (1998), correctly articulates what a defendant must show to establish a *Brady* violation; (2) whether the Court of Appeals erred when it reversed the trial court's grant of a new trial, which was premised on the prosecution's violation of the rule from *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); and (3) whether trial counsel rendered ineffective assistance of counsel under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), for failing to exercise reasonable diligence after learning of the existence of the videotaped interviews.

The Criminal Law Section of the State Bar of Michigan, the Prosecuting Attorneys Association of Michigan, and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 5, 2013:

PEOPLE v CHARLES JONES, No. 145783; Court of Appeals No. 310518. CAVANAGH, J., would grant leave to appeal.

PEOPLE v SMITHINGELL, No. 146362; Court of Appeals No. 302219.

PEOPLE v RUSSELL, No. 146379; reported below: 297 Mich App 707.

PEOPLE v GARCIA, No. 146537; Court of Appeals No. 309926.

PEOPLE v DAVID ALLAN, No. 146789; reported below: 299 Mich App 205.

Summary Disposition June 7, 2013:

PEOPLE v HOLT, No. 145201; Court of Appeals No. 302017. By order of September 4, 2012, the application for leave to appeal the April 10, 2012 judgment of the Court of Appeals was held in abeyance pending the decisions in *Florida v Jardines* (USSC Docket No. 11-564) and *Florida v Harris* (USSC Docket No. 11-817). On order of the Court, *Florida v Jardines* having been decided on March 26, 2013, 569 US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013), and *Florida v Harris* having been decided on February 19, 2013, 568 US ___; 133 S Ct 1050; 185 L Ed 2d 61 (2013), 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 and we reinstate the November 23, 2010 order of the Wayne Circuit Court. In *Florida v Jardines*, under circumstances very similar to those in this case, the United States Supreme Court ruled that the employment of a drug-sniffing dog within the curtilage of the defendant's home without a search warrant was a violation of the Fourth Amendment right against unreasonable searches and seizures. In light of the prosecutor's concession that absent the canine sniff the warrant was not supported by probable cause, and given the reasoning provided by the United States Supreme Court, the trial court in this case properly granted the defendant's motion to suppress the evidence seized in the search of his home.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 7, 2013:

ACORN INVESTMENT CO v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, No. 146452; reported below: 298 Mich App 558. At oral argument, the parties shall address whether the Wayne Circuit Court judgment in this case amounted to a "verdict" that entitled the plaintiff to case evaluation sanctions under MCR 2.403(O)(2)(c). 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 June 13, 2013:

PEOPLE v ROWE, No. 147114; Court of Appeals No. 315407.

Summary Disposition June 14, 2013:

BURTON v MACHA, No. 147156; Court of Appeals No. 311463. 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 June 14, 2013:

AUTO-OWNERS INSURANCE COMPANY v TAX CONNECTION WORLDWIDE, LLC, No. 146458; Court of Appeals No. 306860.

MARKMAN, J. (*dissenting*).

Jackson's Five Star Catering, Inc., brought an action against Tax Connection Worldwide, LLC, arguing that the latter violated the Telephone Consumer Protection Act, 47 USC 227, when it faxed an unsolicited advertisement to the former. Auto-Owners Insurance Company brought this action seeking a declaration that it has no duty to defend, but its arguments were rejected by the trial court, and the Court of Appeals affirmed.

The policy at issue here covers an "advertising injury"—an "injury arising out of one or more of the following offenses"—with Tax Connection asserting that (b) specifically is at issue:

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. *Oral or written publication of material that violates a person's right of privacy*;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan. [Emphasis added.]

I agree with Auto-Owners that it is unreasonable to conclude that the faxing of an unsolicited advertisement can be said to "violate[] a person's right of privacy." First, it is clear that subparts (a), (c), and (d) of the policy all refer to the *substantive* content of what was faxed and that (b) should also be construed as referring to the substantive content of what was faxed. Second, Tax Connection's interpretation of "right of privacy" is inconsistent with the traditional meaning of that term in the tort context, in which an invasion of privacy generally refers to the publication of private or confidential information concerning an individual. See, e.g., *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 306 (2010). It is undisputed that the substantive content of the fax at issue here did not implicate any such information. For these reasons, I would reverse the judgment of the Court of Appeals.

Summary Disposition June 19, 2013:

PEOPLE v TONY GREEN, No. 146990; reported below: 299 Mich App 313. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. It is not disputed that the defendant, a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., transferred a small amount of marijuana to another person who was a registered qualifying patient pursuant to MCL 333.26429(b). In *Michigan v McQueen*, 493 Mich 135 (2013), this Court held that, under the MMMA, "§ 4 immunity does not extend to a registered qualifying patient who transfers marijuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marijuana for the purpose of relieving the transferor's own condition or symptoms." *Id.* at 156, citing MCL 333.26424(a) (footnotes omitted). Thus, the Court of Appeals erred in affirming the Barry Circuit Court's December 22, 2011 order that granted the defendant's motion to dismiss the charge of delivery of marijuana. We remand this case to the circuit court for reinstatement of the charges against the defendant and for further proceedings not inconsistent with this order.

Leave to Appeal Denied June 19, 2013:

PEOPLE v ALEKSANYAN, No. 142379; Court of Appeals No. 301076. By order of July 6, 2012, the application for leave to appeal the December 28, 2010 order of the Court of Appeals was held in abeyance pending the decision in *Chaidez v United States*, cert gtd ___ US ___; 132 S Ct 2101; 182 L Ed 2d 867 (2012). On order of the Court, the case having been decided on February 20, 2013, 568 US ___; 133 S Ct 1103; 185 L Ed 2d 149 (2013), the application is again considered, and it is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CAVANAGH, J., would grant leave to appeal.

PEOPLE v ACOSTA, No. 144168; Court of Appeals No. 302288. By order of July 6, 2012, the application for leave to appeal the October 5, 2011 order of the Court of Appeals was held in abeyance pending the decision in *Chaidez v United States*, cert gtd ___ US ___; 132 S Ct 2101; 182 L Ed 2d 867 (2012). On order of the Court, the case having been decided on February 20, 2013, 568 US ___; 133 S Ct 1103; 185 L Ed 2d 149 (2013), the application is again considered, and it is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CAVANAGH, J., would grant leave to appeal.

PEOPLE v BOLOGNA, No. 144524; Court of Appeals No. 305728.

CAVANAGH, J., would grant leave to appeal.

PEOPLE v ISSAC GOMEZ, No. 144897; reported below: 295 Mich App 411. By order of June 25, 2012, the application for leave to appeal the February 14, 2012 judgment of the Court of Appeals was held in abeyance

pending the decision in *Chaidez v United States*, cert gtd ___ US ___; 132 S Ct 2101; 182 L Ed 2d 867 (2012). On order of the Court, the case having been decided on February 20, 2013, 568 US ___; 133 S Ct 1103; 185 L Ed 2d 149 (2013), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH and MCCORMACK, JJ., would grant leave to appeal.

PEOPLE V SOTO, No. 144977; Court of Appeals No. 307865.
CAVANAGH, J., would grant leave to appeal.

PEOPLE V RICHARDS, No. 144989; Court of Appeals No. 306209.
CAVANAGH, J., would grant leave to appeal.

PEOPLE V IBRAGIMOVA, No. 145005; Court of Appeals No. 308153.
CAVANAGH and MCCORMACK, JJ., would grant leave to appeal.

PEOPLE V ZAK, No. 145118; Court of Appeals No. 298441.
CAVANAGH, J., would grant leave to appeal.

PEOPLE V KALBASS, No. 145133; Court of Appeals No. 307099.
CAVANAGH, J., would grant leave to appeal.

PEOPLE V PENA, No. 146199; Court of Appeals No. 311832.
CAVANAGH, J., would grant leave to appeal.

PEOPLE V WILLIS, No. 146611; Court of Appeals No. 298643.

SEGARS V BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 146617; Court of Appeals No. 310025.

Leave to Appeal Prior to Decision by the Court of Appeals Denied June 19, 2013:

BARROW V DETROIT ELECTION COMMISSION, Nos. 147264 and 147270; Court of Appeals No. 316695.

Summary Disposition June 21, 2013:

MOHNEY V AMERICAN INTERNATIONAL GROUP, No. 146846; Court of Appeals No. 303797. 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 Michigan Compensation Appellate Commission (MCAC) for entry of an order denying plaintiff's claim for worker's compensation benefits. The record shows that plaintiff's injuries here did not arise "out of and in the course of" his employment. In particular, the employer did not "own, lease, or maintain" the parking lot on which plaintiff slipped and fell, and thus the coverage set forth in *Simkins v Gen Motors Corp (After Remand)*, 453 Mich 703, 723 (1996), is not applicable. *Simkins* held that MCL 418.301(3), which provides that an "employee going to or from his or her work, while on the *premises* where the

employee's work is to be performed . . . is presumed to be in the course of his or her employment," is applicable to the situation in which such employee is injured on property "*not* owned, leased, or maintained by his employer," as long as he was "traveling in a reasonably direct route between the parking area owned, leased, or maintained by the employer and the work-site . . . ." (Emphasis added.) Whatever the merits of *Simkins*, we reject the extension of *Simkins* to the present circumstances. There was simply no "ownership, lease, or maintenance" of the parking lot by the employer.

CAVANAGH and MCCORMACK, JJ., would remand this case to the MCAC to address unresolved issues raised by defendant American International Group in its initial appeal to the MCAC and deny leave to appeal in all other respects.

Oral Argument Granted on Case Pending on Application for Leave to Appeal June 21, 2013:

In re SHOLBERG ESTATE, No. 146725; Court of Appeals No. 307308. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance. The parties should not submit mere restatements of their application papers. We further order that the stay issued by this Court on May 1, 2013 remains in effect until completion of this appeal.

Leave to Appeal Denied June 21, 2013:

PEOPLE V CRONIN, No. 146610; Court of Appeals No. 305525. Although we deny leave to appeal, we note that in *People v Bush*, 187 Mich App 316, 329 (1991), aff'd in part and rev'd in part on other grounds sub nom *People v Harding*, 443 Mich 693 (1993), the Court of Appeals erroneously stated that the failure to move for a new trial in the trial court precludes appellate review of a "great weight of the evidence" argument. To the contrary, an unpreserved "great weight" issue is reviewable on appeal, subject to the "plain error" standard of review. See *People v Cameron*, 291 Mich App 599, 616-617 (2011).

Leave to Appeal Denied June 25, 2013:

PEOPLE V MEADE, Nos. 145695 and 145976; Court of Appeals No. 309105.

PEOPLE V COOPER, No. 146028; Court of Appeals No. 302702.

STATE TREASURER V RICHARDS, No. 146156; Court of Appeals No. 308978.

PEOPLE V LATTIMORE, No. 146214; Court of Appeals No. 310082.

PEOPLE v CORRION, No. 146224; Court of Appeals No. 311477.

PEOPLE v DELANDRICK CLARK, No. 146226; Court of Appeals No. 308348.

PEOPLE v MARIO JOHNSON, No. 146228; Court of Appeals No. 311929.

PEOPLE v DEONDRE GAINES, No. 146229; Court of Appeals No. 310548.

PEOPLE v FLETCHER, No. 146230; Court of Appeals No. 311140.

PEOPLE v GATES, No. 146236; Court of Appeals No. 308197.

PEOPLE v GATES, No. 146261; Court of Appeals No. 310832.

PEOPLE v BRADFORD, No. 146304; Court of Appeals No. 310222.

PEOPLE v DAVID DAVIS, No. 146307; Court of Appeals No. 309051.

PEOPLE v CRAIG, No. 146308; Court of Appeals No. 310515.

PEOPLE v GAIL WILSON, No. 146346; Court of Appeals No. 308242.

PEOPLE v ANDREW BAKER, No. 146352; Court of Appeals No. 311037.

PEOPLE v LOVELY, No. 146353; Court of Appeals No. 310666.

PEOPLE v RINGLE, No. 146377; Court of Appeals No. 308116.

PEOPLE v MARK BAILEY, No. 146391; Court of Appeals No. 310166.

PEOPLE v ISAAC, No. 146394; Court of Appeals No. 310291.

PEOPLE v DITTA, No. 146398; Court of Appeals No. 310537.

PEOPLE v KENNEBREW, No. 146405; Court of Appeals No. 312370.

PEOPLE v WITHERSPOON, No. 146407; Court of Appeals No. 310420.

PEOPLE v KITCHEN, No. 146413; Court of Appeals No. 308897.

PEOPLE v MCMUTUARY, No. 146415; Court of Appeals No. 313137.

PEOPLE v PAYNE, No. 146423; Court of Appeals No. 309988.

PEOPLE v TIMOTHY SANDERS, No. 146428; Court of Appeals No. 310573.

PEOPLE v CARLTON, No. 146430; Court of Appeals No. 309886.

PEOPLE v PARKER, No. 146449; Court of Appeals No. 305656.

In re STILLWELL TRUST, No. 146489; reported below: 299 Mich App 289.

PEOPLE v TILLER, No. 146510; Court of Appeals No. 313126.

PEOPLE v SETTY, No. 146541; Court of Appeals No. 299830.

PEOPLE v JEROME JONES, No. 146545; Court of Appeals No. 306411.

PEOPLE v MCINNIS, No. 146569; Court of Appeals No. 310913.

PEOPLE v PAULS, No. 146574; Court of Appeals No. 309594.

PEOPLE v BOBBY WILLIAMS, No. 146578; Court of Appeals No. 312784.

PEOPLE v MICHAEL JACKSON, No. 146581; Court of Appeals No. 310892.

ROBINSON v CIVIL SERVICE COMMISSION, No. 146625; Court of Appeals No. 310250.

TATARIAN v CITY OF DETROIT, No. 146655; Court of Appeals No. 309819.

WAYNE COUNTY TREASURER v TATARIAN, No. 146657; Court of Appeals No. 311690.

PEOPLE v MARKHAM, No. 146660; Court of Appeals No. 303734.

PEOPLE v CROTON, No. 146665; Court of Appeals No. 309085.

PEOPLE v BUTLER, No. 146669; Court of Appeals No. 304447.

PEOPLE v BULLARD, No. 146681; Court of Appeals No. 299876.

PEOPLE v THREATT, No. 146703; Court of Appeals No. 312345.

PEOPLE v DENNIS, No. 146718; Court of Appeals No. 304523.

RANDOM HOUSE, INC v DEPARTMENT OF TREASURY, No. 146723; reported below: 298 Mich App 566.

PEOPLE v REED, No. 146728; Court of Appeals No. 306762.

PEOPLE v SALGAT, No. 146741; Court of Appeals No. 311714.

ADAMS v BRETTON WOODS CONDO ASSOCIATION, INC, No. 146752; Court of Appeals No. 310066.

PEOPLE v HAMBLEY, No. 146756; Court of Appeals No. 306998.

HAYS v LUTHERAN SOCIAL SERVICES OF MICHIGAN, No. 146770; reported below: 300 Mich App 54.

PEOPLE v GRAY, No. 146777; Court of Appeals No. 307763.

PEOPLE v COONE, No. 146778; Court of Appeals No. 309013.

PEOPLE v LAND, No. 146779; Court of Appeals No. 306597.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v KIRKLAND, No. 146785; Court of Appeals No. 311556.

FUEGO GRILL, LLC v DOMESTIC UNIFORM RENTAL, Nos. 146794 and 146795; Court of Appeals Nos. 302230 and 303763.

PEOPLE v BLACKWELL, No. 146799; Court of Appeals No. 305243.

PEOPLE v ST ANGE, No. 146803; Court of Appeals No. 304561.

PEOPLE v GUYNN, No. 146807; Court of Appeals No. 311157.

PEOPLE v ADKINS, No. 146811; Court of Appeals No. 309898.

PEOPLE v SHELLENBARGER, No. 146814; Court of Appeals No. 308245.

PEOPLE v DARRELL WILSON, No. 146820; Court of Appeals No. 306673.

CAPITOL INSURANCE CORPORATION v CONSUMERS ENERGY COMPANY, No. 146827; Court of Appeals No. 307949.

PEOPLE v OLGER, No. 146829; Court of Appeals No. 309559.

PEOPLE v MCCLAIN, No. 146834; Court of Appeals No. 313780.

RIDDLE v DAVISON TOWNSHIP BOARD OF TRUSTEES, No. 146836; Court of Appeals No. 309479.

PEOPLE v DIA, No. 146838; Court of Appeals No. 308606.

PEOPLE v BEEBE, No. 146840; Court of Appeals No. 306389.

PEOPLE v HICKS, No. 146841; Court of Appeals No. 297058.

PEOPLE v DUNIGAN, No. 146844; reported below: 299 Mich App 579.

BURGESS v PEOPLES TRUST CREDIT UNION, No. 146847; Court of Appeals No. 310852.

PEOPLE v ZAGORODNYY, No. 146852; Court of Appeals No. 314465.

PEOPLE v PRESTON, No. 146854; Court of Appeals No. 306473.

PEOPLE v RONIE DAVIS, No. 146855; Court of Appeals No. 314024.

PEOPLE v HILLIER, No. 146856; Court of Appeals No. 307644.

PEOPLE v REYNOLDS, No. 146857; Court of Appeals No. 308323.

PEOPLE v GOSS, No. 146862; Court of Appeals No. 311451.

PEOPLE v ANDREE, No. 146863; Court of Appeals No. 306086.

PEOPLE v WARNER, No. 146869; Court of Appeals No. 314012.

CONGREGATION MISHKAN ISRAEL NUSACH H'ARI v CITY OF OAK PARK, No. 146871; Court of Appeals No. 306465.

PEOPLE v LOTT, No. 146873; Court of Appeals No. 309363.

PEOPLE v JOSEY, No. 146876; Court of Appeals No. 314115.

PEOPLE v TURNER, No. 146878; Court of Appeals No. 305907.

PEOPLE v JEFFERSON, No. 146879; Court of Appeals No. 307388.

PEOPLE v BODIFORD, No. 146881; Court of Appeals No. 308823.

PEOPLE v CRAIG JACKSON, No. 146882; Court of Appeals No. 304163.

PEOPLE v BENNETT, No. 146885; Court of Appeals No. 299829.

NEWTON v FREYDL, No. 146886; Court of Appeals No. 314037.

PEOPLE v TOBY DAVIS, No. 146888; Court of Appeals No. 308050.

PEOPLE v AYERS, No. 146889; Court of Appeals No. 309733.

JACKSON & CHURCH COMPANY v KAISER, No. 146891; Court of Appeals No. 307633.

PEOPLE v EDWARDS, No. 146893; Court of Appeals No. 309708.

PEOPLE v BECKOM, No. 146894; Court of Appeals No. 313663.

PEOPLE v BROOKINS, No. 146896; Court of Appeals No. 314069.

PEOPLE v CHADRICK MILLER, No. 146897; Court of Appeals No. 310597.

PEOPLE v KEVIN HOWELL, No. 146902; Court of Appeals No. 304322.

PEOPLE v RAMIREZ, No. 146904; Court of Appeals No. 306316.

PEOPLE v HERNANDEZ-GUZMAN, No. 146912; Court of Appeals No. 313913.

PEOPLE v HARRIS, No. 146918; Court of Appeals No. 308191.

PEOPLE v MILNER, No. 146919; Court of Appeals No. 306593.

PEOPLE v BLACKMUN, No. 146923; Court of Appeals No. 310280.

In re FORFEITURE OF BAIL BOND, Nos. 146924 and 146925; Court of Appeals Nos. 307055 and 307059.

PEOPLE v HAULCY, No. 146931; Court of Appeals No. 310302.

PEOPLE v BRIAN GREENE, No. 146932; Court of Appeals No. 308448.

PEOPLE v TIMARAC, No. 146933; Court of Appeals No. 304323.

PEOPLE v REESE, No. 146934; Court of Appeals No. 307736.

JOHNSON v GENERAL MOTORS COMPANY, No. 146935; Court of Appeals No. 313204.

FARHOUD v ROSARIO, No. 146936; Court of Appeals No. 308566.

PEOPLE v CROMER, No. 146941; Court of Appeals No. 307930.

PEOPLE v KLICH, No. 146943; Court of Appeals No. 314100.

KOSS v MOUNT CLEMENS REGIONAL MEDICAL CENTER, No. 146947; Court of Appeals No. 306884.

PATSON v GENERAL MOTORS COMPANY, No. 146949; Court of Appeals No. 310736.

PEOPLE v DALTON, No. 146954; Court of Appeals No. 308707.

PEOPLE v KIRK, No. 146959; Court of Appeals No. 307448.

PEOPLE v WILLIAM JOHNSON, No. 146960; Court of Appeals No. 310288.

MILLER v EARNEST C BROOKS CORRECTIONAL FACILITY WARDEN, No. 146971; Court of Appeals No. 311769.

PEOPLE v KELSEY, No. 146973; Court of Appeals No. 298372.

PEOPLE v MCDOUGAL, No. 146980; Court of Appeals No. 306464.

PEOPLE v NELOMS, No. 146985; Court of Appeals No. 307698.

ROUSAKI v SOULIOTIS, No. 146987; Court of Appeals No. 308139.

PEOPLE v SKINNER, No. 146988; Court of Appeals No. 306903.

Superintending Control Denied June 25, 2013:

ENGLISH v ATTORNEY GRIEVANCE COMMISSION, No. 146411.

Application for Leave to Appeal Prior to Decision by the Court of Appeals Dismissed June 25, 2013:

PEOPLE v TRAMMELL, No. 147040; Court of Appeals No. 315927.

Reconsideration Denied June 25, 2013:

PEOPLE v KIRCHER, No. 144740; Court of Appeals No. 306579. Leave to appeal denied at 493 Mich 959.

UNITED SERVICES AUTOMOBILE ASSOCIATION v RIMBEY, No. 145188; Court of Appeals No. 299307. Summary disposition at 493 Mich 932.

PEOPLE v CANNON, No. 145316; Court of Appeals No. 306256. Leave to appeal denied at 493 Mich 967.

CRANE v DIRECTOR OF ASSESSING FOR THE CHARTER TOWNSHIP OF WEST BLOOMFIELD, No. 145551; Court of Appeals No. 301878. Leave to appeal denied at 493 Mich 951.

LANDON v CITY OF FLINT, Nos. 145799, 145800, 145801, and 145802; Court of Appeals Nos. 301802, 310832, 301905, and 301919. Leave to appeal denied at 493 Mich 951.

LANDON v MT MORRIS TOWNSHIP, No. 145804; Court of Appeals No. 301986. Leave to appeal denied at 493 Mich 951.

GOLDBERG v WLEZNIAK, No. 145898; Court of Appeals No. 301439. Leave to appeal denied 493 Mich 929.

PEOPLE v HOWZE, No. 145971; Court of Appeals No. 311012. Leave to appeal denied 493 Mich 951.

JOHNS v WIXOM BUILDERS SUPPLY, INC, No. 146014; Court of Appeals No. 299542. Leave to appeal denied 493 Mich 921.

PEOPLE v ANTHONY JONES, No. 146019; Court of Appeals No. 308515. Leave to appeal denied 493 Mich 967.

PEOPLE v MCMAHON, No. 146072; Court of Appeals No. 302037. Leave to appeal denied 493 Mich 930.

PEOPLE v MARTY MILLER, No. 146076; Court of Appeals No. 311574. Leave to appeal denied 493 Mich 968.

PEOPLE v ROBERT PARKS, No. 146144; Court of Appeals No. 303683. Leave to appeal denied 493 Mich 952.

DEZAAK MANAGEMENT, INC v AUTO-OWNERS INSURANCE COMPANY, No. 146281; Court of Appeals No. 307025. Leave to appeal denied 493 Mich 954.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 146539. Superintending control denied at 493 Mich 971.

Summary Disposition June 28, 2013:

CHICHEWICZ v SALESIN, No. 147228; Court of Appeals No. 312806. 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 June 28, 2013:

In re NAD, No. 147071; Court of Appeals No. 311694.

In re JETER/THOMAS, No. 147233; Court of Appeals No. 311710.

Summary Disposition July 1, 2013:

HANI & RAMIZ, INC v NORTH POINTE INSURANCE, No. 147284; Court of Appeals No. 316453. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the order of the Court of Appeals denying the motion for stay pending appeal, and we remand this case to the Oakland Circuit Court for entry of an order staying the execution of the judgment pending completion of this appeal. MCR 7.209(H)(1).

CAVANAGH, J., would deny leave to appeal.

Leave to Appeal Granted July 1, 2013:

BONNER v CITY OF BRIGHTON, No. 146520; reported below: 298 Mich App 693. The Brighton Code of Ordinances § 18-59 creates a presumption that an unsafe structure shall be demolished as a public nuisance if the cost to repair the structure would exceed 100% of the structure's true cash value as reflected in assessment tax rolls before the structure became unsafe and does not afford the owner of such a structure an option to repair as a matter of right. The parties shall address whether § 18-59 is facially unconstitutional on the basis that the

ordinance violates: (1) substantive due process; and/or (2) procedural due process. These issues are to be briefed separately by the parties.

The motion for leave to file brief amicus curiae is granted. The Public Corporation Law and the Real Property 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.

Summary Disposition July 3, 2013:

LEVINE v O'DORISIO, No. 144783; Court of Appeals No. 299639. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals opinion holding that the trial court erred by failing to equally divide between the parties the profits from use of the vascular laboratory from the date of dissolution to the date of the sale of the laboratory. MCL 450.4404(5) is not applicable to this case. Instead, the division of the profits of the company are governed by the operating agreement, which provides that the PLLC "shall be dissolved" upon the occurrence of a withdrawal event. ¶ 12.1. Thus, the PLLC was dissolved on January 13, 2004, when the hospital and the defendant entered their memorandum of understanding making the defendant's loss of staff privileges permanent. The value of the PLLC should be assessed as of that date. The defendant is not entitled to any profits derived from the plaintiff's use of the laboratory between January 13, 2004, and the date that the laboratory was sold. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

CLOHSET v NO NAME CORPORATION, No. 145658; reported below: 296 Mich App 525. 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 MCL 600.5739(1) and MCR 4.201(G)(2)(b).

PEOPLE v KAHRI SMITH, No. 146568; Court of Appeals No. 309407. 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 July 3, 2013:

INTERNATIONAL BUSINESS MACHINES CORPORATION v DEPARTMENT OF TREASURY, No. 146440; Court of Appeals No. 306618. The parties shall include among the issues to be briefed: (1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq*.; (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilater-

ally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact.

ASHLEY ANN ARBOR, LLC v PITTSFIELD CHARTER TOWNSHIP, No. 146661; reported below: 299 Mich App 138. The parties shall include among the issues to be briefed whether a public corporation's special assessment against an individual parcel of property authorized under the Drain Code, MCL 280.490(1), but implemented through the provisions governing special assessments by the public corporation contained in the Public Improvement Act, MCL 41.721, et seq., is subject to the exclusive jurisdiction of the Michigan Tax Tribunal, pursuant to MCL 205.731, in light of the amendment of 1992 PA 172, excluding the drain code from the definition of "property tax laws."

The Michigan Association of Counties, the Michigan Municipal League, and the Public Corporation 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 July 3, 2013:

PEOPLE v DAVONTRAL COLEMAN, No. 146587; Court of Appeals No. 306915.

PEOPLE v FLANAGAN, No. 146599; Court of Appeals No. 305762.

PEOPLE v KARSTEN, No. 146640; Court of Appeals No. 307339.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v DAVENPORT, No. 146652; Court of Appeals No. 306868. While the Court of Appeals erroneously failed to consider defendant's claim in light of the United States Supreme Court decision in *Holbrook v Flynn*, 475 US 560, 570; 106 S Ct 1340; 89 L Ed 2d 525 (1986) ("the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play' "), citing *Estelle v Williams*, 425 US 501, 505; 96 S Ct 1691; 48 L Ed 2d 126 (1976), the error was harmless under the facts of this case. Given the substantial evidence of guilt presented at trial, we cannot conclude that there was an unacceptable risk of impermissible factors coming into play.

PEOPLE v HORNOF, No. 146761; Court of Appeals No. 313914.

Summary Disposition July 5, 2013:

DISCOUNT TIRE CO v DEPARTMENT OF TREASURY, No. 146694; reported below: 298 Mich App 367. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that portion of the Court of Appeals opinion holding that Mich Admin Code R 205.16 is invalid. The Court of Appeals did not need to reach this issue because, as it correctly held, the petitioner met the requirements of that rule. 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 July 5, 2013:

MAKOWSKI v GOVERNOR, No. 146867; reported below: 299 Mich App 166. The parties shall include among the issues to be briefed: (1) what authority, if any, the courts of this State have to review actions taken by the Governor under the authority conferred by 1963 Const, Art V, § 14; (2) how the separation of powers doctrine and the principle of nonjusticiable political questions relate to that constitutional authority; (3) whether the commutation of the plaintiff's sentence was completed before the Governor took steps to revoke it and whether the Court has the authority to address this question; (4) whether the power to grant clemency under the cited constitutional provision also includes the power to rescind, revoke or otherwise overturn a decision to grant clemency; and (5) to the extent the courts have the authority to address the question, whether the Governor in this case exceeded the authority granted by the constitution by revoking the commutation of sentence given to the plaintiff after it was signed by the Governor, sealed by and filed with the Secretary of State, and delivered to the Michigan Department of Corrections.

MCCORMACK, J., did not participate because of her prior involvement in this case.

Request for Advisory Opinion Denied July 5, 2013:

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2012 PA 348 AND 2012 PA 349, No. 146595. By order of May 3, 2013, the Michigan Solicitor General was invited to file a brief in this case. On order of the Court, the Solicitor General's brief having been received, the request by the Governor for an advisory opinion on the constitutionality of 2012 PA 348 and 2012 PA 349 is again considered, and it is denied, because we are not persuaded that granting the request would be an appropriate exercise of the Court's discretion.

MARKMAN, J., would deny for the reasons set forth in the brief requested by this Court and entitled "Views of the State of Michigan."

Leave to Appeal Denied July 12, 2013:

PEOPLE v ALEXANDER, No. 146527; Court of Appeals No. 306085.

ZAHRA, J. (*concurring*). I concur in the Court's decision to deny leave to appeal. The trial courts are the front line of the criminal justice system, with more than 50,000 criminal cases initiated in 2012.[1] We

[1] See Michigan Supreme Court Annual Report 2012, p 31, available at (accessed June 28, 2013).

should not and cannot require absolute perfection. When a trial court imposes a sentence outside the sentencing guidelines, we must only require adherence to the statutory requirements. The trial court in this case fulfilled its obligation to justify its departure from the sentencing guidelines.

The Legislature has authorized trial courts to depart from a defendant's recommended minimum sentence range under the guidelines if the court "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). This Court has properly held that the trial court must justify not just *some* departure, but the *particular* departure in the case before it. *People v Smith*, 482 Mich 292, 303 (2008). Put another way, the trial court must justify "both the departure and the extent of the departure" on the record. *Id.* at 313. The trial court's justification of its sentence "must be sufficient to allow for effective appellate review." *People v Babcock*, 469 Mich 247, 259 n 13 (2003). But this Court has stopped short of requiring the trial court to say any "magic words." *Id.*

The trial court in this case satisfied its statutory obligation to articulate on the record substantial and compelling reasons for its departure from the guidelines in sentencing defendant. The court expressed its understanding of the guidelines, stating on the record that defendant's guidelines minimum sentence range was "29 months to 114 months." The trial court also understood that a life sentence exceeded the guidelines. Moments before the trial court imposed its sentence, the prosecutor asked the court to "exceed the guidelines and sentence the defendant to life based on a number of reasons." The trial court specifically noted that, if the facts and circumstances so warranted, it possessed the statutory authority to impose a life sentence even though that sentence would exceed the guidelines because defendant had been convicted as a fourth-offense habitual offender. MCL 769.12(1)(b). The trial court then painstakingly proceeded to list each of defendant's *thirteen* convictions, noting the many instances in which defendant was arrested for committing new crimes shortly after being released from confinement for previous crimes. The trial court then stated that "if there was any candidate who the legislature envisioned ought to receive parolable life under the Habitual 4th statute, it would be Mr. Alexander." And on that basis, the trial court exceeded the guidelines range and imposed a life sentence with the possibility of parole.

Thus, the trial court stated on the record that it was exceeding the guidelines range because of defendant's status as an habitual offender, the full extent of which was not captured by the guidelines. And the trial court justified the extent of this particular departure on the basis of the sheer number of felony convictions over a lengthy criminal career and defendant's propensity for rapid recidivism. The facts that formed the basis for the departure were objective and capable of being confirmed through an examination of the record. The trial court therefore satisfied the standard set forth in MCL 769.34(3) and our opinion in *Smith*. I would not require more from the trial courts, which toil not in the ivory tower but in the trenches of our judicial system. Thus, I concur with the Court's decision to deny leave to appeal.

YOUNG, C.J., joins the statement of ZAHRA, J.

MARKMAN, J. (*dissenting*). I respectfully dissent. In enacting MCL 769.34(3), which governs departures from the sentencing guidelines, "the Legislature put the burden on the *trial court* to place on the record one or more substantial and compelling reasons for a particular departure. Hence, it is the *trial court* that must justify on the record both the *departure* and the *extent* of the departure." *People v Smith*, 482 Mich 292, 313 (2008) (citations omitted; emphasis altered). Here, the trial court departed from the guidelines recommended minimum sentence range of 29 to 114 months to a sentence of life imprisonment, but failed utterly to explain or justify the extent of the departure. It is not that the court provided insufficient or unpersuasive reasons for the extent of the departure, but that it gave *no* reasons. Indeed, it appears the court may have been unaware of its obligation to justify the particular sentence imposed, stating that "to the extent that [the sentence imposed] may constitute a departure," the court would "fill out a departure form *just in case*." (Emphasis added.) The court then proceeded to list a *single* "aspect" of the case that supposedly permitted it to impose a sentence outside the guidelines range: "SENTENCE AGREEMENT." There was no sentencing agreement in this case.

At sentencing, the trial court referred to defendant's lengthy criminal record, which includes 13 prior felonies. Such a criminal history, although partially taken into account in the calculation of the guidelines range, would have been far more than sufficient, in my judgment, to explain and justify a substantial upward departure in this case. Yet it is the obligation of the trial court, not the appellate court, to explain and justify a departure. Here, the court undertook *no effort whatsoever* to explain and justify the particular departure imposed. "A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear." *Smith*, 482 Mich at 304.

I would thus remand this case and require the trial court to articulate reasons explaining and justifying its specific departure from the guidelines range. This obligation is far more than simply an inconvenient and ponderous exercise in having the trial court dot its i's and cross its t's. Rather, it is the means chosen by the Legislature to ensure that the sentencing guidelines—one of the most far-reaching and significant pieces of criminal justice legislation ever enacted in this state—are effective in ensuring that *equivalent* sentences are imposed on persons with equivalent criminal conduct and histories and constraining the ability of sentencing judges to replace the criminal punishments set by the Legislature with criminal punishments, above and below these levels, set at their own discretion.

The concurrence explains the trial court's failure to comply with this legislative plan by observing that the trial court (a) knew it was authorized by MCL 769.12(1)(b) to exceed the guidelines range because defendant was a fourth-offense habitual offender and (b) after recounting defendant's criminal record, stated that defendant was just the type of "candidate who the legislature envisioned ought to receive parolable life . . . ." But authorization does not equal justification, and the trial court's authority to sentence above or below the guidelines is an

authority that is specifically *conditioned* on justification. This is what the Legislature has made clear, MCL 769.34(3), and this is what this Court has made clear, *Smith*, 482 Mich at 313. The guidelines have operated to render our justice system fairer and replace the unfettered sentencing discretion of individual judges with the sentencing judgments of the representative branches of government. These accomplishments are diluted when cursory statements by trial courts of what the Legislature supposedly "envisioned" are allowed to substitute for statements of actual sentencing justification as required by the law.

MCCORMACK, J., joins the statement of MARKMAN, J.

Application for Leave to Appeal Dismissed on Stipulation July 15, 2013:

DUNCAN v STATE OF MICHIGAN, No. 147111; reported below: 300 Mich App 176.

Leave to Appeal Denied July 19, 2013:

In re BESOK, No. 147278; Court of Appeals No. 313092.

Application for Leave to Appeal Dismissed on Stipulation July 19, 2013:

ASHLEY ANN ARBOR, LLC v PITTSFIELD CHARTER TOWNSHIP, No. 146661; reported below: 299 Mich App 138.

Rehearing Denied July 23, 2013:

In re HON DEBORAH ROSS ADAMS, No. 144985; opinion at 494 Mich 162.

Leave to Appeal Denied July 26, 2013:

MACKEY v BENAVIDES, No. 147422; Court of Appeals No. 317146.

Order in Case Pending on Leave Granted Entered July 26, 2013:

WOODBURY v RES-CARE PREMIER, INC, No. 144721; Court of Appeals No. 297819. On order of the Court, this case having been argued and submitted, we direct the Clerk to set this case for resubmission in the October 2013 session. Further, the Court having concluded that it would be assisted by supplemental briefing, we direct the parties to file supplemental briefs addressing the following issues: (1) whether § 925(2) of the Nonprofit Corporation Act (NCA), MCL 450.2101 *et seq*., applies retroactively or prospectively to validate "all contracts entered into and other rights acquired" during dissolution; (2) whether renewal pursuant to § 925 permits an administratively dissolved corporation to enforce contracts and rights not related to winding-up in light of MCL 450.2833 and MCL 450.2834; (3) whether *Bergy Bros, Inc v Zeelend Feeder Pig, Inc*,

415 Mich 286 (1980), correctly interpreted MCL 450.1925, the analogous provision in the Business Corporation Act, MCL 450.1101 *et seq.*; and (4) whether the common-law doctrine of corporation by estoppel is applicable here. Additionally, assuming arguendo that § 925(2) applies retroactively to validate "all contracts entered into and other rights acquired" during the interval of dissolution, we further direct the parties to address: (5) whether Center Woods' rights to a thirty-day notice of the sale of the property at issue and the right of first refusal were "acquired" during the interval of Center Woods' dissolution; and, if not, (6) whether those rights were nevertheless enforceable after Center Woods renewed its corporate good standing pursuant to § 925. Finally, assuming arguendo that the rights to notice and first refusal are enforceable, we direct the parties to address: (7) what remedy is available to Center Woods against the seller and purchaser of the property at issue, given that the sale was finalized during the interval of Center Woods' dissolution; and (8) whether Res-Care preserved any objection to the trial court's choice of remedy in this case.

The briefs of appellants are to be filed not later than August 21, 2013 and the briefs of appellees not later than September 11, 2013. The parties may request reargument pursuant to MCR 7.312(E).

The Business Law Section of the State Bar of Michigan, the Michigan Chamber of Commerce, and the Department of Licensing and Regulatory Affairs 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.

Rehearing Denied July 29, 2013:

ADMIRE V AUTO-OWNERS INSURANCE COMPANY, No. 142842; opinion at 494 Mich 10.

Summary Disposition July 30, 2013:

WARE V BRONSON METHODIST HOSPITAL, No. 147048; Court of Appeals No. 307886. 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 BYRON JONES, No. 146740; reported below: 299 Mich App 284. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the portion of the Court of Appeals judgment stating that "[a] scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision" and "[s]coring decisions for which there is any evidence in support will be upheld." *People v Jones*, 299 Mich App 284, 286 (2013) (quoting *People v Hicks*, 259 Mich App 518, 522 (2003), and *People v Hornsby*, 251 Mich App 462, 468 (2002)). As this Court stated in *People v Osantowski*, 481 Mich 103, 111 (2008), an appellate court reviews for clear error a trial court's finding of facts, and "[a] trial court determines the sentencing variables by reference to the

record, *using the standard of preponderance of the evidence*." (Emphasis added.) In all other respects, leave to appeal is denied because we are not persuaded that the questions presented should be reviewed by this Court.

Leave to Appeal Denied July 30, 2013:

PEOPLE v MCCOWAN, No. 145544; Court of Appeals No. 302398.

PEOPLE v WESTBROOK, No. 146314; Court of Appeals No. 310459.

PEOPLE v THOMAS SANDERS, No. 146316; Court of Appeals No. 309639.

PEOPLE v HOLIFIELD, No. 146330; Court of Appeals No. 310581.

PEOPLE v HAROLD WILLIAMS, No. 146334; Court of Appeals No. 308614.

PEOPLE v MILTON, No. 146442; Court of Appeals No. 310487.

PEOPLE v ALLEN, No. 146447; Court of Appeals No. 307767.

PEOPLE v SLATER, No. 146459; Court of Appeals No. 309746.

PEOPLE v ALVIN JONES, No. 146464; Court of Appeals No. 308827.

PEOPLE v IVORY, No. 146466; Court of Appeals No. 306185.

PEOPLE v STUCKEY, No. 146467; Court of Appeals No. 310458.

PEOPLE v CASTLEBERRY, No. 146469; Court of Appeals No. 312099.

PEOPLE v ELMANAR, No. 146470; Court of Appeals No. 311794.

PEOPLE v JOSEPH BAKER, No. 146474; Court of Appeals No. 310628.

PEOPLE v SCHWARZLOSE, No. 146477; Court of Appeals No. 311022. MCCORMACK, J., not participating because of her prior involvement in this case.

PEOPLE v JAN-JAMES BUCHANAN, No. 146479; Court of Appeals No. 309069.

PEOPLE v CORDNEY ROWE, No. 146483; Court of Appeals No. 311499.

PEOPLE v MENEFEE, No. 146498; Court of Appeals No. 310413.

PEOPLE v GRAYS, No. 146500; Court of Appeals No. 310824.

PEOPLE v OLIVAS, No. 146506; Court of Appeals No. 311838.

PEOPLE v MCREYNOLDS, No. 146509; Court of Appeals No. 310984.

PEOPLE v KEVIN BUCHANAN, No. 146512; Court of Appeals No. 309885.

PEOPLE v STEELE, No. 146513; Court of Appeals No. 311432.

PEOPLE v STAV, No. 146528; Court of Appeals No. 311127.

PEOPLE v MICHAEL DAVIS, No. 146531; Court of Appeals No. 310959.

PEOPLE v FRANCE, No. 146543; Court of Appeals No. 310175.

PEOPLE v GROSS, No. 146560; Court of Appeals No. 309352.

PEOPLE v DONYELLE WOODS, No. 146566; Court of Appeals No. 310536.

MCCORMACK, J., not participating because of her prior involvement as counsel for a party.

PEOPLE v ALTOONIAN, No. 146570; Court of Appeals No. 308816.

PEOPLE v O'DONNELL, No. 146588; Court of Appeals No. 312737.

PEOPLE v TERRANCE BAILEY, No. 146592; Court of Appeals No. 310664.

PEOPLE v HOKING, No. 146598; Court of Appeals No. 311135.

PEOPLE v DOTHARD, No. 146613; Court of Appeals No. 311128.

PEOPLE v THOMAS GREEN, No. 146618; Court of Appeals No. 311219.

PEOPLE v SHALECSHA MOORE, No. 146619; Court of Appeals No. 306264.

PEOPLE v TYRONE HILL, No. 146624; Court of Appeals No. 311692.

PEOPLE v AUSTIN, No. 146629; Court of Appeals No. 310551.

PEOPLE v GARDNER, No. 146634; Court of Appeals No. 311583.

PEOPLE v TYRONE WOODS, No. 146672; Court of Appeals No. 310979.

PEOPLE v SLOCUM, No. 146674; Court of Appeals No. 312063.

PEOPLE v VENDEVILLE, No. 146711; Court of Appeals No. 311795.

PEOPLE v RANDALL MITCHELL, No. 146715; Court of Appeals No. 304574.

PEOPLE v FENDERSON, No. 146720; Court of Appeals No. 306057.

PEOPLE v TOMMIE COLEMAN, No. 146727; Court of Appeals No. 312200.

PEOPLE v AARON MITCHELL, No. 146729; Court of Appeals No. 314455.

PEOPLE v MCGOWAN, No. 146735; Court of Appeals No. 311892.

PEOPLE v LOREN GREENE, No. 146737; Court of Appeals No. 312993.

PEOPLE v JAGARLAMUDI, No. 146750; Court of Appeals No. 311375.

PEOPLE v FULLER, No. 146753; Court of Appeals No. 311796.

PEOPLE v STANDARD, No. 146755; Court of Appeals No. 309331.

PEOPLE v GIPSON, Nos. 146758 and 146759; Court of Appeals Nos. 305156 and 305157.

PEOPLE v ANNON, No. 146760; Court of Appeals No. 309372.

PEOPLE v LOVE, No. 146766; Court of Appeals No. 314000.

PEOPLE v DARRYL JOHNSON, No. 146768; Court of Appeals No. 311465.

PEOPLE v SHELTON, No. 146775; Court of Appeals No. 311906.

PEOPLE v NORWOOD, No. 146783; Court of Appeals No. 311824.

PEOPLE v RHODES, No. 146787; Court of Appeals No. 308107.

KNIGHT v NORTHPOINTE BANK, No. 146788; reported below: 300 Mich App 109.

UNCAPHER v DEPARTMENT OF CORRECTIONS, No. 146796; Court of Appeals No. 310630.

PEOPLE v DICKERSON, No. 146798; Court of Appeals No. 306765.

PEOPLE v FLEMING, No. 146801; Court of Appeals No. 313646.

PEOPLE v BOJAJ, No. 146805; Court of Appeals No. 303884.

PEOPLE v BANKS, No. 146812; Court of Appeals No. 313200.

GAGNON v CITIZENS INSURANCE COMPANY, No. 146818; Court of Appeals No. 301188.

PEOPLE v GAYLES, No. 146822; Court of Appeals No. 310700.

GAGNON v CITIZENS INSURANCE COMPANY, No. 146828; Court of Appeals No. 301188.

PEOPLE v LACY, No. 146833; Court of Appeals No. 310408.

In re KALLABAT, No. 146839; Court of Appeals No. 310332.

PEOPLE v THOMPSON, No. 146842; Court of Appeals No. 305760.

GARVIN v DETROIT BOARD OF EDUCATION, No. 146849; Court of Appeals No. 298838.

PEOPLE v JERRY JOHNSON, No. 146853; Court of Appeals No. 308024.

BAJJU v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 146858; Court of Appeals No. 307365.

CITIZENS BANK v BOGGS, No. 146859; reported below: 299 Mich App 517.

REMSING v CITY OF LANSING, No. 146860; Court of Appeals No. 309361.

BENSON v BOYLE, No. 146866; Court of Appeals No. 307543.

PEOPLE v DEWEESE, No. 146868; Court of Appeals No. 313687.

PEOPLE v HENRY JOHNSON, No. 146870; Court of Appeals No. 306986.

PEOPLE v POZNIAK, No. 146890; Court of Appeals No. 306405.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

KARAUS v BANK OF NEW YORK MELLON, No. 146892; reported below: 300 Mich App 9.

PEOPLE v DELGADO, No. 146899; Court of Appeals No. 314544.

PEOPLE v DISKIN, No. 146911; Court of Appeals No. 310795.

PEOPLE v REDMOND, No. 146920; Court of Appeals No. 305318.

PEOPLE v ETTER, No. 146921; Court of Appeals No. 308157.

PEOPLE v HUFFMAN, No. 146939; Court of Appeals No. 314443.

PEOPLE v AL-SAADY, No. 146940; Court of Appeals No. 314603.

WARE v DEPARTMENT OF COMMUNITY HEALTH, No. 146942; Court of Appeals No. 313652.

PEOPLE v HEINZELMANN, No. 146946; Court of Appeals No. 309933.

PEOPLE v VANLAECKE, No. 146950; Court of Appeals No. 312312.

FINDLING v PARKER, No. 146951; Court of Appeals No. 307442.

PEOPLE v LARRY JONES, No. 146953; Court of Appeals No. 313270.

PEOPLE v HINTON, No. 146955; Court of Appeals No. 308019.

PEOPLE v CONKLIN, Nos. 146956 and 146957; Court of Appeals Nos. 305471 and 305472.

PEOPLE v BOWLING, No. 146958; reported below: 299 Mich App 552.

OLEWIN v CARBOLOY, INC, No. 146963; Court of Appeals No. 310856.

PEOPLE OF THE TOWNSHIP OF CANTON v HILLS, No. 146972; Court of Appeals No. 313493.

PEOPLE v STREETS, No. 146975; Court of Appeals No. 309672.

PEOPLE v BURKS, No. 146976; Court of Appeals No. 310301.

PEOPLE v KOAN, No. 146982; Court of Appeals No. 313182.

PEOPLE v CAVIN, No. 146983; Court of Appeals No. 309805.

PEOPLE v SIMMION BROWN, No. 146986; Court of Appeals No. 308620.

PEOPLE v JAMES BROWN, No. 146989; Court of Appeals No. 312097.

PEOPLE v TROTTER, No. 146991; Court of Appeals No. 306458.

PEOPLE v RIMMER-BEY, No. 146994; Court of Appeals No. 314131.

PEOPLE v SPEARS-JONES, No. 146995; Court of Appeals No. 311972.

SUMMIT POLYMERS, INC v ATEK THERMOFORMING, INC, No. 146998; Court of Appeals No. 303277.

PEOPLE v MILES, No. 147006; Court of Appeals No. 310997.

VIVIANO, J., not participating due to a familial relationship with prior counsel in this case.

PEOPLE v VELASQUEZ, No. 147014; Court of Appeals No. 312150.

PEOPLE v LONGACRE, No. 147016; Court of Appeals No. 314410.

DETROIT PUBLIC SCHOOLS v CONNECTIONS FOR DEAF CITIZENS, INC, No. 147025; Court of Appeals No. 309397.

PEOPLE v HOLDEN, No. 147026; Court of Appeals No. 308164.

PEOPLE v JOSEPH JONES, No. 147027; Court of Appeals No. 305843.

PEOPLE v JOHNSON-EL, No. 147028; reported below: 299 Mich App 648.

PEOPLE v MEMMER, No. 147031; Court of Appeals No. 307488.

PEOPLE v MARTIN, No. 147036; Court of Appeals No. 314610.

PEOPLE v HARDY, No. 147037; Court of Appeals No. 305234.

PEOPLE v GIDRON, No. 147038; Court of Appeals No. 311458.

PEOPLE v ROBERTS, No. 147039; Court of Appeals No. 310483.

PEOPLE v DEVAUGHN WILSON, No. 147056; Court of Appeals No. 310559.

PEOPLE v GERORD ROBINSON, No. 147062; Court of Appeals No. 310688.

PEOPLE v TERRY BROWN, No. 147077; Court of Appeals No. 308368.

DETROIT LAND DEVELOPMENT & HOLDINGS, LLC v MLK-BUCHANAN COMMUNITY DEVELOPMENT CORPORATION, No. 147083; Court of Appeals No. 307629.

PEOPLE v UNDERWOOD, No. 147085; Court of Appeals No. 309730.

SEARS v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 147099; Court of Appeals No. 305923.

PEOPLE v GEMAYEL WILLIAMS, No. 147141; Court of Appeals No. 315419.

DAVIS v WAYNE COUNTY AIRPORT AUTHORITY, No. 147152; Court of Appeals No. 308919.

Superintending Control Denied July 30, 2013:

GOODMAN v ATTORNEY GRIEVANCE COMMISSION, No. 146565.

XIONG v ATTORNEY GRIEVANCE COMMISSION, No. 146851.

YOUNG v ATTORNEY GRIEVANCE COMMISSION, No. 146895.

Reconsideration Denied July 30, 2013:

HAGERTY v BOARD OF MANISTEE COUNTY ROAD COMMISSIONERS, Nos. 146047 and 146048. Summary disposition at 493 Mich 933.

GREENVILLE MANUFACTURING, LLC v NEXTENERGY CENTER, No. 146049. Leave to appeal denied at 493 Mich 939.

GREEN v DEPARTMENT OF CORRECTIONS, No. 144123. Leave to appeal denied at 493 Mich 951.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v FRANCIS PARKS, No. 146140. Leave to appeal denied at 493 Mich 944.

TORRES v FERROUS PROCESSING & TRADING COMPANY, No. 146155. Leave to appeal denied at 493 Mich 941.

PEOPLE v WILLIAM HILL, No. 146167. Leave to appeal denied at 493 Mich 968.

SCHARNITZKE v COCA-COLA ENTERPRISES, No. 146171. Summary disposition at 493 Mich 947.

PEOPLE v HUNTER, No. 146210. Summary disposition at 493 Mich 1015.

PEOPLE v DEVI SMITH, No. 146554. Leave to appeal denied at 493 Mich 970.

MCFADDEN v SMITH, No. 146653. Leave to appeal denied at 493 Mich 971.

Leave to Appeal Denied August 2, 2013:

In re RAPHAEL, No. 147349; Court of Appeals No. 312227.

Leave to Appeal Prior to Decision by the Court of Appeals Denied August 2, 2013:

ANHEUSER-BUSCH, INCORPORATED v DEPARTMENT OF TREASURY, Nos. 147438 and 147439; Court of Appeals Nos. 316743 and 316977.

Leave to Appeal Denied August 5, 2013:

KETCHMARK v HAYMAN, No. 147334; Court of Appeals No. 315960.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered May 22, 2013:

PROPOSED AMENDMENTS OF MCR 2.305.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.305 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 2.305. SUBPOENA FOR TAKING DEPOSITION.

(A)-(D) [Unchanged.]

(E) Action Pending in Another ~~State, Territory, or~~ Country. An officer or a person authorized by the laws of another ~~state, territory, or~~ country to take a deposition in Michigan, with or without a commission, in an action pending in a court of that ~~state, territory, or~~ country may ~~petition~~ submit an application to a court of record in the county in which the deponent resides, is employed, transacts business in person, or is found, for a subpoena to compel the deponent to give testimony. The court may hear and act on the ~~petition~~ application with or without notice, as the court directs.

(F) Action Pending in Another State or Territory. A person may request issuance of a subpoena in this state for an action pending in another state or territory under the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 *et seq*., to require a person to attend a deposition, to produce and permit inspection and copying of materials, or to permit inspection of premises.

Staff Comment: The proposed changes of MCR 2.305 would make subrule (E) applicable only to actions pending in another country, while new subrule (F) would cross reference the Uniform Interstate Depositions and Discovery Act, which establishes the procedures to be used in

seeking a deposition or discovery subpoena in Michigan for use in an action that is pending in another state or territory.

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. 2013-20. Your comments and the comments of others will be posted at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-rules-admin-matters/pages/chapter-civil-procedures.aspx.

Order Entered June 19, 2013:

Proposed Amendment of MCR 2.107 and 2.117.

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.107 and 2.117 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

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

(A) [Unchanged.]

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(b) [Unchanged.]

(c) After a final judgment <u>or final order has been entered and the time for an appeal of right has passed, papers must be served on the party unless the rule governing the particular postjudgment procedure specifically allows service on the attorney;</u>

(d) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(G) [Unchanged.]

RULE 2.117. APPEARANCES.

(A)-(B) [Unchanged.]

(C) Duration of Appearance by Attorney.

(1) Unless otherwise stated or ordered by the court, an attorney's appearance applies only in the court in which it is made, or to which the action is transferred, until a final judgment or final order is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed. The appearance applies in an appeal taken before entry of final judgment or final order by the trial court.

(2) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.107 would provide clarification by adding the term "order" so that after either a final judgment or order has entered, papers should be served on the party after the time for appeal has passed. The proposed amendment of MCR 2.117 would clarify that when an attorney appears in an action by filing or defending a postjudgment motion, the duration of the attorney's appearance would be the same as that of an attorney filing or defending the original pleadings.

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 October 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. 2013-10. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered July 3, 2013:

PROPOSAL TO RESCIND ADMINISTRATIVE ORDER NO. 2011-3 AND ADOPT ADMINISTRATIVE ORDER NO. 2013-___ (CASEFLOW MANAGEMENT GUIDELINES)

On order of the Court, this is to advise that the Court is considering the rescission of Administrative Order No. 2011-3 and the entry of Administrative Order No. 2013-___, which would modify the Caseflow Management Guidelines as indicated below. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Proposed Administrative Order No. 2013-___

The management of the flow of cases in the trial court is the responsibility of the judiciary. In carrying out that responsibility, the judiciary must balance the rights and interests of individual litigants, the limited resources of the judicial branch and other participants in the justice system, and the interests of the citizens of this state in having an effective, fair, and efficient system of justice.

Accordingly, on order of the Court,

A. The State Court Administrator is directed, within available resources, to:

1. assist trial courts in implementing caseflow management plans that incorporate case processing time guidelines established pursuant to this order;

2. gather information from trial courts on compliance with caseflow management guidelines; and

3. assess the effectiveness of caseflow management plans in achieving the guidelines established by this order.

B. Trial courts are directed to:

1. maintain current caseflow management plans consistent with case processing time guidelines established in this order, and in cooperation with the State Court Administrative Office;

2. report to the State Court Administrative Office caseflow management statistics and other caseflow management data required by that office; and

3. cooperate with the State Court Administrative Office in assessing caseflow management plans implemented pursuant to this order.

On further order of the Court, the following time guidelines for case processing are provided as goals for the administration of court caseloads. These are only guidelines and are not intended to supersede procedural requirements in court rules or statutes for specific cases, or to supersede reporting requirements in court rules or statutes. The trial courts shall not dismiss cases for the sole reason that the case is likely to exceed the guideline. In addition, these guidelines do not supplant judicial discretion if, for good cause, a specific case of any type requires a time line that extends beyond the maximum permitted under these guidelines.

Note: The phrase "adjudicated" refers to the date a case is reported in Part 2 of the caseload report forms and instructions. Aging of a case is suspended for the time a case is inactive as defined in Parts 2 and 4 of the caseload report forms and instructions. Refer to these specific definitions for details.

Matters Submitted to the Judge. Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and or production of transcripts. Decisions, when possible, should be made from the bench or

within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission.

Probate Court Guidelines.

1. *Estate, Trust, Guardianship, and Conservatorship Proceedings.* 75% of all contested matters should be adjudicated within 182 days from the date of the filing of objection and ~~100~~95% within 364 days.

2. *Mental Illness Proceedings; Judicial Admission Proceedings.* 90% of all petitions should be adjudicated within 14 days from the date of filing and ~~100~~98% within 28 days.

3. *Civil Proceedings.* ~~75~~70% of all cases should be adjudicated within 364 days from the date of case filing and ~~100~~95% within 728 days.

District Court Guidelines.

1. *Civil Proceedings.*

a. General Civil. 90% of all general civil and miscellaneous civil cases should be adjudicated within 273 days from the date of case filing and ~~100~~98% within 455 days.

b. Summary Civil. ~~100~~95% of all small claims, landlord/tenant, and land contract actions should be adjudicated within 126 days from the date of case filing ~~except,~~ in those cases where there is no jury demand. ~~100~~65% of all landlord/tenant and land contract actions where a jury is demanded~~, actions~~ should be adjudicated within 154 days from the date of case filing.

2. *Felony, Misdemeanor, and Extradition Detainer Proceedings.*

a. Misdemeanor. ~~90~~85% of all statute and ordinance misdemeanor cases, including misdemeanor drunk driving and misdemeanor traffic, should be adjudicated within 63 days from the date of first appearance and ~~100~~95% within 126 days.

b. Felony and Extradition/Detainer. ~~80~~60% of all preliminary examinations in felony, felony drunk driving, felony traffic, and extradition/detainer cases should be concluded within 14 days of arraignment and ~~100~~75% within 28 days.

3. *Civil Infraction Proceedings.* 90% of all civil infraction cases, including traffic, nontraffic, and parking cases, should be adjudicated within 35 days from the date of filing and ~~100~~98% within 84 days.

Circuit Court Guidelines.

1. *Civil Proceedings.* ~~75~~70% of all cases should be adjudicated within 364 days from the date of case filing and ~~100~~95% within 728 days.

2. *Domestic Relations Proceedings.*

a. Divorce Without Children. ~~90~~85% of all divorce cases without children should be adjudicated within 182 days from the date of case filing and ~~100~~98% within 364 days.

b. Divorce With Children. ~~90~~85% of all divorce cases with children should be adjudicated within 301 days from the date of case filing and ~~100~~95% within 364 days.

c. Paternity. ~~90~~75% of all paternity cases should be adjudicated within 147 days from the date of case filing and ~~100~~95% within 238 days.

d. Responding Interstate Establishment. ~~90~~75% of all incoming inter-

state actions to establish support should be adjudicated within 147 days from the date of case filing and ~~100~~95% within 238 days.

e. Child Custody Issues, Other Support, and Other Domestic Relations Matters. ~~90~~75% of all child custody, other support, and other domestic relations issues not listed above should be adjudicated within 147 days from the date of case filing and ~~100~~95% within 238 days.

3. *Delinquency Proceedings*. Where a minor is being detained or is held in court custody, ~~90~~80% of all original petitions or complaints should have adjudication and disposition completed within 84 days from the authorization of the petition and ~~100~~90% within 98 days. Where a minor is not being detained or held in court custody, 75% of all original petitions or complaints should have adjudication and disposition completed within 119 days from the authorization of the petition and ~~100~~98% within 210 days. 4. *Child Protective Proceedings*. Where a child is in out-of-home placement (foster care), ~~90~~75% of all original petitions should have adjudication and disposition completed within 84 days from the authorization of the petition and ~~100~~85% within 98 days. Where a child is not in out-of-home placement (foster care), 75% of all original petitions should have adjudication and disposition within 119 days from the authorization of the petition and ~~100~~95% within 210 days.

5. *Designated Proceedings*. 90% of all original petitions should be adjudicated within 154 days from the designation date and ~~100~~98% within 301 days. Minors held in custody should be afforded priority for trial. 6. *Juvenile Traffic and Ordinance Proceedings*. 90% of all citations should have adjudication and disposition completed within 63 days from the date of first appearance and ~~100~~98% within 126 days.

7. *Adoption Proceedings*.

a. Petitions for Adoption. 90% of all petitions for adoption should be finalized or otherwise concluded within 287 days from the date of filing and ~~100~~98% within 364 days.

Petitions to Rescind Adoption. ~~100~~98% of all petitions to rescind adoption should be adjudicated within 91 days from the date of filing.

8. *Miscellaneous Family Proceedings*.

a. Name Change. ~~100~~90% of all petitions should be adjudicated within 126 days from the date of filing.

b. Safe Delivery. ~~100~~98% of all petitions should be adjudicated within 273 days from the date of filing.

c. Personal Protection. 100% of all petitions filed ex parte should be adjudicated within 24 hours of filing. 90% of all petitions not filed ex parte should be adjudicated within 14 days from the date of filing and 100% within 21 days.

d. Emancipation of Minors. ~~100~~98% of all petitions should be adjudicated within 91 days from the date of filing.

e. Infectious Diseases. ~~100~~98% of all petitions should be adjudicated within 91 days from the date of filing.

f. Parental Waiver. ~~100~~98% of all petitions should be adjudicated within 5 days from the date of filing.

9. *Ancillary Proceedings.*

a. Guardianship and Conservatorship Proceedings. 75% of all contested matters should be adjudicated within 182 days from the date of filing and ~~100~~95% within 364 days.

b. Mental Illness Proceedings; Judicial Admission. 90% of all petitions should be adjudicated within 14 days from the date of filing and ~~100~~98% within 28 days.

10. *Criminal Proceedings.* ~~90~~70% of all felony cases should be adjudicated within 91 days from the date of entry of the order binding the defendant over to the circuit court; ~~98~~85% within 154 days; and ~~100~~98% within 301 days. Incarcerated persons should be afforded priority for trial.

With SCAO approval, circuit courts may establish by local administrative order an alternative guideline for criminal proceedings that would provide that ~~90%~~75% of all felony cases should be adjudicated within 154 days from the date of entry of the order binding the defendant over to the circuit court and ~~100~~98% within 301 days. Incarcerated persons should be afforded priority for trial. Courts requesting the alternative guideline must give the sheriff the opportunity to comment on the proposed order.

11. *Appellate, Administrative Review, and Extraordinary Writ Proceedings.*

a. Appeals from Courts of Limited Jurisdiction. ~~100~~98% of all appeals to circuit court from courts of limited jurisdiction should be adjudicated within 182 days from the filing of the claim of appeal.

b. Appeals from Administrative Agencies. ~~100~~98% of all appeals to the circuit court from administrative agencies should be adjudicated within 182 days from the filing of the claim of appeal.

c. Extraordinary Writs. ~~98~~90% of all extraordinary writ requests should be adjudicated within 35 days from the date of filing and ~~100~~98% within 91 days.

Staff Comment: Proposed Administrative Order 2013-___ would rescind Administrative Order No. 2011-3 and update the guidelines found in that order. The updates would revise the guidelines to make them more reflective of disposition rates based on statewide court data and to accommodate the fact that there may be delay in any case type that would make 100 percent disposition nearly impossible. However, the 100 percent disposition expectation would remain in place for PPO cases.

The staff comment is not an authoritative construction of 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. 2013-24. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered July 3, 2013:

PROPOSED AMENDMENT OF MCR 8.109.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.109. MECHANICAL RECORDING OF COURT PROCEEDINGS.

(A) Official Record. Trial courts are authorized to use audio and video recording equipment for making a record of court proceedings. If a trial court uses audio or video recording ~~devices~~equipment for making the record of court proceedings, it shall use only recording ~~devices~~equipment that meets the standards as published by the State Court Administrative Office (i.e., the Standards for Digital Video Recording Systems, the Standards for Digital Audio Recording Systems), or analog equipment that the State Court Administrative Office has approved for use.

(B) Operating Standards. Trial courts that use audio or video recording equipment, whether digital or analog, must adhere to the audio and video recording operating standards published by the State Court Administrative Office.

(C) [Former (B) relettered, but otherwise unchanged.]

Staff Comment: The proposed amendment of MCR 8.109 would provide explicit authority for courts to use audio and video recording equipment to make a record of court proceedings and that trial courts using recording equipment would be required to follow the standards relevant to recording of proceedings that are published by the State Court Administrative Office.

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 November 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. 2012-23. Your comments

and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

PROPOSED AMENDMENT OF MCR 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 proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.111. ASSIGNMENT OF CASES.

(A) Application. The rule applies to all courts defined in subrule 8.110(A), regardless whether the court is acting in the capacity of a trial court or an appellate court.

(B)-(D) [Unchanged.]

Staff Comment: This proposal would clarify that the reassignment requirement applies regardless whether the court is acting in the capacity of a trial court or as an appellate court, such as a circuit court considering an appeal of a district court or probate court determination.

The staff comment is not an authoritative construction of 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 November 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. 2012-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.