MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

March 30, 1981 to November 2, 1981

WILLIAM H. LEWIS
SUPREME COURT REPORTER

VOL. 411

FIRST EDITION

ROCHESTER, NEW YORK
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
1982

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SUPREME COURT

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	TERM EXPIRES JANUARY 1 OF
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DEPUTY CHIEF JUSTICE

JOHN W. FITZGERALD, GRAND LEDGE	1983

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G. MENNEN WILLIAMS, GROSSE POINTE FARMS	1987
CHARLES L. LEVIN, DETROIT	1989
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ATTORNEY GENERAL: FRANK J. KELLEY, ALPENA

SOLICITOR GENERAL: ROBERT A. DERENGOSKI, EAST LANSING

[1] From October 27, 1981.

COURT OF APPEALS

CHIEF JUDGE

	Term Expires January 1 of
ROBERT J. DANHOF, EAST LANSING,	1987

CHIEF JUDGE PRO TEM

VINCENT J. BRENNAN, DETROIT,	1987

JUDGES

ROBERT B. BURNS, GRAND RAPIDS,	1983
JOHN H. GILLIS, GROSSE POINTE,	1983
S. JEROME BRONSON, FRANKLIN VILLAGE,	1987
THOMAS M. BURNS, SAGINAW,	1987
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DANIEL F. WALSH, GAYLORD,	1983
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FIRST DISTRICT: STEPHEN DALLOS, DETROIT[1]
ELLA WILLIAMS, DETROIT[2]
THIRD DISTRICT: KAREN ZIEGELE, GRAND RAPIDS

[1] Retired August 31, 1981.

[2] From September 1, 1981.

CIRCUIT JUDGES

	Term Expires January 1 of
1. HARVEY W. MOES, Hillsdale,	1985
2. ZOE S. BURKHOLZ, St. Joseph,	1983
CHESTER J. BYRNS, St. Joseph,	1985
JULIAN E. HUGHES, St. Joseph,	1987
WILLIAM S. WHITE, Niles,	1987
3. VICTOR J. BAUM, Detroit,	1987
THEODORE R. BOHN, Detroit,	1983
SUSAN D. BORMAN, Detroit,	1985
ARTHUR M. BOWMAN, Detroit,	1983[1]
THOMAS J. BRENNAN, Detroit,	1985
IRWIN H. BURDICK, Detroit,	1985
WILLIAM LEO CAHALAN, Detroit,	1983
ROBERT J. COLOMBO, Detroit,	1983
MICHAEL J. CONNOR, Detroit,	1983
HARRY J. DINGEMAN, Jr., Detroit,	1985
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RICHARD D. DUNN, Dearborn Heights,	1987
CHARLES S. FARMER, Detroit,	1985
THOMAS J. FOLEY, Detroit,	1985
WILLIAM J. GIOVAN, Detroit,	1985
ROMAN S. GRIBBS, Detroit,	1985
JAMES A. HATHAWAY, Detroit,	1987
JOHN H. HAUSNER, Grosse Pointe Park,	1983
HAROLD HOOD, Detroit,	1987
CHARLES KAUFMAN, Detroit,	1987
RICHARD C. KAUFMAN, Detroit,	1987
JOHN R. KIRWAN, Detroit,	1987
JAMES E. MIES, Livonia,	1983[2]
JOHN D. O'HAIR, Detroit,	1987
ROLAND L. OLZARK, Grosse Pointe,	1985
JOSEPH G. RASHID, Detroit,	1983[3]
MAUREEN P. REILLY, Detroit,	1985
THOMAS ROUMELL, Dearborn Heights,	1987
HAROLD M. RYAN, Detroit,	1985
PETER B. SPIVAK, Detroit,	1987[4]

[1] From September 7, 1981.

[2] From June 29, 1981.

[3] Died August 9, 1981.

[4] To July 22, 1981.

		Term Expires January 1 of
	MICHAEL L. STACEY, Detroit,	1983
	JOSEPH B. SULLIVAN, Detroit,	1983
	HENRY J. SZYMANSKI, Detroit	1987
	MYRON H. WAHLS, Detroit,	1983
	LUCILE A. WATTS, Detroit,	1987
	JOHN M. WISE, Detroit,	1983
4.	GORDON W. BRITTEN, Grass Lake,	1983
	CHARLES J. FALAHEE, Michigan Center,	1985
	JAMES G. FLEMING, Jackson	1987
	RUSSELL E. NOBLE, Jackson	1987
5.	HUDSON E. DEMING, Grand Ledge,	1983
	RICHARD E. ROBINSON, Eaton Rapids,	1985
6.	ROBERT C. ANDERSON, Pontiac	1987
	STEVEN N. ANDREWS, Bloomfield Hills,	1985
	HILDA GAGE, West Bloomfield,	1987
	ALICE L. GILBERT, Bloomfield Hills,	1983
	RICHARD D. KUHN, Pontiac,	1987
	GEORGE H. LaPLATA, West Bloomfield,	1985
	FRANCIS X. O'BRIEN, Royal Oak,	1983
	JOHN N. O'BRIEN, Berkley,	1987
	FARRELL E. ROBERTS, Bloomfield Hills,	1985
	GENE SCHNELZ, Walled Lake,	1985
	ROBERT L. TEMPLIN, Birmingham,	1985
	JAMES S. THORBURN, Royal Oak,	1983
	ROBERT B. WEBSTER, Birmingham,	1983
	FREDERICK C. ZIEM, Pontiac,	1987
7.	OLLIE B. BIVINS, Jr., Flint,	1983
	EARL E. BORRADAILE, Flint,	1983
	PHILIP C. ELLIOTT, Flint,	1987
	DONALD R. FREEMAN, Flint,	1985
	HARRY B. McARA, Flint,	1983
	ROBERT M. RANSOM, Flushing,	1985
	THOMAS C. YEOTIS, Flint,	1987
8.	JAMES L. BANKS, Ionia,	1985
	CHARLES W. SIMON, Jr., Edmore,	1987
9.	DONALD T. ANDERSON, Kalamazoo,	1983
	ROBERT L. BORSOS, Kalamazoo,	1987
	JOHN E. FITZGERALD, Kalamazoo,	1987
	C. H. MULLEN, Jr., Kalamazoo,	1985
10.	HAZEN R. ARMSTRONG, Saginaw,	1985
	FRED J. BORCHARD, Saginaw,	1983
	ROBERT S. GILBERT, Saginaw,	1987
	GARY R. McDONALD, Saginaw,	1983
	JOSEPH R. McDONALD, Saginaw,	1987
11.	WILLIAM F. HOOD, Manistique,	1985
12.	STEPHEN D. CONDON, Hancock,	1985
13.	WILLIAM R. BROWN, Traverse City,	1985
	CHARLES M. FORSTER, Traverse City,	1987
14.	R. MAX DANIELS, Muskegon,	1981
	JAMES M. GRAVES, Jr., Muskegon,	1989

	Term Expires January 1 of
RONALD H. PANNUCCI, Muskegon,	1985
JOHN H. PIERCEY, Muskegon Heights,	1987
15. THOMAS C. MEGARGLE, Bronson,	1985
16. RAYMOND R. CASHEN, Mount Clemens,	1987
ROBERT J. CHRZANOWSKI, Mount Clemens,	1987
JAMES C. DANER, Mount Clemens,	1983
GEORGE R. DENEWETH, Mount Clemens,	1983
EDWARD J. GALLAGHER, Warren,	1983
FRANK E. JEANNETTE, Mount Clemens,	1985
JOHN G. ROSKOPP, Mount Clemens,	1987
KENNETH N. SANBORN, Mount Clemens,	1985
17. ROBERT A. BENSON, Grand Rapids,	1983
GEORGE V. BOUCHER, Grand Rapids,	1983
GEORGE R. COOK, Lowell,	1987
STUART HOFFIUS, East Grand Rapids,	1983
ROMAN J. SNOW, Grand Rapids,	1985
WOODROW A. YARED, Grand Rapids,	1987
18. WILLIAM J. CAPRATHE, Bay City,	1987
EUGENE PENZIEN, Bay City,	1989
JOHN X. THEILER, Bay City,	1985
19. CHARLES A. WICKENS, Manistee,	1985
20. CALVIN L. BOSMAN, Grand Haven,	1987
JAMES E. TOWNSEND, Holland,	1985
21. ROBERT H. CAMPBELL, Clare,	1985[5]
KURT N. HANSEN, Gladwin,	1983[6]
PAUL F. O'CONNELL, Mt. Pleasant,	1987
22. WILLIAM F. AGER, Ann Arbor,	1983
ROSS W. CAMPBELL, Ann Arbor,	1987
HENRY T. CONLIN, Ann Arbor,	1983
PATRICK J. CONLIN, Ann Arbor,	1985
EDWARD D. DEAKE, Ypsilanti,	1985
23. J. RICHARD ERNST, Tawas City,	1983
24. ALLEN E. KEYES, Marlette,	1985
25. JOHN E. McDONALD, Marquette,	1985
EDWARD A. QUINNELL, Marquette,	1987
26. ROBERT R. FERGUSON, Ossineke,	1983
JOSEPH P. SWALLOW, Alpena,	1987
27. TERRENCE R. THOMAS, Newaygo,	1985
28. WILLIAM R. PETERSON, Cadillac,	1985
29. TIMOTHY M. GREEN, St. Johns,	1987
RANDY L. TAHVONEN, St. Johns,	1985
30. ROBERT HOLMES BELL, Mason,	1985
THOMAS L. BROWN, Lansing,	1987
JAMES R. GIDDINGS, Lansing,	1987
MICHAEL G. HARRISON, Lansing,	1983
RAY C. HOTCHKISS, Lansing,	1983
JAMES T. KALLMAN, Lansing,	1985
JACK W. WARREN, Lansing,	1985

[5] Retired April 30, 1981.

[6] From June 22, 1981.

	Term Expires January 1 of
31. JAMES T. CORDEN, Port Huron,	1989
PETER E. DEEGAN, Port Huron,	1987
ERNEST F. OPPLIGER, Port Huron,	1985
32. DONALD L. MUNRO, Ontonagon,	1985
33. MARTIN B. BREIGHNER, Petoskey,	1985
34. CARL L. HORN, Standish,	1985
35. PETER J. MARUTIAK, Corunna,	1985
36. MEYER WARSHAWSKY, Paw Paw,	1985
37. CREIGHTON R. COLEMAN, Battle Creek,	1985
STANLEY EVERETT, Battle Creek,	1987
PAUL NICOLICH, Marshall,	1983
38. JAMES J. KELLEY, Monroe,	1989
DANIEL L. SULLIVAN, Monroe,	1985
WILLIAM J. WEIPERT, Jr., Monroe,	1987
39. KENNETH B. GLASER, Jr., Adrian,	1983
REX B. MARTIN, Adrian,	1985
40. NORMAN A. BAGULEY, Lapeer,	1987
MARTIN E. CLEMENTS, Lapeer,	1985
41. V. ROBERT PAYANT, Iron Mountain,	1985
42. DAVID S. DeWITT, Midland,	1985
TYRONE GILLESPIE, Midland,	1983
43. JAMES E. HOFF, Dowagiac,	1987
44. BERT M. HENSICK, Howell,	1987
PAUL R. MAHINSKE, Howell,	1983
45. JAMES P. NOECKER, Centreville,	1983
46. WILLIAM A. PORTER, Gaylord,	1985
47. CLAIR J. HOEHN, Escanaba,	1987
48. GEORGE R. CORSIGLIA, Allegan,	1987
49. LAWRENCE C. ROOT, Big Rapids,	1983
50. NICHOLAS J. LAMBROS, Sault Ste. Marie,	1983
51. RICHARD I. COOPER, Ludington,	1985
52. M. RICHARD KNOBLOCK, Bad Axe,	1985
53. ROBERT C. LIVO, Cheboygan	1987
54. PATRICK REED JOSLYN, Caro,	1989[7]

[7] From July 1, 1981.

RECORDER'S COURT OF DETROIT

	Term Expires January 1 of
EVELYN K. COOPER,	1985
GEORGE W. CROCKETT, III,	1983
ROBERT L. EVANS,	1987
GERALDINE BLEDSOE FORD,	1987
SAMUEL C. GARDNER,	1987
JOHN H. GILLIS, Jr.,	1989
JOSEPH A. GILLIS,	1987
WILLIAM C. HAGUE,	1983
RICHARD P. HATHAWAY,	1989
HENRY L. HEADING,	1985
DONALD LEWIS HOBSON,	1985
BEVERLEY ANNE JASPER,	1987
CLARICE JOBES,	1985
VERA MASSEY JONES,	1985
DAVID P. KERWIN,	1987
CLARENCE LASTER, Jr.,	1985
WARFIELD MOORE, Jr.,	1985
JOHN PATRICK O'BRIEN,	1983
SAMUEL H. OLSEN,	1987
JUSTIN C. RAVITZ,	1983
DALTON A. ROBERSON,	1983
JAMES E. ROBERTS,	1987
MICHAEL SAPALA,	1987
M. JOHN SHAMO,	1985
LAWRENCE D. SILVERMAN,	1987
CRAIG S. STRONG,	1985
MICHAEL J. TALBOT,	1983
EDWARD M. THOMAS,	1985
LEONARD TOWNSEND,	1987

JUDICIAL CIRCUITS

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

TABLE OF CASES REPORTED

(Lines set in small type refer to actions on applications for leave to appeal from the Court of Appeals starting at page 851, and to special orders in other matters starting at page 1101.)

A

	PAGE
Aaron, People v	1026
Abood v Detroit Board of Education	970
Acosta v Great Lakes Dredge & Dock Co	1070
Adamowicz v R B Industries	1057
Adams, People v (George)	904
Adams, People v (Jerry)	1070
Adamson v Muskegon Motor Specialties	1053
Ada Twp, Silva v	972
Adkins v Auto Owners Ins Co	912
Adkins, People v (Clarence)	878
Adkins, People v (Ward)	934
Advance Watch Co, Ltd, McLean Screen Print, Inc v	976
Advance Watch Co, Ltd, Spartan Plastics, Inc v	976
Ahee, Arndt v	1082
Ahonen Lumber Co, Bulkowski v	1046
Air Products & Chemicals, Inc v J F Cavanaugh Co, Inc	727
Alexander v City of Norton Shores	1004
Alexander, People v (Annette)	899
Alexander, People v (Ernest)	1018
Allen, People v (Larry)	870
Allen, People v (Samuel)	1044
Allendale Mutual Ins Co, Smith v	1154
Allinger v Kell	1053

PAGE
Allred, People v ... 1073
Alpena Circuit Judge, Jacobs v ... 1048
Alston, People v ... 905
Alvarez v Great Lakes Dredge & Dock Co ... 1070
American Ass'n of University Professors, Eastern Michigan University Chapter v Morgan ... 955
American Metals, Sawyer v ... 1068
American Society for Prevention of Cruelty to Animals v Howard ... 871
American Steamship Co, Obad v ... 989
Amick v Baller ... 944
Anaya, People v ... 920
Anderson v Great Lakes Dredge & Dock Co ... 619
Anderson, People v (Donny) ... 994
Anderson, People v (Terry) ... 1017
Andreen v Cadillac Overall Supply Co ... 1068
Andrews, People v (Johnny) ... 921
Andrews, People v (Madison) ... 930
Anglin, People v ... 854
Ann Arbor, St Joseph Hospital of, Homenik v (Appeal of Cohan) ... 935
Appeal of Cohan ... 935
Applied Arts, Division of AGM Industries, Inc, Karklis v ... 976
Applied Arts Corp, Van Norden v ... 1027
Arc-Mation, Inc, Kassin v ... 1065
Ardman v Detroit-Macomb Hospital Ass'n ... 1053
Armond Cassil Co, Torres v ... 891
Armstrong, People v (Lavair) ... 951
Armstrong, People v (Walter) ... 1081
Armstrong v Ross Twp ... 932
Arndt v Ahee ... 1082
Arnold Transit Co v City of Mackinac Island ... 1046
Arsenault v City of Taylor ... 908
Artuso, People v ... 870
Ashley, People v ... 952
Attorney General v Diamond Mortgage Co ... 1003
Attorney General v Public Service Comm. 903, 990, 1028, 1063, 1064
Auger v Detroit Automobile Inter-Ins Exchange ... 1071
Austin v City of Romulus ... 955
Auto Owners Ins Co, Adkins v ... 912
Auto-Owners Ins Co, Miller v ... 633
Ayoub v Ford Motor Co ... 871

B

Bailey v Graves ... 510
Baker v Baker ... 567
Baker, People v (Charles) ... 872
Baker, People v (James) ... 964
Balardo, Sam v ... 405

	PAGE
Baller, Amick v	944
Barfield, People v	**700**
Barfield, People v	1080
Barker, People v	**291**
Barker, People v (Freddy)	1072
Barker, People v (Robert)	866
Barker-Fowler Electric Co, Pollard v	1013
Bart Edmund, Inc, Stafford v	1067
Bass, Berrien County Dep't of Social Services v	854
Bass, In the Matter of	854
Bassett, People v	960
Bauer v Underwriters Adjusting Co	903
Bauss v Matthews	1067
Baxter, People v	852
Bay County Prosecutor, *In re*	1002
Bay County Prosecutor v Bay County District Judge	1002
Beach, People v	1056
Beals v Walker	900
Beaudoin v Beaudoin	1076
Beaudoin, In the Matter of	1076
Beckley, People v	1054
Beets, People v	996
Belanger, People v	868
Bendix Corp, Patterson v	1075
Bendix United Geophysical, Gilmer v	878
Bennett, People v	952
Bensek, People v	905
Benton Harbor Mercy Hospital, Whitmore v	938
Berger v Weber	**1**
Berger v Weber	1155
Bergy Brothers, Inc v Zeeland Feeder Pig, Inc	974
Berkompas v Otterbein	1074
Bernard v Johnson	1076
Berrien County Dep't of Social Services v Bass	854
Berrien County Road Comm, Mayhew v	1035
Berryman, People v	915
Berryman v Warden, State Prison of Southern Michigan	1081
Berutti, People v	1042
Bescoe v Laborers' Union Local No 334	887
Bibbs, People v	961
Bill, People v	855
Birmingham (City of), Rennell v	865
Blachura, People v	960
Black v Rasile	987
Blackburn, People v	1048
Blanton, People v	876
Bliss (E W) Co, Pontious v	1062
Blocker, First National Bank v	1039
Blocker, Kiggins v	880
Blount, People v	1039

	PAGE
Blue Cross & Blue Shield of Michigan, Michigan Ass'n of Psychotherapy Clinics v	869
Blue Cross & Blue Shield of Michigan, Midwest Mental Health Clinic, PC v	869
Bluemlein v Szepanski	995
Board of Comm'rs (Wayne County), National Union of Police Officers, Local 502 AFL-CIO v	1046, 1063
Board of Comm'rs (Wayne County), Wayne County Sheriff v	1058
Board of Education (Detroit), Abood v	970
Board of Education (Detroit), Kyes v	970
Board of Education (Detroit) v Parks	970
Board of Education (Detroit), Thomas v	1061
Board of Education (Detroit), Warczak v	970
Board of Education (Detroit), Watson v	1014
Board of Education (Detroit), Williams v	995
Board of Education (Grand Blanc), Smiley v	900
Board of Education (Harper Woods), Harper Woods Federation of Teachers v	1074
Board of Education (Kearsley), Niemi v	1076
Board of Education (Walled Lake), Stokus v	909
Board of Governors of Wayne State University, Tsang v	1015
Board of Health (Lenawee County) v Messerly	900
Boguslaw v Wrigley Supermarkets, Inc	1021
Bohan, In the Matter of	1119
Booker, People v	856
Booth Newspapers, Inc, Butler v	993
Bordas v Detroit General Hospital	857
Borman's, Inc, Pitoniak v	1049
Boron Oil Co, Wolverine Commercial Development Corp v	1038
Bortell v Citizens for Better Care Institute, Inc	902
Bowers, Zimmer v	991
Bowman, People v	860
Boyd v St Lawrence Community Mental Health Clinic	1044
Brake v Burke	874
Bransford, People v	1062
Bray v Dep't of State	972
Bridges, People v	969
Briggs v Briggs	1003
Brinkman, Reichenbach v	980
Brinkman Estate, *In re*	980
Brockway v Tecumseh Products Co	1062
Bronson, Rinaldi v	996
Brooks, People v	940
Brooks v Reed	862
Brookside Center Ass'n v J's & B's Food	1013
Browder v International Fidelity Ins Co	972
Brown v Dep't of Corrections	1061
Brown v LTV Aerospace Corp (After Remand)	908
Brown, People v (Clark)	860
Brown, People v (Jimmie)	967
Brown, People v (John)	910
Brown, People v (Ralph)	1075

PAGE
Brown, People v (Ronald) 964
Brownstown Twp, Ottawa Silica Co v 974
Buchanan, People v 950
Buckeye Union Ins Co, Lapeer Community Schools v 991
Buckles, People v 914
Bulkowski v Ahonen Lumber Co 1046
Bullard v City of Kalamazoo 881
Bullock v Michigan Millers Mutual Ins Co 1154
Bundo v Liquor Control Comm 874
Bundy Corp, Jacques v 910
Bungard v Lakeville Community Schools 1042
Burch, People v 853
Burden, People v 56
Burdick v State Farm Mutual Automobile Ins Co 1036
Burke, Brake v 874
Burke, Zendt's Landscaping, Inc v 909
Burl, People v 877
Burton v Pontiac General Hospital 975
Bush v Dep't of Military Affairs 1027
Bushnell, Gage & Reizen v O'Meara 895
Bushong, People v 1076
Bustion, People v 967
Butcher, Stanton v 995
Butler v Booth Newspapers, Inc 993
Butler, People v 852
Butts, People v 1041
Byers, People v 918
Byrd, People v (George) 1022
Byrd, People v (Michael) 873

C

Cadillac Gage, Clark v 1034
Cadillac Overall Supply Co, Andreen v 1068
CAF Investment Co v Saginaw Twp 1119
Cahalan, Walker v 857
Caldwell, People v (Charles) 862
Caldwell, People v (Henry) 1078
Cameron, People v 890
Campbell's Mobil Service, Kilcrease v 1003
Capraro v Ritter 916
Card v Chrysler Corp 1069
Cardenas v Chavez 999
Cargill, People v 875
Carlo, Wilkerson v 984
Carlson v Manistique Pulp & Paper Co 954
Carpenter v Lansing Drop Forge 1075
Carpenter, People v 939
Carr, People v 1060
Carter, People v 979
Carter Metropolitan Christian Methodist Episcopal Church v Liquor Control Comm 1037

PAGE
Cartwright, People v 992
Casey, People v 179
Casper, People v 981
Cazal, People v 901
Ceausu v Dover Corp 884
Central Heating Co, Fuller v 1021
Central Industrial Park Project, In the Matter of Acquisition of Land for the 889
Certified Question, *In re* 727
Chamblis, People v 917
Champion, People v 468
Chandler, People v 916
Chandler, Roosa v 999
Chaney, People v 1051, 1052
Chase v State Boundary Comm 1048
Chas J Rogers, Inc, KMH Equipment Co v 1079
Chatman, People v 945
Chatterton, People v 867
Chavez, Cardenas v 999
Cheboygan Cement Products, Inc, People *ex rel* Acting Director, Dep't of Natural Resources v 1015
Cheney v Vandeventer 891
Chilingirian, Quadnau v 1039
Chilingirian v Quadnau 1039
Chrysler Corp, Card v 1069
Chrysler Corp, Draper v 1053
Chrysler Corp, Simoff v 922
Church of Scientology of Michigan, Sternicki v 945
Ciaglo v Fanning 1020
Ciba-Geigy Corp, Formella v 995
Cincinnati Ins Co, Morgan v 267
Circuit Judge (Wayne), Jacobs v 1084
Citizens for Better Care Institute, Inc, Bortell v 902
Citizens Ins Co v Lemaster 970
Citizens Ins Co, Swanson v 945
Citizens Ins Co of America v Tuttle 536
City Messenger Co, Lowin v 1019
City of Birmingham, Rennell v 865
City of Detroit, Commodities Export Co v 1021
City of Detroit, Commuter Tax Ass'n of Metropolitan Detroit v. 1065
City of Detroit, Detroit Fire Fighters Ass'n, Local 344, IAFF v . 861
City of Detroit, Safran Printing Co v 880
City of East Lansing, Meridian Charter Twp v 962
City of East Lansing, Shopping Centers, Inc v 885
City of Grand Rapids v Impens 1035
City of Kalamazoo, Bullard v 881
City of Kalamazoo, Glover v 951
City of Lathrup Village, Walker's Amusements, Inc v 1058
City of Lincoln Park, Rudy v 1014

PAGE
City of Mackinac Island, Arnold Transit Co v 1046
City of Midland, Garb-Ko, Inc v 1072
City of Muskegon, Plough v 1000
City of Norton Shores, Alexander v 1004
City of Romulus, Austin v 955
City of Royal Oak, McMillan v 918
City of Southfield, Schecter v 893
City of Southfield, Village of Franklin v 1016
City of Stambaugh, Turcotte v 1062
City of Taylor, Arsenault v 908
City of Troy, Sheffield Development Co v 974
City of Warren, Local 1383, IAFF v 642
City of Westland, Spencer v 954
Civil Rights (Dep't of) *ex rel* Jones v Dep't of Civil Service 1034
Civil Service (Dep't of), Dep't of Civil Rights *ex rel* Jones v 1034
Claassen, People v 1066
Clabin, People v 472
Clabin, People v 1157
Clark v Cadillac Gage 1034
Clark, People v (David) 988
Clark, People v (Michael) 1025
Clark, People v (Stanley) 995
Clark Equipment Co, Evans v 888
Cleveland v Rizzo 884
Cline v Rock 1004
Clink v Livingston County Board of Road Comm'rs 892
Coates, People v 1026
Cobb, People v (Bobbie) 1073
Cobb, People v (Ralph) 855
Cohan, Appeal of 935
Cohan v Riverside Park Place Condominium Ass'n, Inc. ... 998, 1061
Cohee v General Motors Corp 1067
Cohen v Cohen 866
Cohen v Honigman, Miller, Schwartz & Cohn 1038
Cole v Michigan Consolidated Gas Co 874
Cole, People v 483
Coleman, People v 884
Collins, People v 907
Commercial Union Ins Co v Smith 889
Commodities Export Co v City of Detroit 1021
Commuter Tax Ass'n of Metropolitan Detroit v City of Detroit . 1065
Compton-Cummings v Ford Motor Co 1017
Condor Manufacturing, Inc, Vermiglio v 988
Cone, People v 904
Conger v Foremost-McKesson, Inc 890
Consolidated Litho, Inc, Wasilewski v 1049
Consolidated Packaging Co, Snavely v 952
Consumers Power Co for Authority to Issue Securities, In the Matter of the Application of 990

PAGE
Conte, People v ... 892
Cook, People v ... 986
Cooke, People v ... 997
Cooks, People v ... 1001
Cooper v Garden City Osteopathic Hospital ... 962
Cope, West Side Auto Parts, Inc v ... 910
Corbett v Jamison ... 1000
Corbett, People v ... 856
Corrections (Dep't of), Brown v ... 1061
Corrections (Dep't of), Cross v ... 1062
Corrections (Dep't of), Director, Sanford v ... 1085
Corrections (Dep't of), Oakland County Prosecuting Attorney v ... 183
Corrections (Dep't of), Oakland County Prosecuting Attorney v. 889
Corrections (Dep't of), Pecoraro v ... 973
Corrections (Dep't of), Penn v ... 858
Cotton v Kambly ... 1033
Coulter, People v ... 889
Court of Appeals, MacDonald v ... 911
Cousineau v Oakland County Road Comm ... 901
Covington, People v ... 880
Crader, People v ... 943
Cramer, People v ... 862
Crawford v Salt River Lumber Co, Inc ... 854
Crosby v Sterner Sheet Metal & Roofing Co ... 1043
Cross v Dep't of Corrections ... 1062
Cross, People v ... 944
Crum, People v ... 875
Csutora v Michigan Millers Mutual Ins Co ... 1154
Currelley, People v ... 904

D

Daggs, In the Matter of ... 304
Daniels, People v ... 1071
Danly Machine Corp, Glowczynski v ... 972
Daske, People v ... 1065
Davey v Detroit Automobile Inter-Ins Exchange ... 900
Davis, People v ... 321
Davis, People v (Billy) ... 963
Davis, People v (Kerry) ... 914
Dayton-Hudson Corp, Smith v ... 991
Dease, People v ... 1013
Dechert v General Motors Corp ... 980
Dedenbach v Snell ... 1024
Dellinger v Holton Public Schools ... 990
Delta County Dep't of Social Services v Voakes ... 897
Delta Tube & Fabricating Corp, McCann v ... 1036
DeMars v Roadway Express, Inc ... 857
Demps, People v ... 911
Denson, People v ... 1018

PAGE
Dep't of Civil Rights *ex rel* Jones v Dep't of Civil Service 1034
Dep't of Civil Service, Dep't of Civil Rights *ex rel* Jones v..... 1034
Dep't of Corrections, Brown v..... 1061
Dep't of Corrections, Cross v..... 1062
Dep't of Corrections, Director, Sanford v..... 1085
Dep't of Corrections, Oakland County Prosecuting Attorney v..... 183
Dep't of Corrections, Oakland County Prosecuting Attorney v.. 889
Dep't of Corrections, Pecoraro v..... 973
Dep't of Corrections, Penn v..... 858
Dep't of Labor, Mulvihill v 991
Dep't of Labor v Panel Controls Corp..... 1082
Dep't of Military Affairs, Bush v 1027
Dep't of Natural Resources, People *ex rel* Acting Director v Cheboygan Cement Products, Inc 1015
Dep't of Social Services (Berrien County) v Bass..... 854
Dep't of Social Services, Koziarski v..... 980
Dep't of Social Services (Lapeer County) v Priest 1052
Dep't of Social Services, Scroggins v..... 982
Dep't of State, Bray v 972
Dep't of State Highways, Phelps v..... 955
Dep't of State Highways, Silvola v 961
Deputy Warden, State Prison of Southern Michigan, Jordan v . 1001
Detroit (City of), Commodities Export Co v..... 1021
Detroit (City of), Commuter Tax Ass'n of Metropolitan Detroit v 1065
Detroit (City of), Detroit Fire Fighters Ass'n, Local 344, IAFF v 861
Detroit (City of), Safran Printing Co v 880
Detroit Automobile Inter-Ins Exchange, Auger v 1071
Detroit Automobile Inter-Ins Exchange, Davey v 900
Detroit Automobile Inter-Ins Exchange, Liddell v 1079
Detroit Automobile Inter-Ins Exchange v Neequaye 851
Detroit Automobile Inter-Ins Exchange, Osterhart v..... 1021
Detroit Automobile Inter-Ins Exchange v Straw..... 879
Detroit Automobile Inter-Ins Exchange, Vovak v..... 851
Detroit Automobile Inter-Ins Exchange, Wood v..... 900
Detroit Board of Education, Abood v 970
Detroit Board of Education, Gant v 891
Detroit Board of Education, Kyes v..... 970
Detroit Board of Education v Parks 970
Detroit Board of Education, Thomas v..... 1061
Detroit Board of Education, Warczak v 970
Detroit Board of Education, Watson v 1014
Detroit Board of Education, Williams v..... 995
Detroit Edison Co, Signs v..... 870
Detroit Fire Fighters Ass'n, Local 344, IAFF v City of Detroit.. 861
Detroit General Hospital, Bordas v..... 857
Detroit-Macomb Hospital Ass'n, Ardman v 1053
Detroit Rendering Co, Ledesma v 971
DeVilbiss Co, Hicok v 896
Diamond Mortgage Co, Attorney General v 1003

	PAGE
Dinsmore, People v	1071
Director, Dep't of Corrections, Sanford v	1085
Director, State Police v Northstar Baptist Church	1085
Director, State Police v Rose Park Baptist Church	1084
Direct Transit Lines, Inc, Riley v	1022
District Judge (Bay County), Bay County Prosecutor v	1002
Doe v Probate Judge	1005
Dogariu v Frank's Nursery Sales, Inc	1051
Dolby, Vine v	956
Dolsen, People v	1045
Doran, People v	1026
Doss, People v	851
Dotson, Wright v	1053
Douglas, People v	872
Dover Corp, Ceausu v	884
Dowtin, People v	963
Dozier, People v	888
Drain Comm'r (Monroe County), Joba Construction Co, Inc v	1025
Draper v Chrysler Corp	1053
Driskell, People v	1054
Dudgeon, People v	902
Dudley, People v	1058
Dueweke v Morang Drive Greenhouses, Inc	670
Dugan, People v	989
Duhame v Kaiser Engineers of Michigan, Inc	955
Dullinger v Hubeny	994
Dummitt, People v	888
Dunlap v Employment Security Comm	904
Dupuie, People v	940

E

Ealey, People v	987
Ealy, Rohde v	898
Eastern Michigan University Chapter, American Ass'n of University Professors v Morgan	955
East Lansing (City of), Meridian Charter Twp v	962
East Lansing (City of), Shopping Centers, Inc v	885
East Lansing-Meridian Water & Sewer Authority, Jones v	894
Eichelberger #1, People v	910
Eichelberger #2, People v	956
El-Ameen, Michigan Consolidated Gas Co v	1019
Ellison v Wayne County General Hospital	988
Emmons v Rockwell International, Automotive Products Division	973
Employers Fire Ins Co v Smith-Santoro, Inc	907
Employment Security Comm, Dunlap v	904
Employment Security Comm v Lansing Community College	874
Endykiewicz v State Highway Comm	1035
Engle v Henry DeKoning Construction Co	1056
English v Van Buren County Road Comm	884
Escamilla, People v	1066

PAGE
Ettinger v Hooker Motor Freight 892
Evans v Clark Equipment Co 888
Evans v Greene 1068
Evans, People v 1015
E W Bliss Co, Pontious v 1062
Ewing, People v 321
Executive Message of the Governor, *In re* 1131
Expose, People v 1075

F

Falk v State Bar of Michigan 63
Falk v State Bar of Michigan 1157
Fanning, Ciaglo v 1020
Farley, People v 871
Farm Bureau Mutual Ins Co of Michigan, Oikarinen v 908
Farmer Jack's, Inc, Lewis v 973
Ferguson v Yingling 1056
Ferro Manufacturing Co, Hovey v 1022
Fesik, Rayhall v 997
Fields, People v (Elizabeth) 869
Fields, People v (James) 962
Figures v Ricken 877
Finch, People v 1017
Finklea, People v 981
Fireman's Fund Ins Co, O'Dell v 947
Fireman's Fund Ins Co, Staffney v 947
First National Bank v Blocker 1039
Fisher v Jackson 1015
Fisher v National Ben Franklin Life Ins Corp 947
Fisher, People v 885
Fizer v Jennings 1078
Flannel, People v 920
Fletcher v Harafajee 971
Flint Osteopathic Hospital, Skukalek v 944
Flower v Gensterblum 895
Flynn v Libkie 942
Ford v Monroe Steel Castings Co 874
Ford Motor Co, Ayoub v 871
Ford Motor Co, Compton-Cummings v 1017
Ford Motor Co, Gage v 1070
Ford Motor Co, Lenzotti v 998
Ford Motor Co, Swiderek v 1067
Ford Motor Co, Youngblood v 882
Foremost-McKesson, Inc, Conger v 890
Formella v Ciba-Geigy Corp 995
Foster, People v 980
Fowlerville Community Schools, Vassallo v 959
Franklin, People v 943
Franklin (Village of) v City of Southfield 1016
Frank's Nursery Sales, Inc, Dogariu v 1051

PAGE
Frazier, People v ... 953
Freck, People v ... 975
Fredericks v General Motors Corp ... 712
Freeman, People v (Demetrius) ... 997
Freeman, People v (Louis) ... 978
Freeman, People v (Tommy) ... 1020
Fresard v Michigan Millers Mutual Ins Co ... 900
Freybler v Gallmeyer Livingston Co ... 996
Frezza, Pattyn v ... 1023
Friday, People v ... 1025
Fuller v Central Heating Co ... 1021
Fuson, People v (Cebert) ... 986
Fuson, People v (Michael) ... 899

G

Gaddis, People v ... 1051
Gage v Ford Motor Co ... 1070
Gallmeyer Livingston Co, Freybler v ... 996
Gant v Detroit Board of Education ... 891
Garb-Ko, Inc v City of Midland ... 1072
Garden City Osteopathic Hospital, Cooper v ... 962
Garland, People v ... 1076
Garrison, People v ... 881
Garside, People v ... 933
Garza, People v ... 913
Gauna v General Motors Corp ... 1078
Gaval, People v ... 1069
General Electric Co, Jackson v ... 933
General Motors Corp, Cohee v ... 1067
General Motors Corp, Dechert v ... 980
General Motors Corp, Fredericks v ... 712
General Motors Corp, Gauna v ... 1078
General Motors Corp, Helton v ... 1049
General Motors Corp, Hightower v ... 886
General Motors Corp, Hoffman v ... 1055
General Motors Corp, Jackson v ... 1057
General Motors Corp, Jones v (Johnny) ... 979
General Motors Corp, Jones v (Mabel) ... 956
General Motors Corp, Klimczuk v ... 913
General Motors Corp, Martin v ... 935
General Motors Corp, McCullough v ... 994
General Motors Corp, Moberg v ... 1068
General Motors Corp, Nadolski v ... 1016
General Motors Corp, Nice v ... 1020
General Motors Corp, Pillen v ... 1049
General Motors Corp, Swanson v ... 875
General Motors Corp, Villaneuva v ... 896
General Motors Corp, Wilson v ... 1002
General Motors Corp, Wise v ... 878
Gensterblum, Flower v ... 895

PAGE
Gentelia, Pustay v ... 1066
Germain, People v ... 858
Gibson, People v ... 993
Gilbert, People v ... 868
Gilmer v Bendix United Geophysical ... 878
Givans, People v ... 951
Glarum, Howard v ... 903
Glover v City of Kalamazoo ... 951
Glover, People v ... 945
Glowczynski v Danly Machine Corp ... 972
Goins, People v ... 1018
Gojcaj, People v ... 873
Goldsmith, People v ... 555
Goodyear Tire & Rubber Co, Rarick v ... 1072
Gorlewski v U S Steel Corp ... 993
Gosdzinski v Walbro Corp ... 1084
Gourdie, Fraser & Associates, Inc, Rankin v ... 951
Governor, *In re* Executive Message of the ... 1131
Graham, People v ... 854
Grand Blanc Board of Education, Smiley v ... 900
Grand Rapids (City of) v Impens ... 1035
Grand Rapids Growers, Inc v Old Kent Bank & Trust Co ... 918
Grant, People v (Gerald) ... 1049
Grant, People v (Larry) ... 936
Gratzer, People v ... 961
Graves, Bailey v ... 510
Gray, People v ... 952
Grayson v White Pine Copper Co ... 952
Great Lakes Dredge & Dock Co, Acosta v ... 1070
Great Lakes Dredge & Dock Co, Alvarez v ... 1070
Great Lakes Dredge & Dock Co, Anderson v ... 619
Great Lakes Dredge & Dock Co, Surrent v ... 1070
Green, People v (Keith) ... 935
Green, People v (Richard) ... 965
Green, People v (Robert) ... 879
Greene, Evans v ... 1068
Greene v Union Optical, Inc ... 875
Griffin, People v (Charles) ... 1039
Griffin, People v (Gregory) ... 1072
Griffin, People v (Lewis) ... 907
Griffith, People v ... 897
Grigsby, People v ... 1048
Grimmett, People v ... 853
Grosse Pointe Cycle, Makres v ... 882
Grosse Pointe Quality Food Co v Najor ... 1067
Grunow v Secretary of State ... 1058
Guajardo, People v ... 1069

H

Haddix, People v ... 870

	PAGE
Haggitt, People v	873
Hahn v Sarah Coventry, Inc	886
Haines, People v	1077
Halberg, People v	1059
Hale, People v	1002
Hall v Hall	1051
Hall, People v (Ronald)	1026
Hall #1, People v (Robert Lee)	883
Hall #2, People v (Robert Lee)	951
Hamilton, People v (David)	976
Hamilton, People v (Linda)	1084
Hamm, People v	888
Hammer, People v	1045
Hand, People v	887
Hansen v Michigan Millers Mutual Ins Co	1154
Harafajee, Fletcher v	971
Harlan Electrical Construction Co, Harris v	906
Harman, People v	1083
Harmon, People v	950
Harper Hospital, Lee v	1079
Harper Woods Board of Education, Harper Woods Federation of Teachers v	1074
Harper Woods Federation of Teachers v Harper Woods Board of Education	1074
Harris v Harlan Electrical Construction Co	906
Harris, People v (Arthur)	1036
Harris, People v (Curtis)	950
Harris Corp, Langley v	973
Hathcock, People v	853
Hayes, People v	881
Haynes, People v	937, 1024
Headspeth, People v	852
Health Dep't (Wayne County) v Olsonite Corp	1001
Heiler, People v	879
Helm, In the Matter of	1128
Helton v General Motors Corp	1049
Henderson, People v	1073
Henry, People v	886
Henry DeKoning Construction Co, Engle v	1056
Herbert, People v	1045
Herron v Stafford Corp	993
Hesson, People v	906
Hetrick, People v	931
Hicks, People v	1068
Hicok v DeVilbiss Co	896
Highland Park Housing Comm v Johnson	941
Hightower v General Motors Corp	886
Hileman Motors, Inc, White v	1080
Hilgendorf v Sears, Roebuck & Co	905
Hill, People v (Arthur)	908
Hill, People v (Michael)	965
Hill, People v (Richie)	946

PAGE
Hillcrest Christian Nursing Home, Inc, People v 1060
Hiscock v Whitcomb 1084
Hoeneggers' & Co, Inc v Zeeland Feeder Pig, Inc 1004
Hoffman v General Motors Corp 1055
Hoffman, People v 1036
Holiday Inns, Inc v Jackson 1015
Holliday, People v 1081
Holloway, People v 973
Holmes, People v (Charles) 985
Holmes, People v (Johnnie) 1067
Holmes, People v (William) 899
Holton Public Schools, Dellinger v 990
Holy Cross Hospital, Stevens v 1057
Homenik v St Joseph Hospital of Ann Arbor (Appeal of Cohan) 935
Honigman, Miller, Schwartz & Cohn, Cohen v 1038
Hooker Motor Freight, Ettinger v 892
Hooks, People v 1054
Hopkins, People v 992
Hotchkiss, In the Matter of 1128, 1135
Housing Comm (Highland Park) v Johnson 941
Houston, People v (Gregory) 917
Houston, People v (Kevin) 1037
Hovey v Ferro Manufacturing Co 1022
Howard, American Society for Prevention of Cruelty to Animals v 871
Howard v Glarum 903
Howard, People v 898
Howard Estate, *In re* 871
Hubbard, People v 992
Hubeny, Dullinger v 994
Huddleston, People v 1077
Hudson, People v (Alexander) 969
Hudson, People v (Roosevelt) 917
Huff, People v 974
Hughes, People v 517
Hughes, People v 950
Humbert, People v 902
Hunter, People v 895
Hurd, People v (Clark) 1038
Hurd, People v (Maurice) 972
Huron Cement, Shiemke v 1055
Huron Metro Associates v Huron Twp 959
Huron Twp, Huron Metro Associates v 959
Hurst, People v 1070

I

IAFF, Detroit Fire Fighters Ass'n, Local 344 v City of Detroit .. 861
IAFF, Local 1383 v City of Warren 642
Ideis, People v 854
Impens, City of Grand Rapids v 1035

PAGE
In re Bay County Prosecutor 1002
In re Brinkman Estate 980
In re Certified Question 727
In re Executive Message of the Governor 1131
In re Howard Estate 871
In re Kettunen 1069
In re LaPoint Estate 1000
In re Prichard Estate 1120
In re Semeyn Estate 1059
In re Thomas Estate 1039
In re Weldon 1005
International Fidelity Ins Co, Browder v 972
International Harvester Co, Michigan Mutual Ins Co v 961
In the Matter of Acquisition of Land for the Central Industrial Park Project 889
In the Matter of Bass 854
In the Matter of Beaudoin 1076
In the Matter of Bohan 1119
In the Matter of Daggs 304
In the Matter of Helm 1128
In the Matter of Hotchkiss 1128, 1135
In the Matter of Jackson 896
In the Matter of O'Connell 1130
In the Matter of Priest 1052
In the Matter of Probert 210
In the Matter of Selburn 1138
In the Matter of the Application of Consumers Power Co for Authority to Issue Securities 990
In the Matter of Van Zant 859
Irish Enterprises, Union Lake Associates v 955
Iseler v Tinsey 976
Iverson, People v 862, 977

J

Jackson, Fisher v 1015
Jackson v General Electric Co 933
Jackson v General Motors Corp 1057
Jackson, Holiday Inns, Inc v 1015
Jackson, In the Matter of 896
Jackson, People v (George) 941
Jackson, People v (Lawrence) 884
Jackson, People v (Michael) 878
Jackson County Prosecutor, W Mason, Inc v 868
Jacobs v Alpena Circuit Judge 1048
Jacobs v Wayne Circuit Judge 1084
Jacques v Bundy Corp 910
Jamison, Corbett v 1000
Jamison, Stockdale v 1000
Janiga, People v 1043

PAGE
Janowicz, People v 853
Jemison, People v 1059
Jenison Public Schools, Lanting v 1066
Jennings, Fizer v 1078
Jennings, People v 890
Jerome v Michigan Mutual Auto Ins Co 911
Jerrils, People v 881
J F Cavanaugh Co, Inc, Air Products & Chemicals, Inc v 727
J L Hudson Co, Rahn v 1025
Joba Construction Co, Inc v Monroe County Drain Comm'r 1025
Johnson, Bernard v 1076
Johnson, Highland Park Housing Comm v 941
Johnson v Marquette General Hospital, Inc 1071
Johnson, People v 50
Johnson, People v (David T) 1074
Johnson, People v (David) 1080
Johnson, People v (Edgar) 1023
Johnson, People v (Johnnie) 1052
Johnson, People v (LaDon) 947
Johnson, People v (Marvin) 1040
Johnson, People v (Walter) 1155
Johnson v Salem Twp 1001
Johnston, Van Noord v 1062
Jones (Dep't of Civil Rights *ex rel*) v Dep't of Civil Service 1034
Jones v East Lansing-Meridian Water & Sewer Authority 894
Jones (Johnny) v General Motors Corp 979
Jones (Mabel) v General Motors Corp 956
Jones, People v 56
Jones, People v (James) 985
Jones, People v (Jesse) 970
Jones, People v (Patrick) 1077
Jones, People v (Ronald) 942
Jones, People v (Thomas) 996
Jones, People v (Victor) 994
Jordan v Deputy Warden, State Prison of Southern Michigan 1001
Jordan, People v 865
Jordan v Roseville Police Dep't 882
J's & B's Food, Brookside Center Ass'n v 1013
Julian, People v 946

K

Kaiser Engineers of Michigan, Inc, Duhame v 955
Kalamazoo (City of), Bullard v 881
Kalamazoo (City of), Glover v 951
Kalka v Kalka 960
Kaly, People v 975, 1022
Kambly, Cotton v 1033
Kapitzke, People v 957
Karjala, People v 1028

	PAGE
Karklis v Applied Arts, Division of AGM Industries, Inc	976
Kassin v Arc-Mation, Inc	1065
Kata, Kaye v	939
Kaye v Kata	939
Kearsley Board of Education, Niemi v	1076
Kell, Allinger v	1053
Kelly, People v	862
Kemp, People v	1074
Kerley, People v	868
Kessler, People v	979
Kessler, Three Lakes Ass'n v	1056
Kestenbaum v Michigan State University	869
Kettunen, *In re*	1069
Kiernan v Scott Paper Co	880
Kiggins v Blocker	880
Kilcrease v Campbell's Mobil Service	1003
Kimberly Clark Corp, Rutherford v	1019
Kincaid, People v	1055
King v McCullough	914
King, People v (Reginald)	1060
King, People v (Thomas)	939
Kinross Sportsmens Club, Stringer v	919
Kinsman Marine Transit Co, Szopko v	902
Kirkpatrick, People v	918
Klimczuk v General Motors Corp	913
KMH Equipment Co v Chas J Rogers, Inc	1079
Kolon v Pax-Elm-J	993
Kowalczyk v Lawyers Title Ins Corp	1023
Kowtun, People v	987
Koziarski v Dep't of Social Services	980
Kozlow, People v	1036
Kregger, People v	931, 1041
Kropp Painting, Tomich v	882
Krueger-Detroit Division of Lear Siegler, Inc, Piperides v	1047
Krzesowiak v Larson	1080
Kyes v Detroit Board of Education	970
Kyle v Mutual of Omaha Ins Co, Inc	896

L

Labor (Dep't of), Mulvihill v	991
Laborers' Union Local No 334, Bescoe v	887
Lakeville Community Schools, Bungard v	1042
Lakey Foundry Corp, Lattimore v	1024
Langley v Harris Corp	973
Langworthy, People v	998
Lankford, People v	939
Lansing Community College, Employment Security Comm v	874
Lansing Drop Forge, Carpenter v	1075
Lanting v Jenison Public Schools	1066
Lapeer Community Schools v Buckeye Union Ins Co	991
Lapeer County Dep't of Social Services v Priest	1052

	PAGE
LaPoint v Young	1000
LaPoint Estate, *In re*	1000
Larner v Lundberg Screw Products	996
Larson, Krzesowiak v	1080
Lasala, United Coin Meter Co v	854
Lathrup Village (City of), Walker's Amusements, Inc v	1058
Lattimore v Lakey Foundry Corp	1024
Lawaetz v St Lucia Investment Co	858
Lawyers Title Ins Corp, Kowalczyk v	1023
Leaphart, People v	978
Leavell, People v	941
LeBlanc v State Farm Mutual Automobile Ins Co	1119
Ledesma v Detroit Rendering Co	971
Lee v Harper Hospital	1079
Lee, People v (Davis)	1040
Lee, People v (Steven)	1050
Lemaster, Citizens Ins Co v	970
Lempert & Biegel Co, Nelms v	965
Lenawee County Board of Health v Messerly	900
Lenzotti v Ford Motor Co	998
Lewis v Farmer Jack's, Inc	973
Lewis, People v (James)	855
Lewis, People v (Robert H)	861
Lewis, People v (Robert V)	949
Lewis v Stadler	971
Libkie, Flynn v	942
Liddell v Detroit Automobile Inter-Ins Exchange	1079
Liggins, People v	1018
Lilly, Schwark v	909
Lincoln, Devlin & Kalcher, PC v Thiebaut	960
Lincoln Park (City of), Rudy v	1014
Liquor Control Comm, Bundo v	874
Liquor Control Comm, Carter Metropolitan Christian Methodist Episcopal Church v	1037
Liquor Control Comm, Southland Corp v	998
Livingston County Board of Road Comm'rs, Clink v	892
Local 502, AFL-CIO, National Union of Police Officers, Wayne County Board of Comm'rs v. 1046,	1063
Local 1383, IAFF v City of Warren	**642**
Lonchar, People v	923
Losey, People v	864
Loukas, People v	1078
Love, People v	1035
Lowin v City Messenger Co	1019
LTV Aerospace Corp, Brown v (After Remand)	908
Luckhardt, Schumaier v	1027
Luick v Luick	1021
Lumbermen's Mutual Ins Co, Smith v	873
Lundberg Screw Products, Larner v	996
Lundy, People v	1003
Luster, People v	936

	PAGE
Lyberg v Montgomery Ward & Co, Inc	989
Lyles, People v	855
Lynn, People v	**291**
Lynn, People v	1157
Lytle, People v	1019

M

MacDonald v Court of Appeals	911
Mack, People v	1000
Mack v Wayne State University	1081
Mackay, People v	893
MacKenzie, People v (Kenneth)	904
MacKenzie, People v (Louis)	984
Mackinac Island (City of), Arnold Transit Co v	1046
Mackworth Rees Division of Avis Industries, Inc, Tulkku v (On Remand)	897
Mahaday, People v	1079
Mahone, People v	922
Majors, People v	976
Makres v Grosse Pointe Cycle	882
Mancuso, People v	1020
Manistique Pulp & Paper Co, Carlson v	954
Marathon Oil Co, Simkus v	1080
Marchlewicz, People v	1076
Markowicz v Pappas	992
Marks, Smith v	1077
Marquette General Hospital, Inc, Johnson v	1071
Marriott Corp, Pryber v	887
Marshall, People v (Donnie)	892
Marshall, People v (Wayne)	978
Martenies v Muskegon Motor Specialties Co	1023
Martin v General Motors Corp	935
Martin, Moultrie v	922
Martin, People v	910
Marts v Plymouth Community School Dist	1083
Marvin, People v	986
Marzolf, People v	1004
Mask, People v	911
Mason (W), Inc v Jackson County Prosecutor	868
Massalsky, People v	867
Massey, People v	911
Matthews, Bauss v	1067
Mattison, People v	931
Mattson v White Pine Copper Co	992
Maury, People v	865
Maxwell, People v	1041
Mayhew v Berrien County Road Comm	1035
Mays, People v	886
McCallister v Sun Valley Pools, Inc	905
McCann v Delta Tube & Fabricating Corp	1036
McCarley, People v	894
McClurkin, People v	1074

PAGE
McCoy, People v (Garcie) 871
McCoy, People v (Robert) 1017
McCullough v General Motors Corp 994
McCullough, King v 914
McDonald, People v (Jacqueline) 1072
McDonald, People v (Patrick) 870
McEntyre, People v 944
McFadden, Sylvan Glens Homeowners Ass'n v 1050
McGhar, People v 989
McGreevy, People v 1050
McIntosh, People v 913
McKee v Woodhaven Public Schools 901
McKinney, People v 1057
McLean Screen Print, Inc v Advance Watch Co, Ltd 976
McLemore, People v 691
McLennan, People v 877
McMaster, People v 988
McMillan v City of Royal Oak 918
McMillan, People v 911
McMillan v State Highway Comm 918
McNamee, People v 981
McQueen, People v 859
McRaft, People v 987
Medina, People v 912
Meirthew, People v 949
Mendoza, People v 1084
Mercury Plastics Co, Munday v 975
Mercy Hospital of Benton Harbor, Whitmore v 938
Meridian Charter Twp v City of East Lansing 962
Messerly, Lenawee County Board of Health v 900
Michigan (State of) v Renaissance Continuing Care Center, Inc. 992
Michigan Ass'n of Psychotherapy Clinics v Blue Cross & Blue Shield of Michigan 869
Michigan Consolidated Gas Co, Cole v 874
Michigan Consolidated Gas Co v El-Ameen 1019
Michigan Millers Mutual Ins Co, Bullock v 1154
Michigan Millers Mutual Ins Co, Csutora v 1154
Michigan Millers Mutual Ins Co, Fresard v 900
Michigan Millers Mutual Ins Co, Hansen v 1154
Michigan Millers Mutual Ins Co, Sabraw v 1154
Michigan Millers Mutual Ins Co, Waugh v 1154
Michigan Mutual Auto Ins Co, Jerome v 911
Michigan Mutual Ins Co v International Harvester Co 961
Michigan Mutual Ins Co v Shaheen 1048
Michigan Mutual Ins Co v Sharp 882
Michigan National Bank of Detroit v Molson 997
Michigan State University, Kestenbaum v 869
Michigan Technological University v Public Service Comm 1060
Midland (City of), Garb-Ko, Inc v 1072
Midwest Mental Health Clinic, PC v Blue Cross & Blue Shield of Michigan 869

PAGE

Military Affairs (Dep't of), Bush v ... 1027
Miller v Auto-Owners Ins Co ... 633
Miller, People v ... 321
Miller, Pratt v ... 1024
Miller v State Farm Mutual Automobile Ins Co ... 1154
Mills, People v ... 964
Minier, People v ... 902
Missouri, People v ... 1039
Mix, People v ... 1040
Mixon, People v ... 916
Moberg v General Motors Corp ... 1068
Modock, People v ... 891
Molson, Michigan National Bank of Detroit v ... 997
Monasterski, People v ... 1017
Moncure, People v ... 1027
Monroe, People v ... 917
Monroe County Drain Comm'r, Joba Construction Co, Inc v ... 1025
Monroe Steel Castings Co, Ford v ... 874
Montgomery Ward & Co, Inc, Lyberg v ... 989
Moore, People v (Joseph) ... 861
Moore, People v (Roosevelt) ... 953
Moore, People v (Terry) ... 885
Moore, People v (Warren) ... 983
Morang Drive Greenhouses, Inc, Dueweke v ... 670
Morbark Industries, Inc, Shock Bros, Inc v ... 696
Moreno, People v ... 859
Morgan v Cincinnati Ins Co ... 267
Morgan, Eastern Michigan University Chapter, American Ass'n of University Professors v ... 955
Morgan, People v ... 1037
Morris, People v ... 868
Morrison, People v ... 869
Moses v Young's Homes & Apartments, Inc ... 961
Motor Wheel Corp, Warren v ... 1049
Moultrie v Martin ... 922
Mulvihill v Dep't of Labor ... 991
Munday v Mercury Plastics Co ... 975
Munde, People v ... 1017
Murrell v Paragon Transport, Inc ... 1120
Muskegon (City of), Plough v ... 1000
Muskegon Fire Dep't, Vasser v ... 1004
Muskegon Motor Specialties, Adamson v ... 1053
Muskegon Motor Specialties Co, Martenies v ... 1023
Mutual of Omaha Ins Co, Inc, Kyle v ... 896
Myers v Redford Twp ... 861
Myers, Schaible v ... 704
Myers, Upthegrove v ... 884

N

Nabers, People v ... 1046

PAGE
Nadolski v General Motors Corp 1016
Najor, Grosse Pointe Quality Food Co v 1067
National Ben Franklin Life Ins Corp, Fisher v 947
National Boring Corp v Tuna Machine Tool, Inc 881
National Union of Police Officers, Local 502, AFL-CIO v Wayne County 907
National Union of Police Officers, Local 502, AFL-CIO v Wayne County Board of Comm'rs 1046, 1063
Natural Resources (People *ex rel* Acting Director, Dep't of) v Cheboygan Cement Products, Inc 1015
Neal, People v 934
Neequaye, Detroit Automobile Inter-Ins Exchange v 851
Nelms v Lempert & Biegel Co 965
Nelson, People v (George) 932
Nelson, People v (Karen) 967
Neumayer v Pontiac Police Dep't 900
Newhouse, People v 978
Newton, People v 912
Niagara Machine & Tool Works, Inc, Riza v 915
Nice v General Motors Corp 1020
Nichols v Nichols 1045
Nicholson, People v 999
Nickert v Stewart 1069
Niemi v Kearsley Board of Education 1076
Northstar Baptist Church, Director, State Police v 1085
Norton Shores (City of), Alexander v 1004
Novak v Novak 1071

O

Oakland County Prosecuting Attorney v Dep't of Corrections 183
Oakland County Prosecuting Attorney v Dep't of Corrections .. 889
Oakland County Road Comm, Cousineau v 901
Obad v American Steamship Co 989
O'Connell, In the Matter of 1130
O'Dell v Fireman's Fund Ins Co 947
Oikarinen v Farm Bureau Mutual Ins Co of Michigan 908
Old Kent Bank & Trust Co, Grand Rapids Growers, Inc v 918
Old State Bank of Fremont, Thompson Beef Farms v 890
Oliver, People v 863
Olsonite Corp, Wayne County Health Dep't v 1001
O'Meara, Bushnell, Gage & Reizen v 895
Omeye, People v 907
O'Neal, People v 1073
Onifer, People v 864
Ortman v Vacri Land Development, Inc 1060
Osborne, People v 1027
Oster, People v 920

PAGE
Osterhart v Detroit Automobile Inter-Ins Exchange 1021
Ottawa Silica Co v Brownstown Twp 974
Otterbein, Berkompas v 1074
Ovalle, People v 478

P

Page, People v 895
Palmer, People v (Robert C) 1057
Palmer, People v (Robert J) 935
Panel Controls Corp, Dep't of Labor v 1082
Pangburn, People v 1069
Papora v Papora 1082
Pappas, Markowicz v 992
Paragon Transport, Inc, Murrell v 1120
Parker, People v (Gregory) 1003
Parker, People v (Ricky) 1061
Parker Motor Freight, Inc v Public Service Comm 1047
Parks, Detroit Board of Education v 970
Parshay, People v 1081
Patterson v Bendix Corp 1075
Patton, People v 490
Patton, People v 1158
Pattyn v Frezza 1023
Pauli, People v 894
Pax-Elm-J, Kolon v 993
Payne, People v 1082
Pecoraro v Dep't of Corrections 973
Peete #1, People v 876
Peete #2, People v 962
Pelichet, People v 1038
Penn v Dep't of Corrections 858
People v Aaron 1026
People v Adams (George) 904
People v Adams (Jerry) 1070
People v Adkins (Clarence) 878
People v Adkins (Ward) 934
People v Alexander (Annette) 899
People v Alexander (Ernest) 1018
People v Allen (Larry) 870
People v Allen (Samuel) 1044
People v Allred 1073
People v Alston 905
People v Anaya 920
People v Anderson (Donny) 994
People v Anderson (Terry) 1017
People v Andrews (Johnny) 921
People v Andrews (Madison) 930
People v Anglin 854
People v Armstrong (Lavair) 951
People v Armstrong (Walter) 1081

	PAGE
People v Artuso	870
People v Ashley	952
People v Baker (Charles)	872
People v Baker (James)	964
People v Barfield	**700**
People v Barfield	1080
People v Barker	**291**
People v Barker (Freddy)	1072
People v Barker (Robert)	866
People v Bassett	960
People v Baxter	852
People v Beach	1056
People v Beckley	1054
People v Beets	996
People v Belanger	868
People v Bennett	952
People v Bensek	905
People v Berryman	915
People v Berutti	1042
People v Bibbs	961
People v Bill	855
People v Blachura	960
People v Blackburn	1048
People v Blanton	876
People v Blount	1039
People v Booker	856
People v Bowman	860
People v Bransford	1062
People v Bridges	969
People v Brooks	940
People v Brown (Clark)	860
People v Brown (Jimmie)	967
People v Brown (John)	910
People v Brown (Ralph)	1075
People v Brown (Ronald)	964
People v Buchanan	950
People v Buckles	914
People v Burch	853
People v Burden	**56**
People v Burl	877
People v Bushong	1076
People v Bustion	967
People v Butler	852
People v Butts	1041
People v Byers	918
People v Byrd (George)	1022
People v Byrd (Michael)	873
People v Caldwell (Charles)	862
People v Caldwell (Henry)	1078
People v Cameron	890

PAGE
People v Cargill ... 875
People v Carpenter ... 939
People v Carr ... 1060
People v Carter ... 979
People v Cartwright ... 992
People v Casey ... 179
People v Casper ... 981
People v Cazal ... 901
People v Chamblis ... 917
People v Champion ... 468
People v Chandler ... 916
People v Chaney ... 1051, 1052
People v Chatman ... 945
People v Chatterton ... 867
People v Claassen ... 1066
People v Clabin ... 472
People v Clabin ... 1157
People v Clark (David) ... 988
People v Clark (Michael) ... 1025
People v Clark (Stanley) ... 995
People v Coates ... 1026
People v Cobb (Bobbie) ... 1073
People v Cobb (Ralph) ... 855
People v Cole ... 483
People v Coleman ... 884
People v Collins ... 907
People v Cone ... 904
People v Conte ... 892
People v Cook ... 986
People v Cooke ... 997
People v Cooks ... 1001
People v Corbett ... 856
People v Coulter ... 889
People v Covington ... 880
People v Crader ... 943
People v Cramer ... 862
People v Cross ... 944
People v Crum ... 875
People v Currelley ... 904
People v Daniels ... 1071
People v Daske ... 1065
People v Davis ... 321
People v Davis (Billy) ... 963
People v Davis (Kerry) ... 914
People v Dease ... 1013
People v Demps ... 911
People v Denson ... 1018
People v Dinsmore ... 1071
People v Dolsen ... 1045

	PAGE
People v Doran	1026
People v Doss	851
People v Douglas	872
People v Dowtin	963
People v Dozier	888
People v Driskell	1054
People v Dudgeon	902
People v Dudley	1058
People v Dugan	989
People v Dummitt	888
People v Dupuie	940
People v Ealey	987
People v Eichelberger #1	910
People v Eichelberger #2	956
People v Escamilla	1066
People v Evans	1015
People v Ewing	**321**
People v Expose	1075
People v Farley	871
People v Fields (Elizabeth)	869
People v Fields (James)	962
People v Finch	1017
People v Finklea	981
People v Fisher	885
People v Flannel	920
People v Foster	980
People v Franklin	943
People v Frazier	953
People v Freck	975
People v Freeman (Demetrius)	997
People v Freeman (Louis)	978
People v Freeman (Tommy)	1020
People v Friday	1025
People v Fuson (Cebert)	986
People v Fuson (Michael)	899
People v Gaddis	1051
People v Garland	1076
People v Garrison	881
People v Garside	933
People v Garza	913
People v Gaval	1069
People v Germain	858
People v Gibson	993
People v Gilbert	868
People v Givans	951
People v Glover	945
People v Goins	1018
People v Gojcaj	873
People v Goldsmith	**555**
People v Graham	854
People v Grant (Gerald)	1049

	PAGE
People v Grant (Larry)	936
People v Gratzer	961
People v Gray	952
People v Green (Keith)	935
People v Green (Richard)	965
People v Green (Robert)	879
People v Griffin (Charles)	1039
People v Griffin (Gregory)	1072
People v Griffin (Lewis)	907
People v Griffith	897
People v Grigsby	1048
People v Grimmett	853
People v Guajardo	1069
People v Haddix	870
People v Haggitt	873
People v Haines	1077
People v Halberg	1059
People v Hale	1002
People v Hall (Ronald)	1026
People v Hall #1 (Robert Lee)	883
People v Hall #2 (Robert Lee)	951
People v Hamilton (David)	976
People v Hamilton (Linda)	1084
People v Hamm	888
People v Hammer	1045
People v Hand	887
People v Harman	1083
People v Harmon	950
People v Harris (Arthur)	1036
People v Harris (Curtis)	950
People v Hathcock	853
People v Hayes	881
People v Haynes	937, 1024
People v Headspeth	852
People v Heiler	879
People v Henderson	1073
People v Henry	886
People v Herbert	1045
People v Hesson	906
People v Hetrick	931
People v Hicks	1068
People v Hill (Arthur)	908
People v Hill (Michael)	965
People v Hill (Richie)	946
People v Hillcrest Christian Nursing Home, Inc	1060
People v Hoffman	1036
People v Holliday	1081
People v Holloway	973
People v Holmes (Charles)	985
People v Holmes (Johnnie)	1067
People v Holmes (William)	899
People v Hooks	1054
People v Hopkins	992

PAGE
People v Houston (Gregory) ... 917
People v Houston (Kevin) ... 1037
People v Howard ... 898
People v Hubbard ... 992
People v Huddleston ... 1077
People v Hudson (Alexander) ... 969
People v Hudson (Roosevelt) ... 917
People v Huff ... 974
People v Hughes ... 517
People v Hughes ... 950
People v Humbert ... 902
People v Hunter ... 895
People v Hurd (Clark) ... 1038
People v Hurd (Maurice) ... 972
People v Hurst ... 1070
People v Ideis ... 854
People v Iverson ... 862, 977
People v Jackson (George) ... 941
People v Jackson (Lawrence) ... 884
People v Jackson (Michael) ... 878
People v Janiga ... 1043
People v Janowicz ... 853
People v Jemison ... 1059
People v Jennings ... 890
People v Jerrils ... 881
People v Johnson ... 50
People v Johnson (David T) ... 1074
People v Johnson (David) ... 1080
People v Johnson (Edgar) ... 1023
People v Johnson (Johnnie) ... 1052
People v Johnson (LaDon) ... 947
People v Johnson (Marvin) ... 1040
People v Johnson (Walter) ... 1155
People v Jones ... 56
People v Jones (James) ... 985
People v Jones (Jesse) ... 970
People v Jones (Patrick) ... 1077
People v Jones (Ronald) ... 942
People v Jones (Thomas) ... 996
People v Jones (Victor) ... 994
People v Jordan ... 865
People v Julian ... 946
People v Kaly ... 975, 1022
People v Kapitzke ... 957
People v Karjala ... 1028
People v Kelly ... 862
People v Kemp ... 1074
People v Kerley ... 868
People v Kessler ... 979
People v Kincaid ... 1055

	PAGE
People v King (Reginald)	1060
People v King (Thomas)	939
People v Kirkpatrick	918
People v Kowtun	987
People v Kozlow	1036
People v Kregger	931, 1041
People v Langworthy	998
People v Lankford	939
People v Leaphart	978
People v Leavell	941
People v Lee (Davis)	1040
People v Lee (Steven)	1050
People v Lewis (James)	855
People v Lewis (Robert H)	861
People v Lewis (Robert V)	949
People v Liggins	1018
People v Lonchar	923
People v Losey	864
People v Loukas	1078
People v Love	1035
People v Lundy	1003
People v Luster	936
People v Lyles	855
People v Lynn	**291**
People v Lynn	1157
People v Lytle	1019
People v Mack	1000
People v Mackay	893
People v MacKenzie (Kenneth)	904
People v MacKenzie (Louis)	984
People v Mahaday	1079
People v Mahone	922
People v Majors	976
People v Mancuso	1020
People v Marchlewicz	1076
People v Marshall (Donnie)	892
People v Marshall (Wayne)	978
People v Martin	910
People v Marvin	986
People v Marzolf	1004
People v Mask	911
People v Massalsky	867
People v Massey	911
People v Mattison	931
People v Maury	865
People v Maxwell	1041
People v Mays	886
People v McCarley	894
People v McClurkin	1074
People v McCoy (Garcie)	871
People v McCoy (Robert)	1017

	PAGE
People v McDonald (Jacqueline)	1072
People v McDonald (Patrick)	870
People v McEntyre	943
People v McGhar	989
People v McGreevy	1050
People v McIntosh	913
People v McKinney	1057
People v McLemore	**691**
People v McLennan	877
People v McMaster	988
People v McMillan	911
People v McNamee	981
People v McQueen	859
People v McRaft	987
People v Medina	912
People v Meirthew	949
People v Mendoza	1084
People v Miller	**321**
People v Mills	964
People v Minier	902
People v Missouri	1039
People v Mix	1040
People v Mixon	916
People v Modock	891
People v Monasterski	1017
People v Moncure	1027
People v Monroe	917
People v Moore (Joseph)	861
People v Moore (Roosevelt)	953
People v Moore (Terry)	885
People v Moore (Warren)	983
People v Moreno	859
People v Morgan	1037
People v Morris	868
People v Morrison	869
People v Munde	1017
People v Nabers	1046
People v Neal	934
People v Nelson (George)	932
People v Nelson (Karen)	967
People v Newhouse	978
People v Newton	912
People v Nicholson	999
People v Oliver	863
People v Omeye	907
People v O'Neal	1073
People v Onifer	864
People v Osborne	1027
People v Oster	920
People v Ovalle	**478**

	PAGE
People v Page	895
People v Palmer (Robert C)	1057
People v Palmer (Robert J)	935
People v Pangburn	1069
People v Parker (Gregory)	1003
People v Parker (Ricky)	1061
People v Parshay	1081
People v Patton	**490**
People v Patton	1158
People v Pauli	894
People v Payne	1082
People v Peete #1	876
People v Peete #2	962
People v Pelichet	1038
People v Perez	864
People v Perry (Arthur)	903
People v Perry (Larry)	961
People v Perry (Pamela)	966
People v Peterson	1055
People v Pettway	1083
People v Phillips (Richard)	872
People v Phillips (Vincent)	970
People v Pillette	875
People v Pincheff	883
People v Pitsaroff	941
People v Poindexter	856
People v Poole	968
People v Powell	966
People v Powers	913
People v Prophet	906
People v Prothro	919
People v Provience	1058
People v Pruett	1043
People v Pulley	**523**
People v Ranes	943
People v Ray	1082
People v Reese	887
People v Rhile	919
People v Rice (Gillis)	883
People v Rice (Roy)	1054
People v Richmond	890
People v Rider	**496**
People v Riley	1037
People v Rivera (Daniel)	1077
People v Rivera (Emanuel)	1016
People v Roberts	1054
People v Robinson	908
People v Rocha	915
People v Rodgers	863

	PAGE
Rodriguez	872
Rogan	1050
v Rogers	202
Rogers (Duane)	1040
Rogers (Wilford)	1022
Roland	1042
Rone	984
Rucinski	1043
Ruffin	1059
Rush	985
Rust	921
v Saenz	454
Salisbury	942
Sawyer	1119
Saxton	865
Schinzel	982
Seals	1039
Seawright	920
Senter	909
Sesi	1077
Shelton	876
Shepard	949
Shina	1077
Shugar	1020
Simpson	1083
Sinclair	983
Sinishtaj	873
Slavik	1000
v Slayton	291
Smith (Calvin)	1043
Smith (Felida)	885
Smith (Garcia)	995
Smith (Johnnie)	882
Smith (Monroe)	936
Smith (Ollie)	886
Smith (Scarlet)	875
Smith (Warren)	938
Snyder	1080
Solis	962
Soltis	1037
Spalla	962
Sparks	1050
Spearman	1001
Spragner	934
Springer (Charles)	1045
Springer (Jimmie)	867
Standley	881
Stankiewicz	979
Stein	880
Stephens	974

	PAGE
People v Stewart	1079
People v Stitt	905
People v Stolze	1061
People v Sullivan	999
People v Summers	887
People v Suszek	1023
People v Sykes	956
People v Szymanski	863
People v Tallman	894
People v Talsma	1071
People v Tanceusz	1042
People v Tate	989
People v Tavolacci	**50**
People v Tavolacci	1155
People v Taylor (Douglas)	898
People v Taylor (Gregory)	984
People v Taylor (Maurice)	997
People v Taylor (Tommie)	851
People v Taylor (Walter)	954
People v Teague	**562**
People v Terrell	861
People v Thomas	1022
People v Thompson	999
People v Thorp	1058
People v Till	982
People v Tipsword	902
People v Tolbert	1013
People v Townsend	951
People v Tramell	987
People v Trice	884
People v Tucker	901
People v Turnbow	1072
People v Turner	897
People v Tye	1016
People v Tyler	952
People v Ullah	1082
People v Ulmer	949
People v Valdez	942
People v Van Alexander	860
People v Van Auker	863
People v Van Diver	864
People v Venegas	906
People v Viaene	881
People v Villarreal	899
People v Walker	1019
People v Ward (Bradley)	866
People v Ward (Gene)	1059
People v Ward (Willie)	975
People v Ware	898
People v Warzocha	940
People v Washburn	857

PAGE
People v Washington (Leroy) 1067
People v Washington (Sheldon) 971
People v Waugh 866
People v Weaver (Michael) 1085
People v Weaver (Ronald) 922
People v Webb 901
People v Wells 980
People v West 983
People v Whaley 1078
People v Whisnant 960
People v White 366
People v Wilder 328
People v Wilder 1157
People v Williams (Burl) 1085
People v Williams (Daniel) 994
People v Williams (Eddie) 948
People v Williams (Johnnie) 935
People v Williams (Mark) 1014
People v Williams (Morris) 894
People v Williams (Ralph) 897
People v Williams (Robert) 991
People v Williams (Ronald) 945
People v Williamson 948
People v Willis 937
People v Wilson (Jeffrey) 917
People v Wilson (Marcia) 905
People v Wilson (Ronald) 990
People v Wilson (Terrell) 996
People v Winzeler 1020
People v Wisner 1066
People v Wogaman 893
People v Womack 954
People v Woodard 879
People v Woodfork 1041
People v Woodley 883
People v Woods (Donald) 946
People v Woods (Ronald) 901
People v Wright (Arnold) 985
People v Wright (Raymond) 853
People v Wright (Ronald) 954
People v Wyatt 1075
People v Yaldoo 860
People v Yatooma 1056
People v Yowell 1051
People v Zmijewski 931
People *ex rel* Acting Director, Dep't of Natural Resources v Cheboygan Cement Products, Inc 1015
Perez, People v 864
Perry, People v (Arthur) 903
Perry, People v (Larry) 961
Perry, People v (Pamela) 966

PAGE
Peterson, People v ... 1055
Petrilla v Uniroyal, Inc ... 889
Pettway, People v ... 1083
Phelps v Dep't of State Highways ... 955
Phillips, People v (Richard) ... 872
Phillips, People v (Vincent) ... 970
Pillen v General Motors Corp ... 1049
Pillette, People v ... 875
Pincheff, People v ... 883
Piperides v Krueger-Detroit Division of Lear Siegler, Inc ... 1047
Pitoniak v Borman's, Inc ... 1049
Pitsaroff, People v ... 941
Plough v City of Muskegon ... 1000
Plymouth Community School Dist, Marts v ... 1083
Poindexter, People v ... 856
Pollard v Barker-Fowler Electric Co ... 1013
Pontiac General Hospital, Burton v ... 975
Pontiac Police Dep't, Neumayer v ... 900
Pontious v E W Bliss Co ... 1062
Poole, People v ... 968
Powell, People v ... 966
Powers, People v ... 913
Pratt v Miller ... 1024
Prichard Estate, *In re* ... 1120
Priest, In the Matter of ... 1052
Priest, Lapeer County Dep't of Social Services v ... 1052
Probate Judge, Doe v ... 1005
Probert, In the Matter of ... 210
Prophet, People v ... 906
Prosecuting Attorney (Oakland County) v Dep't of Corrections ... 183
Prosecuting Attorney (Oakland County) v Dep't of Corrections ... 889
Prosecutor (Bay County), *In re* ... 1002
Prosecutor (Jackson County), W Mason, Inc v ... 868
Prosecutor (Wayne County) v Recorder's Court Judge ... 1036
Prothro, People v ... 919
Provience, People v ... 1058
Pruett, People v ... 1043
Pryber v Marriott Corp ... 887
Public Service Comm, Attorney General v 903, 990, 1028, 1063, 1064
Public Service Comm, Michigan Technological University v ... 1060
Public Service Comm, Parker Motor Freight, Inc v ... 1047
Public Service Comm, Sullivan v ... 1004
Pulley, People v ... 523
Pustay v Gentelia ... 1066

Q

Quadnau v Chilingirian ... 1039

PAGE
Quadnau, Chilingirian v ... 1039

R

Rahn v J L Hudson Co ... 1025
Ranes, People v ... 943
Rankin v Gourdie, Fraser & Associates, Inc ... 951
Rarick v Goodyear Tire & Rubber Co ... 1072
Rasile, Black v ... 987
Ray, People v ... 1082
Rayhall v Fesik ... 997
R B Industries, Adamowicz v ... 1057
Recorder's Court Judge, Wayne County Prosecutor v ... 1036
Redford Twp, Myers v ... 861
Reed, Brooks v ... 862
Reese, People v ... 887
Regents of the University of Michigan v Washtenaw County Coalition Against Apartheid ... 878
Reichenbach v Brinkman ... 980
Renaissance Continuing Care Center, Inc, State of Michigan v ... 992
Rennell v City of Birmingham ... 865
Rhile, People v ... 919
Rice, People v (Gillis) ... 883
Rice, People v (Roy) ... 1054
Richmond, People v ... 890
Ricken, Figures v ... 877
Rider, People v ... 496
Riley v Direct Transit Lines, Inc ... 1022
Riley, People v ... 1037
Rinaldi v Bronson ... 996
Ritter, Capraro v ... 916
Rivera, People v (Daniel) ... 1077
Rivera, People v (Emanuel) ... 1016
Riverside Park Place Condominium Ass'n, Inc, Cohan v ... 998, 1061
Riza v Niagara Machine & Tool Works, Inc ... 915
Rizzo, Cleveland v ... 884
Road Comm (Berrien County), Mayhew v ... 1035
Road Comm (Oakland County), Cousineau v ... 901
Road Comm (Van Buren County), English v ... 884
Road Comm'rs (Livingston County Board of), Clink v ... 892
Roadway Express, Inc, DeMars v ... 857
Roberts, People v ... 1054
Robinson, People v ... 908
Robinson, Rofe v ... 974
Rocha, People v ... 915
Rock, Cline v ... 1004
Rockwell International, Automotive Products Division, Emmons v ... 973
Rodgers, People v ... 863
Rodriguez, People v ... 872
Rofe v Robinson ... 974
Rogan, People v ... 1050

PAGE
Rogers, Inc (Chas J), KMH Equipment Co v ... 1079
Rogers, People v ... 202
Rogers, People v (Duane) ... 1040
Rogers, People v (Wilford) ... 1022
Rohde v Ealy ... 898
Roland, People v ... 1042
Romulus (City of), Austin v ... 955
Rone, People v ... 984
Roosa v Chandler ... 999
Rose Park Baptist Church, Director, State Police v ... 1084
Roseville Police Dep't, Jordan v ... 882
Ross Twp, Armstrong v ... 932
Royal Oak (City of), McMillan v ... 918
Rubin v Woods ... 1024
Rucinski, People v ... 1043
Rudy v City of Lincoln Park ... 1014
Ruffin, People v ... 1059
Rush, People v ... 985
Rusinek v Schultz, Snyder & Steele Lumber Co ... 502
Rust, People v ... 921
Rutherford v Kimberly Clark Corp ... 1019

S

Sabraw v Michigan Millers Mutual Ins Co ... 1154
Saenz, People v ... 454
Safran Printing Co v City of Detroit ... 880
Saginaw Twp, CAF Investment Co v ... 1119
St Joseph Hospital of Ann Arbor, Homenik v (Appeal of Cohan) ... 935
St Lawrence Community Mental Health Clinic, Boyd v ... 1044
St Lucia Investment Co, Lawaetz v ... 858
St Lucia Investment Co, Vilican-Leman & Associates, Inc v ... 1027
Salem Twp, Johnson v ... 1001
Salisbury, People v ... 942
Salsini v White Pine Copper Co ... 937
Salt River Lumber Co, Inc, Crawford v ... 854
Sam v Balardo ... 405
Sanford v Director, Dep't of Corrections ... 1085
Sarah Coventry, Inc, Hahn v ... 886
Sawyer v American Metals ... 1068
Sawyer, People v ... 1119
Saxton, People v ... 865
Schaible v Myers ... 704
Schecter v City of Southfield ... 893
Schinzel, People v ... 982
Schultz, Snyder & Steele Lumber Co, Rusinek v ... 502

	PAGE
Schumaier v Luckhardt	1027
Schwark v Lilly	909
Scientology Church of Michigan, Sternicki v	945
Scott Paper Co, Kiernan v	880
Scroggins v Dep't of Social Services	982
Seals, People v	1039
Sears, Roebuck & Co, Hilgendorf v	905
Sears, Roebuck & Co, Tirpak v	976
Seaton v State Farm Life Ins Co	911
Seawright, People v	920
Secretary of State, Grunow v	1058
Secretary of State, Southeastern Michigan Transportation Authority v	979
Selburn, In the Matter of	1138
Semeyn v Semeyn	1059
Semeyn Estate, *In re*	1059
Senter, People v	909
Sesi, People v	1077
Shaheen, Michigan Mutual Ins Co v	1048
Sharp, Michigan Mutual Ins Co v	882
Sheffield Development Co v City of Troy	974
Shelton, People v	876
Shepard, People v	949
Shiemke v Huron Cement	1055
Shina, People v	1077
Shock Bros, Inc v Morbark Industries, Inc	**696**
Shopping Centers, Inc v City of East Lansing	885
Shugar, People v	1020
Signs v Detroit Edison Co	870
Silva v Ada Twp	972
Silvola v Dep't of State Highways	961
Simkus v Marathon Oil Co	1080
Simoff v Chrysler Corp	922
Simpson, People v	1083
Sinclair, People v	983
Sinishtaj, People v	873
60th Dist Court, Teamsters Union Local 214 v	1000
Skukalek v Flint Osteopathic Hospital	944
Slavik, People v	1000
Slayton, People v	**291**
Sly v Valley Consolidated Industries	913
Smiley v Grand Blanc Board of Education	900
Smith v Allendale Mutual Ins Co	1154
Smith, Commercial Union Ins Co v	889
Smith v Dayton-Hudson Corp	991
Smith v Lumbermen's Mutual Ins Co	873
Smith v Marks	1077
Smith, People v (Calvin)	1043
Smith, People v (Felida)	885
Smith, People v (Garcia)	995
Smith, People v (Johnnie)	882

	PAGE
Smith, People v (Monroe)	936
Smith, People v (Ollie)	886
Smith, People v (Scarlet)	875
Smith, People v (Warren)	938
Smith, Superior National Bank & Trust Co v	1026
Smith, Ultimate Precision, Inc v	977
Smith, Veselenak v	973
Smith-Santoro, Inc, Employers Fire Ins Co v	907
Snavely v Consolidated Packaging Co	952
Snell, Dedenbach v	1024
Snow v Workers' Compensation Appeal Board	991
Snyder, People v	1080
Social Services (Berrien County Dep't of) v Bass	854
Social Services (Delta County Dep't of) v Voakes	897
Social Services (Dep't of), Koziarski v	980
Social Services (Dep't of), Scroggins v	982
Social Services (Lapeer County Dep't of) v Priest	1052
Solis, People v	962
Soltis, People v	1037
Southeastern Michigan Transportation Authority v Secretary of State	979
Southfield (City of), Schecter v	893
Southfield (City of), Village of Franklin v	1016
Southland Corp v Liquor Control Comm	998
Spalla, People v	962
Sparks, People v	1050
Spartan Plastics, Inc v Advance Watch Co, Ltd	976
Spearman, People v	1001
Spencer v City of Westland	954
Spragner, People v	934
Springer, People v (Charles)	1045
Springer, People v (Jimmie)	867
Stachowiak v Subczynski	**459**
Stadler, Lewis v	971
Staffney v Fireman's Fund Ins Co	947
Stafford v Bart Edmund, Inc	1067
Stafford Corp, Herron v	993
Stambaugh (City of), Turcotte v	1062
Standley, People v	881
Stankiewicz, People v	979
Stanton v Butcher	995
State Bar of Michigan, Falk v	**63**
State Bar of Michigan, Falk v	1157
State Boundary Comm, Chase v	1048
State Farm Life Ins Co, Seaton v	911
State Farm Mutual Automobile Ins Co, Burdick v	1036
State Farm Mutual Automobile Ins Co, LeBlanc v	1119
State Farm Mutual Automobile Ins Co, Miller v	1154
State Highway Comm, Endykiewicz v	1035
State Highway Comm, McMillan v	918
State Highways (Dep't of), Phelps v	955

PAGE
State Highways (Dep't of), Silvola v 961
State House of Correction & Branch Prison Warden, Williams v 933
State of Michigan v Renaissance Continuing Care Center, Inc .. 992
State Police Director v Northstar Baptist Church 1085
State Police Director v Rose Park Baptist Church 1084
State Prison of Southern Michigan, Deputy Warden, Jordan v . 1001
State Prison of Southern Michigan, Warden, Berryman v 1081
Steelcase, Inc, Verhage v 961
Stein, People v 880
Stephens, People v 974
Sterner Sheet Metal & Roofing Co, Crosby v 1043
Sternicki v Church of Scientology of Michigan 945
Stevens v Holy Cross Hospital 1057
Stewart, Nickert v 1069
Stewart, People v 1079
Stilwill, Wilson v 587
Stitt, People v 905
Stockdale v Jamison 1000
Stockler v Zebari 968
Stokus v Walled Lake Board of Education 909
Stolze, People v 1061
Story & Clark Piano Co, Wortelboer v 1055
Straw, Detroit Automobile Inter-Ins Exchange v 879
Stringer v Kinross Sportsmens Club 919
Subczynski, Stachowiak v 459
Sullivan, People v 999
Sullivan v Public Service Comm 1004
Summers, People v 887
Sun Valley Pools, Inc, McCallister v 905
Superior National Bank & Trust Co v Smith 1026
Surrent v Great Lakes Dredge & Dock Co 1070
Suszek, People v 1023
Svitchan, Vargo v 1035
Swanson v Citizens Ins Co 945
Swanson v General Motors Corp 875
Swiderek v Ford Motor Co 1067
Sykes, People v 956
Sylvan Glens Homeowners Ass'n v McFadden 1050
Szepanski, Bluemlein v 995
Szopko v Kinsman Marine Transit Co 902
Szymanski, People v 863

T

Tallman, People v 894
Talsma, People v 1071
Tanceusz, People v 1042
Tate, People v 989
Tavolacci, People v 50
Tavolacci, People v 1155

	PAGE
Taylor (City of), Arsenault v	908
Taylor, People v (Douglas)	898
Taylor, People v (Gregory)	984
Taylor, People v (Maurice)	997
Taylor, People v (Tommie)	851
Taylor, People v (Walter)	954
Teague, People v	**562**
Teamsters Union Local 214 v 60th Dist Court	1000
Tecumseh Products Co, Brockway v	1062
Terrell, People v	861
Thiebaut, Lincoln, Devlin & Kalcher, PC v	960
Thomas v Detroit Board of Education	1061
Thomas, People v	1022
Thomas Estate, *In re*	1039
Thompson, People v	999
Thompson Beef Farms v Old State Bank of Fremont	890
Thorp, People v	1058
Three Lakes Ass'n v Kessler	1056
Till, People v	982
Tinsey, Iseler v	976
Tipsword, People v	902
Tirpak v Sears, Roebuck & Co	976
Tolbert, People v	1013
Tomich v Kropp Painting	882
Torres v Armond Cassil Co	891
Townsend, People v	951
Tramell, People v	987
Trice, People v	884
Troy (City of), Sheffield Development Co v	974
Tsang v Board of Governors of Wayne State University	1015
Tucker, People v	901
Tulkku v Mackworth Rees Division of Avis Industries, Inc (On Remand)	897
Tuna Machine Tool, Inc, National Boring Corp v	881
Turcotte v City of Stambaugh	1062
Turnbow, People v	1072
Turner, People v	897
Tuttle, Citizens Ins Co of America v	**536**
Tye, People v	1016
Tyler, People v	952

U

Ullah, People v	1082
Ulmer, People v	949
Ultimate Precision, Inc v Smith	977
Underwriters Adjusting Co, Bauer v	903
Union Lake Associates v Irish Enterprises	955
Union Optical, Inc, Greene v	875
Uniroyal, Inc, Petrilla v	889
United Coin Meter Co v Lasala	854

PAGE
Universal Oil Products Co, Vasquez v 876
University of Michigan Regents v Washtenaw County Coalition Against Apartheid 878
Upthegrove v Myers 884
U S Steel Corp, Gorlewski v 993

V

Vacri Land Development, Inc, Ortman v 1060
Valdez, People v 942
Valley Consolidated Industries, Sly v 913
Van Alexander, People v 860
Van Auker, People v 863
Van Buren County Road Comm, English v 884
Vandeventer, Cheney v 891
Van Diver, People v 864
Van Noord v Johnston 1062
Van Norden v Applied Arts Corp 1027
Van Zant, In the Matter of 859
Vargo v Svitchan 1035
Vasquez v Universal Oil Products Co 876
Vassallo v Fowlerville Community Schools 959
Vasser v Muskegon Fire Dep't 1004
Venegas, People v 906
Verhage v Steelcase, Inc 961
Vermiglio v Condor Manufacturing, Inc 988
Veselenak v Smith 973
Viaene, People v 881
Vilican-Leman & Associates, Inc v St Lucia Investment Co 1027
Village of Franklin v City of Southfield 1016
Villaneuva v General Motors Corp 896
Villarreal, People v 899
Vine v Dolby 956
Voakes, Delta County Dep't of Social Services v 897
Vovak v Detroit Automobile Inter-Ins Exchange 851

W

Walbro Corp, Gosdzinski v 1084
Walker, Beals v 900
Walker v Cahalan 857
Walker, People v 1019
Walker's Amusements, Inc v City of Lathrup Village 1058
Walled Lake Board of Education, Stokus v 909
Warczak v Detroit Board of Education 970
Ward, People v (Bradley) 866
Ward, People v (Gene) 1059
Ward, People v (Willie) 975
Warden, State House of Correction & Branch Prison, Williams v 933
Warden, State Prison of Southern Michigan, Berryman v 1081
Ware, People v 898
Warren (City of), Local 1383, IAFF v 642

	PAGE
Warren v Motor Wheel Corp	1049
Warzocha, People v	940
Washburn, People v	857
Washington, People v (Leroy)	1067
Washington, People v (Sheldon)	971
Washtenaw County Coalition Against Apartheid, Regents of the University of Michigan v	878
Wasilewski v Consolidated Litho, Inc	1049
Watson v Detroit Board of Education	1014
Waugh v Michigan Millers Mutual Ins Co	1154
Waugh, People v	866
Wayne Circuit Judge, Jacobs v	1084
Wayne County, National Union of Police Officers, Local 502, AFL-CIO v	907
Wayne County, Woodington v	1052
Wayne County Board of Comm'rs, National Union of Police Officers, Local 502, AFL-CIO v ... 1046,	1063
Wayne County Board of Comm'rs, Wayne County Sheriff v 989,	1058
Wayne County General Hospital, Ellison v	988
Wayne County Health Dep't v Olsonite Corp	1001
Wayne County Prosecutor v Recorder's Court Judge	1036
Wayne County Sheriff v Wayne County Board of Comm'rs . 989,	1058
Wayne State University, Mack v	1081
Wayne State University Board of Governors, Tsang v	1015
Weaver, People v (Michael)	1085
Weaver, People v (Ronald)	922
Webb, People v	901
Weber, Berger v	**1**
Weber, Berger v	1155
Weldon, *In re*	1005
Wells, People v	980
West, People v	983
Westland (City of), Spencer v	954
West Side Auto Parts, Inc v Cope	910
Whaley, People v	1078
Whisnant, People v	960
Whitcomb, Hiscock v	1084
White v Hileman Motors, Inc	1080
White, People v	**366**
White Pine Copper Co, Grayson v	952
White Pine Copper Co, Mattson v	992
White Pine Copper Co, Salsini v	937
Whitmore v Mercy Hospital of Benton Harbor	938
Wilcox v Wilcox	856
Wilder, People v	**328**
Wilder, People v	1157

PAGE
Wilkerson v Carlo 984
Williams v Detroit Board of Education 995
Williams, People v (Burl) 1085
Williams, People v (Daniel) 994
Williams, People v (Eddie) 948
Williams, People v (Johnnie) 935
Williams, People v (Mark) 1014
Williams, People v (Morris) 894
Williams, People v (Ralph) 897
Williams, People v (Robert) 991
Williams, People v (Ronald) 945
Williams v Warden, State House of Correction & Branch Prison 933
Williamson, People v 948
Willis, People v 937
Wilson v General Motors Corp 1002
Wilson, People v (Jeffrey) 917
Wilson, People v (Marcia) 905
Wilson, People v (Ronald) 990
Wilson, People v (Terrell) 996
Wilson v Stilwill 587
Winzeler, People v 1020
Wise v General Motors Corp 878
Wisner, People v 1066
W Mason, Inc v Jackson County Prosecutor 868
Wogaman, People v 893
Wolverine Commercial Development Corp v Boron Oil Co 1038
Womack, People v 954
Wood v Detroit Automobile Inter-Ins Exchange 900
Woodard, People v 879
Woodfork, People v 1041
Woodhaven Public Schools, McKee v 901
Woodington v Wayne County 1052
Woodley, People v 883
Woods, People v (Donald) 946
Woods, People v (Ronald) 901
Woods, Rubin v 1024
Workers' Compensation Appeal Board, Snow v 991
Wortelboer v Story & Clark Piano Co 1055
Wright v Dotson 1053
Wright, People v (Arnold) 985
Wright, People v (Raymond) 853
Wright, People v (Ronald) 954
Wrigley Supermarkets, Inc, Boguslaw v 1021
Wyatt, People v 1075

Y

Yaldoo, People v 860
Yatooma, People v 1056
Yingling, Ferguson v 1056
Young, LaPoint v 1000

PAGE
Youngblood v Ford Motor Co 882
Young's Homes & Apartments, Inc, Moses v 961
Yowell, People v 1051

Z

Zebari, Stockler v 968
Zeeland Feeder Pig, Inc, Bergy Brothers, Inc v 974
Zeeland Feeder Pig, Inc, Hoeneggers' & Co, Inc v 1004
Zendt's Landscaping, Inc v Burke 909
Zimmer v Bowers 991
Zmijewski, People v 931

42 CASES; 67 OPINIONS; 872 ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL GRANTED OR DENIED

TABLE OF SPECIAL ORDERS NOT RELATED TO SPECIFIC CASES

	PAGE
Proposed Amendment of Court Rules:	
GCR 1963, 208	1138
———, 701	1131
———, 708	1102
———, 718	1102
———, 735	1102
———, 738	1102
———, 739	1102
———, 785	1136
———, 803	1131
———, 853	1131
———, 864	1131
———, 912	1129
———, 964	1137
DCR 4002	1155
PCR 106	1120
——— 109	1120
——— 201	1120
——— 707	1120
——— 709	1120
——— 722	1120
——— 801	1120, 1131
Proposed New Court Rules:	
GCR 1963, 794	1101
———, 929	1131
DCR 791	1135
PCR 202	1120
——— 802	1120
JCR 1969, 14	1131
MCR 2.213	1102
——— 3.101	1102
——— 3.102	1102
——— 3.103	1102
——— 3.408	1102

TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

PAGE

ADMINISTRATIVE ORDERS

Order No. 1981-3 lxxxix

RULES ADOPTED

GCR 1963, 785 xc
———, 790 xci
———, 791 xciii
———, 815 xcvii
———, 925 xcviii
———, 928 cii
———, 959 civ
DCR 790 cv
——— 4005 cv
LOCAL COURT RULES
——— Fourth Judicial Circuit 502 cvii
——— Thirty-Sixth Judicial Circuit 102 cviii
——— ——— 104 cviii
——— ——— 113 cviii
——— ——— 504 cix
——— ——— 520 cx
——— ——— 523 cx
——— ——— 738 cxii
——— ——— 3001 cxii
——— ——— 4005 cxiii
——— Seventy-Ninth Judicial Circuit 754 cxv

RULES REPEALED

LOCAL COURT RULES
——— Third Judicial Circuit 1, 2, 3.1, 3.3, 4, 8.1, 8.2, 12 & 20 ... cxvi
Recorder's Court Rules 1-5, 7-9, 11-14A cxvii
Recorder's Court Traffic Rules 1-31 cxviii
Common Pleas Court Rules 1-46 cxix

TABLE OF CASES CITED

PAGE

Abood v Detroit Board of Education, 395 Mich 755 (1975) 101
Abood v Detroit Board of Education, 431 US 209 (1977), *reh den* 433 US 915 (1977) 85, 90, 92, 97-100, 102, 103, 105, 106, 109-112, 123, 136-138, 141, 143-145, 147-149, 167- 171
Abood v Detroit Board of Education, 60 Mich App 92 (1975) .. 100, 101
Adams v Southern Pacific Transportation Co, 50 Cal App 3d 37 (1975) 34
Adkins v Chicago, R I & P R Co, 54 Ill 2d 511 (1973) 628, 629
Ager v Baltimore Transit Co, 213 Md 414 (1957) 600, 614
Alan v Wayne County, 388 Mich 210 (1972) 683
Albernaz v United States, 450 US 333 (1981) 351, 356- 359
Albert v McGrath, 107 US App DC 336 (1960) 29
Alcala v State, 487 P2d 448 (Wy, 1971) 560
Allen-Bradley Co v Dep't of Industry, Labor & Human Relations, 58 Wis 2d 1 (1973) 685
Allen v United States, 164 US 492 (1896) 556, 559, 560
Allison v Smith, 16 Mich 405 (1868) 425
American Party of Texas v White, 415 US 767 (1974) 111, 112
Anderson v Charles, 447 US 404 (1980) 488
Anderson v Great Lakes Dredge & Dock Co, 96 Mich App 194 (1980) 624
Anderson v Pacific Coast Steamship Co, 225 US 187 (1912) 446
Application of the President of the Montana Bar Ass'n, 163 Mont 523 (1974) 131, 138
Arrand v Graham, 297 Mich 559 (1941) 286, 287
Ashe v Swenson, 397 US 436 (1970) 348, 384
Ayres v Hadaway, 303 Mich 589 (1942) 128
B F Farnell Co v Monahan, 377 Mich 552 (1966) 731
Bailey v Graves, 408 Mich 894 (1980) 513
Bailey v Richardson, 341 US 918 (1951), *aff'g* 86 US App DC 248 (1950) 107
Baker v Baker, 407 Mich 947 (1979) 573
Baker v Bolton, 1 Camp 493 (1808) 47
Ball v Detroit, 84 Mich App 383 (1978) 86
Bandfield v Bandfield, 117 Mich 80 (1898) 507, 508
Barrios v Davis, 415 SW2d 714 (Tex Civ App, 1967) 614
Basic Food Industries, Inc v Travis, Warren, Nayer & Burgoyne, 60 Mich App 492 (1975) 418
Bates v Little Rock, 361 US 516 (1960) 108, 111, 112
Bates v State Bar of Arizona, 433 US 350 (1977) 155

PAGE
Baxter v Superior Court of Los Angeles County, 19 Cal 3d 461 (1977) 31
Bayne v Everham, 197 Mich 181 (1917) 441
Bean v United States, 409 A2d 1064 (DC App, 1979) 694
Belvidere Land Co v Owen Park Plaza, Inc, 362 Mich 107 (1960) 464
Benton v Maryland, 395 US 784 (1969) 342, 355
Berger v Weber, 403 Mich 846 (1979) 20
Berger v Weber, 82 Mich App 199 (1978) 11, 15, 17, 20
Berry v Zisman, 70 Mich App 376 (1976) 418
Best v Samuel Fox & Co, [1952] AC 716 ..... 27- 29
Bias v Ausbury, 369 Mich 378 (1963) 31
Biberstine v Woodworth, 81 Mich App 705 (1978), *aff'd* 406 Mich 275 (1979) 418
Bingham v American Screw Products Co, 398 Mich 546 (1976) .. 684
Bishop v Ashland Oil, Inc, 394 F Supp 203 (WD Pa, 1975) 626
Bivens v Detroit Osteopathic Hospital, 403 Mich 820 (1978) .. 463, 464
Bivens v Detroit Osteopathic Hospital, 77 Mich App 478 (1977), *rev'd on other grounds* 403 Mich 820 (1978) 611
Blackledge v Perry, 417 US 21 (1974) 395- 397
Blair v Seitner Dry Goods Co, 184 Mich 304 (1915), *overruled on other grounds* Montgomery v Stephan, 359 Mich 33 (1960) .. 12, 26
Blockburger v United States, 284 US 299 (1932) 342, 348, 349, 351, 358, 359, 363
Board of Control of Eastern Michigan University v Labor Mediation Board, 384 Mich 561 (1971) 657, 662, 666
Borer v American Airlines, Inc, 19 Cal 3d 441 (1977) .. 12, 16, 36-38, 42, 43, 47, 48
Bowen v Johnston, 306 US 19 (1939) 181
Boydston v State, 277 P2d 138 (Okla, 1954) 441
Bradfield v Estate of Burgess, 62 Mich App 345 (1975), *lv den* 395 Mich 803 (1975) 710
Bradford v Union Electric Co, 598 SW2d 149 (Mo App, 1979) 43
Bradley v Mid-Century Ins Co, 409 Mich 1 (1980) 551
Brady v United States, 397 US 742 (1970) 394, 396
Brandon v Art Centre Hospital (Osteopathic), 366 F2d 369 (CA 6, 1966) 612
Briggs v Campbell, Wyant & Cannon Foundry Co, 2 Mich App 204 (1966) 475
Briggs Drive, Inc v Moorehead, 103 RI 555 (1968) 448, 449
Brockbank v Whitehaven J R Co, 7 H & N 835 (1862) 26
Bronston v United States, 409 US 352 (1973) 381, 385
Brooks v Hydorn, 76 Mich 273 (1889) 475
Brotherhood of Railway & Steamship Clerks v Allen, 373 US 113 (1963) 147
Brown v Ohio, 432 US 161 (1977) 349, 350, 356, 358, 365
Buckley v Valeo, 424 US 1 (1976) ... 104, 107, 108, 112, 134, 135, 168
Bunda v Hardwick, 376 Mich 640 (1965) 705, 709, 710
Button v Day, 204 Va 547 (1963) 127, 129, 131
Camara v Municipal Court, 387 US 523 (1967) 164
Canfield v City of Jackson, 112 Mich 120 (1897) 316
Cantwell v Connecticut, 310 US 296 (1940) 104, 111
Cargile v State, 194 Ga 20 (1942) 441

PAGE
Castner v Farmers' Mut Fire Ins Co, 46 Mich 15 (1881) 275
Cawood v Earl Paige & Co, 239 Mich 485 (1927) 35
Central Michigan University Faculty Ass'n v Central Michigan University, 404 Mich 268 (1978) 652-654, 658, 662, 667
Chamberlain v Hazelwood, 5 M & W 515 (1839) 26
Chicago, M S P & P R Co v Public Service Comm, 332 Mich 291 (1952) 130
Chittum v State, 1 Md App 205 (1967) 344
Chomley v Conge, 4 Leon 88 (1586) 25
Clark v Clark, 56 NH 105 (1875) 286
Clark v Suncoast Hospital, Inc, 338 So 2d 1117 (Fla App, 1976) .. 43
Clay Fire & Marine Ins Co v Huron Salt & Lumber Mfg Co, 31 Mich 346 (1875) 289
Club Holding Co v Flint Citizens Loan & Investment Co, 272 Mich 66 (1935) 731, 732
Cohen v Hurley, 366 US 117 (1961) 139
Collins v Wayne Corp, 621 F2d 777 (CA 5, 1980) 601
Colonial Pipeline Co v Clayton, 275 NC 215 (1969) 431
Commonwealth *ex rel* Moszczynski v Ashe, 343 Pa 102 (1941) ... 344
Commonwealth v Diggs, 273 Pa Super 121 (1979) 694
Commonwealth v Florence, — Mass App — (1979) 694
Commonwealth v Sparrow, 471 Pa 490 (1977), *overruled* Commonwealth v Tarver, 493 Pa 320 (1981) 344
Commonwealth v Tarver, 493 Pa 320 (1981) 344, 350
Connelly v Paul Ruddy's Equipment Repair & Service Co, 388 Mich 146 (1972) 424, 430
Contreras v St Luke's Hospital, 78 Cal App 3d 919 (1978) 608
Corley v Logan, 35 Mich App 199 (1971) 418
Cotton v Minter, 469 F Supp 199 (ED Mich, 1979) 504, 507
Council No 23, Local 1905, AFSCME v Recorder's Court Judges, 399 Mich 1 (1976) 655
Cousins v Wigoda, 419 US 477 (1975) 103, 111, 135
Cray v General Motors Corp, 389 Mich 382 (1973) 627, 628
Crystal v Hubbard, 92 Mich App 240 (1979), *lv gtd* 408 Mich 895 (1980) 32
Cugell v Sani-Wash Laundry Co, 280 Mich 286 (1937) 12
Curtin v Litton Systems, Inc, 365 F Supp 489 (ED Pa, 1973) 629
Cuyler v Adams, 449 US 433 (1981) 694
Darr v Burford, 339 US 200 (1950) 181
Davis v Conour, 178 Colo 376 (1972) 448
Dean v Radford, 141 Mich 36 (1905) 424
Deems v Western Maryland R Co, 247 Md 95 (1967) 45
DeHaan v Winter, 262 Mich 192 (1933), *(After Remand)* 265 Mich 101 (1933) 600
De Jonge v Oregon, 299 US 353 (1937) 111, 133
DesJardin v Lynn, 6 Mich App 439 (1967) 698
Detroit Bar Ass'n v Union Guardian Trust Co, 282 Mich 707 (1938) 127
Detroit Edison Co v Janosz, 350 Mich 606 (1957) 445
Detroit v Killingsworth, 48 Mich App 181 (1973) 226
Detroit Police Officers Ass'n v Detroit, 391 Mich 44 (1974) ... 652, 653, 659, 660, 662, 666, 668

PAGE
Detroit Police Officers Ass'n v Detroit, 61 Mich App 487 (1975), *lv den* 395 Mich 756 (1975) 652, 653
DeYoung v Mesler, 373 Mich 499 (1964) 287
Dodd v Secretary of State, 390 Mich 606 (1973) 612, 726
Doe v Oettle, 97 Mich App 183 (1980) 475
Douglass v Douglass, 72 Mich 86 (1888) 113
Doyle v Ohio, 426 US 610 (1976) 488
Dueweke v Morang Drive Greenhouses, Inc, 91 Mich App 27 (1979) 680
Duhan v Milanowski, 75 Misc 2d 1078 (1973) 37, 43
Dulles v Johnson, 273 F2d 362 (CA 2, 1959) 146
Dussia v Monroe County Employees Retirement System, 386 Mich 244 (1971) 242
Ealey v State, 139 Ga App 110 (1976) 498
Earl Dubey & Sons, Inc v Macomb Contracting Corp, 97 Mich App 553 (1980), *lv den* 410 Mich 897 (1981) 732
Early v United States, 474 F2d 756 (CA 9, 1973) 43
Eaton v United States, 458 F2d 704 (CA 7, 1972) 402
Egholtz v Creech, 365 Mich 527 (1962) 289
Ellis v Boer, 150 Mich 452 (1907) 432
Elrod v Burns, 427 US 347 (1976) 103-106, 109, 111, 112, 117, 135, 136, 169
Engel v Davenport, 271 US 33 (1926) 625
Equitable Trust Co v Milton Realty Co, 261 Mich 571 (1933) . 425, 430
Eschenbach v Benjamin, 195 Minn 378 (1935) 43
Evansville-Vanderburgh Airport Authority Dist v Delta Airlines, Inc, 405 US 707 (1972) 142
Ex parte Collett, 337 US 55 (1949) 626
Ex parte Jewel, 535 SW2d 362 (Tex Crim App, 1976) 344
Ex parte Lange, 85 US (18 Wall) 163 (1874) 347
Falk v State Bar, 402 Mich 960 (1978) 87, 106, 122
Falk v State Bar, 406 Mich 1117 (1979) 87
Faretta v California, 422 US 806 (1975) 528, 534
Fargo v Annexation Review Comm of Cass County, 148 NW2d 338 (ND, 1966) 448
Ferriter v Daniel O'Connell's Sons, Inc, 413 NE2d 690 (Mass, 1980) 12, 18, 43
Fisher v Provin, 25 Mich 347 (1872) 286
Fogel v Sinai Hospital of Detroit, 2 Mich App 99 (1965) 611
Foran v Metz, 463 F Supp 1088 (SD NY, 1979) 694
Ford Motor Co v Huffman, 345 US 330 (1953) 652
Fourco Glass Co v Transmirra Products Corp, 353 US 222 (1957) 446
Fredericks v General Motors Corp, 407 Mich 896-897 (1979) 722
Fredericks v General Motors Corp, 48 Mich App 580 (1973), *lv den* 390 Mich 805 (1973) 718, 722
Gadde v Michigan Consolidated Gas Co, 377 Mich 117 (1966) . 606, 607
Gallinaro v Commonwealth, 362 Mass 728 (1973) 347
Galloway v Hood, 69 Ohio App 278 (1941) 427
Garza v Kantor, 54 Cal App 3d 1025 (1976) 46
General Electric Co v Bush, 88 Nev 360 (1972) 43
General Ins Co of America v Lamar Corp, 482 F2d 856 (CA 6, 1973) 732

PAGE
Gibson v Johnston, 75 Ohio Law Abstract 413 (Ohio App, 1956) . 43
Gitlow v New York, 268 US 652 (1925) 111, 133
Goldfarb v Virginia State Bar, 421 US 773 (1975) 139, 142
Gold v Sinai Hospital of Detroit, Inc, 5 Mich App 368 (1966) 611
Goodwin v S A Healy Co, 383 Mich 300 (1970)..... 415
Gordon v United States, 127 US App DC 343 (1967) 522
Gowdy v United States, 271 F Supp 733 (WD Mich, 1967)..... 35
Grafton v United States, 206 US 333 (1907)..... 350
Graham v Richardson, 403 US 365 (1971)..... 107
Grewe v Mount Clemens General Hospital, 404 Mich 240 (1978). 609
Grossman v State, 457 P2d 226 (Alas, 1969)..... 403
Gruenburg v Kavanagh, 413 F Supp 1132 (ED Mich, 1976)...232, 256
Guilty Plea Cases, 395 Mich 96 (1975) .55, 206, 381, 382, 386, 481, 501
Gulf Oil Corp v Gilbert, 330 US 501 (1947)..... 627, 628, 631
Gumienny v Hess, 285 Mich 411 (1938).....13, 31
Gustin v Alpena Power Co, 307 Mich 241 (1943)..... 113
Gutowski v M & R Plastics & Coating, Inc, 60 Mich App 499 (1975) 601
Guy v Livesey, Cro Jac 501 (1618)..... 25
Halberg v Young, 41 Hawaii 634 (1957).....18, 43
Hankins v Derby, 211 NW2d 581 (Iowa, 1973).....16, 43
Hansen-Snyder Co v General Motors Corp, 371 Mich 480 (1963) . 424
Hanson v Union Pacific R Co, 160 Neb 669 (1955) 91
Harris v Oklahoma, 433 US 682 (1977) 349, 350, 352, 365
Harris v United States, 359 US 19 (1959) 349
Hayes v Coleman, 338 Mich 371 (1954) 599
Hayrynen v White Pine Copper Co, 9 Mich App 452 (1968)....12, 43
Henderson v Connolly's Estate, 294 Mich 1 (1940)..... 113
Hendrick v Maryland, 235 US 610 (1915) 142
Hensley v Hensley, 357 Mich 3 (1959) 573
Hill v Sibley Memorial Hospital, 108 F Supp 739 (D DC, 1952) 16, 43
Hitaffer v Argonne Co, 87 US App DC 57 (1950)..... 26
Hoesing v Sears, Roebuck & Co, 484 F Supp 478 (D Neb, 1980) .. 43
Hoffman v Dautel, 189 Kan 165 (1962).....16, 43
Hopkins v Atlantic & St L R Co, 36 NH 9 (1857) 26
Hopson v St Mary's Hospital, 176 Conn 485 (1979) 26
Howard v Park, 37 Mich App 496 (1972), *lv den* 387 Mich 782 (1972) 609
Hoyt v New Hampshire Fire Ins Co, 92 NH 242 (1942)..... 283
Hoyt v Winstanley, 221 Mich 515 (1922)..... 287
Hunt v Deming, 375 Mich 581 (1965).....415, 511
Hunter v Doe, 61 Mich App 465 (1975) 698
Hyde v Scyssor, Cro Jac 538 (1619)..... 25
Ijames v Republic Ins Co, 33 Mich App 541 (1971)..... 279, 281, 282
Inland Steel Co v National Labor Relations Board, 170 F2d 247 (CA 7, 1948) 652
In re Cameron's Estate, 170 Mich 578 (1912)..... 508
In re Cannon, 206 Wis 374 (1932) 127
In re Casella, 313 Mich 393 (1946)..... 192, 194, 195
In re Estate of James, 192 Neb 614 (1974) 447
In re Graham, 366 Mich 268 (1962)..... 231
In re Hans Nielsen, 131 US 176 (1889)..... 349, 350, 365

PAGE
In re Hartford, 282 Mich 124 (1937) 88
In re Heideman, 387 Mich 630 (1972) 231
In re Huff, 352 Mich 402 (1958) 229- 231
In re Hurd-Marvin Drain, 331 Mich 504 (1951) 431
In re Inquiry Concerning a Judge No 53, Linwood T Peoples, 296 NC 109 (1978) 227, 245
In re Inquiry Relating to District Judge Harold L Hammond, 224 Kan 745 (1978) 226
In re Integration of the Bar, 5 Wis 2d 618 (1958) 150
In re Mussman, 112 NH 99 (1972) 231
In re Petition for Integration of the Bar of Minnesota, 216 Minn 195 (1943) 127
In re Primus, 436 US 412 (1978) 170
In re Richards, 150 Mich 421 (1907) 703
In re Schlossberg v State Bar Grievance Board, 388 Mich 389 (1972) 88, 128
In re Unification of the New Hampshire Bar, 109 NH 260 (1968) 129-131, 150
International Ass'n of Machinists v Street, 215 Ga 27 (1959) 92
International Ass'n of Machinists v Street, 367 US 740 (1961) . 92, 94-97, 100-103, 147-149, 167, 168, 170
In the Matter of Bennett, 403 Mich 178 (1978) 224, 234, 235, 260- 262
In the Matter of Del Rio, 400 Mich 665 (1977) .. 224-226, 231, 232, 236, 237, 256, 260- 262
In the Matter of DeSaulnier, 360 Mass 787 (1972) 231
In the Matter of Fowler, 49 Mich 234 (1882) 528, 529
In the Matter of Integration of the Bar of Hawaii, 50 Hawaii 107 (1967) 129
In the Matter of Mikesell, 396 Mich 517 (1976) 224, 226, 254, 260- 262
In the Matter of Mills, an Attorney, 1 Mich 392 (1850) .. 88, 424, 425
In the Matter of Petition for Representation Election Among Supreme Court Staff Employees, 406 Mich 647 (1979)..... 655
In the Matter of Suspension or Revocation of License of Raymond Kerlin, DVM, 151 NJ Super 179 (1977) 441
In the Matter of the Florida Bar Board of Governors' Action on Adoption of Proposed New State Constitution, 217 So 2d 323 (Fla, 1969)..... 146
In the Matter of Watson, 273 NC 629 (1968) 681
Jacobs v Miller, 50 Mich 119 (1883) 284
Jakubiec v Hasty, 337 Mich 205 (1953) 13
Jefferson County Teachers Ass'n v Board of Education of Jefferson County, 463 SW2d 627 (Ky, 1970) 448
Jeune v Del E Webb Construction Co, 77 Ariz 226 (1954)..... 43
Jones v Bloom, 388 Mich 98 (1972) 463, 615
Jones v Grand Ledge Public Schools, 349 Mich 1 (1957)..... 417
Journigan v Duffy, 552 F2d 283 (CA 9, 1977).....398, 401
Judges of 74th Judicial Dist v Bay County, 385 Mich 710 (1971) . 655
Kambas v St Joseph's Mercy Hospital, 33 Mich App 127 (1971).. 433, 439
Kambas v St Joseph's Mercy Hospital of Detroit, 389 Mich 249 (1973) 419-422, 426, 427, 436, 438, 439, 442-444, 450, 453
Keiser v Bell, 332 F Supp 608 (ED Pa, 1971) 226

PAGE
Keith v Chrysler Corp, 390 Mich 458 (1973) 679
Keith v Chrysler Corp, 41 Mich App 708 (1972) 679-681, 688, 690
Kelly v Brewer, 239 NW2d 109 (Iowa, 1976) 448
Kern v St Luke's Hospital Ass'n of Saginaw, 404 Mich 339 (1978) 605, 606, 616
Keyishian v Board of Regents, 385 US 589 (1967) 103, 106, 107
Kime v Aetna Casualty & Surety Co, 66 Ohio App 277 (1940) ... 441
Klemens v Badger Mutual Ins Co of Milwaukee, 8 Wis 2d 565 (1959) 276
Konigsberg v State Bar of California, 366 US 36 (1961) 133
Kriger v South Oakland County Mutual Aid Pact, 49 Mich App 7 (1973), *rev'd on other grounds* 399 Mich 835 (1977) 475- 477
Kusper v Pontikes, 414 US 51 (1973) 103, 108, 111, 135, 136, 169
Ladner v United States, 358 US 169 (1958) 365
Lamb v Oakwood Hospital Corp, 41 Mich App 287 (1972) 610
Lammert v Wells, 321 Mo 952 (1929) 614
Lansing v Lansing Twp, 356 Mich 641 (1959) 418, 427
Lathrop v Donohue, 10 Wis 2d 230 (1960) 96, 146, 152
Lathrop v Donohue, 367 US 820 (1961) .. 92, 96-98, 131, 133, 136-138, 146, 148, 150, 152, 167
Law Students Research Council v Wadmond, 401 US 154 (1971) . 139
Lefkowitz v Newsome, 420 US 283 (1975) 397
Leslie v Mollica, 236 Mich 610 (1926) 423
Lewis v Minneapolis Moline, Inc, 288 Minn 432 (1970) 685
Lewis v United States, 146 US 370 (1892) 528
Lievers v State, 4 Md App 219 (1968) 344
Lince v Monson, 363 Mich 135 (1961) 611
Livingston County v Livingston Circuit Judge, 393 Mich 265 (1975) 655
Local 1383, International Ass'n of Fire Fighters, AFL-CIO v City of Warren, 407 Mich 897 (1979) 649
Local 1383, International Ass'n of Fire Fighters, AFL-CIO v City of Warren, 89 Mich App 135 (1979) 648, 669
Losada v Chrysler Corp, 24 Mich App 656 (1970) 679, 689, 690
Lundgren v Whitney's, Inc, 94 Wash 2d 91 (1980) 26
Magreta v Ambassador Steel Co, 380 Mich 513 (1968) 686
Mankato Citizens Telephone Co v Comm'r of Taxation, 275 Minn 107 (1966) 448
Mault v Elliott, 329 Mich 544 (1951) 576
McCall v St Joseph's Hospital, 184 Neb 1 (1969) 608
McCarthy v Wayne Circuit Judge, 294 Mich 368 (1940) 226
McFadden v Tate, 350 Mich 84 (1957) 514, 515
McKinney v Western Stage Co, 4 Iowa 420 (1857) 26
McMann v Richardson, 397 US 759 (1970) 394- 396
McNenar v New York, C & S L R Co, 20 FRD 598 (WD Pa, 1957) 614
McNitt v Henderson, 155 Mich 214 (1908) 464
Menna v New York, 423 US 61 (1975) 395-398, 400, 401
Mercantile Trust Co v New York Underwriters Ins Co, 376 F2d 502 (CA 7, 1967) 282
Meredith v Scruggs, 244 F2d 604 (CA 9, 1957) 18, 43
Midland Twp v State Boundary Comm, 401 Mich 641 (1977) 475
Mihailoff v Meijer, Inc, 53 Mich App 312 (1974) 462

PAGE
Miranda v Arizona, 384 US 436 (1966) 488
Missouri *ex rel* Southern R Co v Mayfield, 340 US 1 (1950) 625
Mitchell v Farrell Lines, Inc, 350 F Supp 1325 (ED Pa, 1972) 626
Mitchell v Trawler Racer, Inc, 362 US 539 (1960) 625
Monaghan v Agricultural Fire Ins Co of Watertown, NY, 53 Mich 238 (1884) 274, 276, 279, 281-283, 289
Moning v Alfono, 400 Mich 425 (1977) 23, 24, 27, 28, 719, 723
Montgomery v Stephan, 359 Mich 33 (1960) . 12, 13, 16, 20, 22, 24, 26, 504
Moore v Parole Board, 379 Mich 624 (1967) 190
Moore v Whyte, — W Va — (1980) 694
Morey v Commonwealth, 108 Mass 433 (1871) 348, 349
Morgan v Cincinnati Ins Co, 91 Mich App 48 (1979) 273, 278
Morgan v McDermott, 382 Mich 333 (1969) 508
Morrill v Morrill, 138 Mich 112 (1904) 286, 287
Muniz v Hoffman, 422 US 454 (1975) 446
Murero v Reinhart Lumber Co, 85 Cal App 385 (1927) 614
Myers v Genesee County Auditor, 375 Mich 1 (1965) 508
NAACP v Alabama *ex rel* Patterson, 357 US 449 (1958) 103, 107, 108, 133, 135
NAACP v Button, 371 US 415 (1963) 108, 111, 112
National Bank of Detroit v Eames & Brown, Inc, 396 Mich 611 (1976) 731, 732
National Labor Relations Board v Century Cement Manufacturing Co, Inc, 208 F2d 84 (CA 2, 1953) 652
National Savings Bank v Ward, 100 US 195 (1879) 425
Near v Minnesota *ex rel* Olson, 283 US 697 (1931) 133
Neuberg v Bobowicz, 401 Pa 146 (1960) 26
Newton v State, 280 Md 260 (1977) 344
Nicholson v Hugh Chatham Memorial Hospital, Inc, 300 NC 295 (1980) 26
North Carolina v Pearce, 395 US 711 (1969) 343, 347, 348, 355
Norwood v Kirkpatrick, 349 US 29 (1955) 629
Ohio Bureau of Employment Services v Hodory, 431 US 471 (1977) 688
Ohio Dep't of Natural Resources v Sellers, 14 Ohio App 2d 132 (1968) 448
Ohralik v Ohio State Bar Ass'n, 436 US 447 (1978) . 111, 112, 170, 171
Pacific Car & Foundry Co v Pence, 403 F2d 949 (CA 9, 1968) . 629, 632
Panama R Co v Johnson, 264 US 375 (1924) 625
Parker v Klochko Equipment Rental Co, Inc, 590 F2d 649 (CA 6, 1979) 730- 732
Parker v North Carolina, 397 US 790 (1970) 394
Pascu v State, 577 P2d 1064 (Alas, 1978) 403
People *ex rel* Bristol v Board of Supervisors of Ingham County, 20 Mich 95 (1870) 475
People *ex rel* Twitchell v Blodgett, 13 Mich 127 (1865) 417
People v Aaron, 409 Mich 672 (1980) . 337-341, 347, 348, 350, 353, 354
People v Adams (Otis), 34 Mich App 546 (1971) 298
People v Adams, 389 Mich 222 (1973) 296- 303
People v Albers, 137 Mich 678 (1904) 383
People v Allen, 390 Mich 383 (1973) 345

PAGE
People v Anderson (Arthur), 62 Mich App 475 (1975), *remanded* 406 Mich 987 (1979) 347
People v Anderson (James), 391 Mich 419 (1974) 530
People v Baldwin, 405 Mich 550 (1979) 520
People v Barker, 407 Mich 902 (1979) 295
People v Barker, 90 Mich App 151 (1979) 296, 299
People v Beckner, 92 Mich App 166 (1979) 398
People v Befeld, 90 Ill App 3d 772 (1980) 694
People v Blachura, 390 Mich 326 (1973) 233
People v Bobo, 390 Mich 355 (1973) 484, 487
People v Bonner, 102 Mich App 514 (1980) 402
People v Boyd, 49 Mich App 388 (1973) 535
People v Burden, 94 Mich App 209 (1979) 58, 59, 62
People v Carstensen, 161 Colo 249 (1966) 498
People v Carter, 395 Mich 434 (1975) 345
People v Casey, 102 Mich App 595 (1980) 180
People v Casey, 408 Mich 935 (1980) 180
People v Cash, 388 Mich 153 (1972) 384
People v Cassidy, 40 NY2d 763 (1976) 344
People v Causley, 299 Mich 340 (1941) 344
People v Chamblis, 395 Mich 408 (1975) 207
People v Champion, 97 Mich App 25 (1980) 469, 470
People v Chivas, 322 Mich 384 (1948) 703
People v Clabin, 97 Mich App 340 (1980) 474
People v Cook (Fred), 147 Mich 127 (1907) 192-195, 198, 528
People v Cook (Louis), 236 Mich 333 (1926) 344, 357
People v Covelesky, 217 Mich 90 (1921) 430
People v Culver, 280 Mich 223 (1937) 566
People v Cummings, 88 Mich 249 (1891) 193, 194
People v D'Angelo, 401 Mich 167 (1977) 387, 388, 399, 400, 403
People v Davis (Zachery), 41 Mich App 683 (1972) 530
People v Densmore, 87 Mich App 434 (1978) 362- 364
People v DerMartzex, 390 Mich 410 (1973) 465
People v Doemer, 35 Mich App 149 (1971) 54
People v Earegood, 383 Mich 82 (1970) 530
People v Fox, 312 Mich 577 (1945) 191
People v Francis, 71 Cal 2d 66 (1969) 54
People v Freleigh, 334 Mich 306 (1952) 191-193, 195, 196
People v Ginther, 390 Mich 436 (1973) 391, 392
People v Goldsmith, 94 Mich App 155 (1979) 558
People v Gould, 345 Ill 288 (1931) 429
People v Gratz, 35 Mich App 42 (1971) 326
People v Greer, 30 Cal 2d 589 (1947) 347
People v Grimmett, 388 Mich 590 (1972) 530
People v Haack, 396 Mich 367 (1976) 381
People v Hall (David), 97 Mich App 143 (1980) 398, 399
People v Hall (John), 396 Mich 650 (1976) 528
People v Hamilton, 76 Mich 212 (1889) 206
People v Hardesty, 67 Mich App 376 (1976) 298
People v Hill, 86 Mich App 706 (1978) 397
People v Hobbs, 35 Ill 2d 263 (1966) 448
People v Hughes (Gary), 85 Mich App 674 (1978) 356

PAGE
People v Jackson, 391 Mich 323 (1974) 520, 522
People v Jankowski, 408 Mich 79 (1980) .. 336, 341, 343, 345, 346, 349, 356-359, 364, 365
People v Jenkins, 395 Mich 440 (1975) 208
People v Johnson (Alvin), 396 Mich 424 (1976), *cert den* 429 US 951 (1976) 383, 387, 392, 393, 398
People v Johnson (Antonio), 85 Mich App 247 (1978) 180, 181
People v Jones (Louis), 71 Mich App 270 (1976) 208
People v Jones (Ora), 395 Mich 379 (1975) 206, 344, 345, 349, 360
People v Jury, 3 Mich App 427 (1966) 458
People v Kamin, 405 Mich 482 (1979) 207
People v Lee, 391 Mich 618 (1974) 530
People v Longuemire, 87 Mich App 395 (1978) 377, 380
People v Lynn, 91 Mich App 117 (1979) 297
People v Malkowski, 385 Mich 244 (1971) 530
People v Martin, 398 Mich 303 (1976) 345-347, 349, 353, 357, 362
People v McFarlin, 389 Mich 557 (1973) 529
People v McIntosh, 62 Mich App 422 (1975) 530
People v McLemore, 95 Mich App 536 (1980) 693
People v Medcoff, 344 Mich 108 (1955) 528, 533, 534
People v Meservey, 76 Mich 223 (1889) 702, 703
People v Miles, 23 NY2d 527 (1969) 298
People v Miller (Dwjuan), 88 Mich App 210 (1979) 323, 325
People v Miller (Gordon), 301 Mich 93 (1942) 300
People v Milton, 393 Mich 234 (1974) 449
People v Morgan, 400 Mich 527 (1977) 534
People v Ormsby, 48 Mich 494 (1882) 534, 535
People v Palm, 245 Mich 396 (1929) 528
People v Phillips, 385 Mich 30 (1971) 206, 207
People v Powell, 223 Mich 633 (1923) 471
People v Provost, 403 Mich 843 (1978) 530
People v Putnam, 323 Mich 374 (1948) 300
People v Riley, 88 Mich App 727 (1979) 397, 399
People v Robideau, 94 Mich App 663 (1980) 362, 363
People v Rogers, 405 Mich 822 (1979) 205
People v Rosa, 268 Mich 462 (1934) 471
People v Shipp, 34 Mich App 67 (1971) 458
People v Shuler, 136 Mich 161 (1904) 475
People v Smith, 388 Mich 457 (1972) 208
People v Stanton, 400 Mich 192 (1977) 473, 474
People v Stein, 90 Mich App 159 (1979) 325
People v Stewart *(On Rehearing)*, 400 Mich 540 (1977) .. 345, 349, 357, 362, 364
People v Sullivan, 392 Mich 324 (1974) 556- 561
People v Taylor, 386 Mich 204 (1971) 599
People v Triplett, 407 Mich 510 (1980) 529
People v Turner, 390 Mich 7 (1973) 388, 393, 401, 403, 404
People v Uribe, 13 Ill App 3d 1027 (1973) 560
People v Webb, 89 Mich App 50 (1979) 398
People v White, 390 Mich 245 (1973) 348, 365
People v Wilder, 403 Mich 816 (1978) 336
People v Wilder, 82 Mich App 358 (1978) 336, 353

PAGE
People v Williams, 159 Mich 518 (1910) ... 566
People v Wisneski, 96 Mich App 299 (1980) ... 403
People v Woods, 182 Colo 3 (1973) ... 498
People v Worden, 71 Mich App 507 (1976) ... 298
Perry v Sindermann, 408 US 593 (1972) ... 103, 106, 107
Petition of Florida State Bar Ass'n, 40 So 2d 902 (Fla, 1949) ... 130
Pierce v New York C R Co, 409 F2d 1392 (CA 6, 1969) ... 35
Pleasant v Washington Sand & Gravel Co, 104 US App DC 374 (1958) ... 43
Podbielski v Argyle Bowl, Inc, 392 Mich 380 (1974) ... 13
Pointer v United States, 151 US 396 (1894) ... 323
Pontiac Police Officers Ass'n v Pontiac, 50 Mich App 382 (1973), *lv gtd and vacated* 391 Mich 814 (1974) ... 660, 661
Pontiac Police Officers Ass'n v Pontiac *(After Remand)*, 397 Mich 674 (1976) ... 660-662, 666
Pontiac Police Officers Ass'n v Pontiac *(Supplemental Opinion)*, 54 Mich App 282 (1974) ... 661
Preston v Grant Advertising, Inc, 375 F2d 439 (CA 5, 1967) ... 625
Production Credit Ass'n of Lansing v Dep't of Treasury, 404 Mich 301 (1978) ... 242
Production Steel Strip Corp v Detroit, 390 Mich 508 (1973) ... 30
Pure Oil Co v Suarez, 384 US 202 (1966) ... 625
Railway Employes' Dep't v Hanson, 351 US 225 (1956) . 90-95, 97, 100-103, 105, 148, 167, 168, 170
Ransford v Graham, 374 Mich 104 (1964) ... 226, 230
Rapid Roller Co v National Labor Relations Board, 126 F2d 452 (CA 7, 1942) ... 652
Regents of University of Michigan v Employment Relations Comm, 389 Mich 96 (1973) ... 657, 658, 662
Regents of University of Michigan v Pray, 264 Mich 693 (1933) . 449
Remey v Detroit U R Co, 141 Mich 116 (1905) ... 35
Rex v Bodmin Justices *ex parte* McEwen, [1947] KB 321 ... 531
Richardson v Doe, 176 Ohio St 370 (1964) ... 419
Ridgeway v United States, 558 F2d 357 (CA 6, 1977), *cert den* 436 US 946 (1978) ... 692
Roberts v Young, 369 Mich 133 (1963) ... 611
Robinson v Neil, 409 US 505 (1973) ... 395
Rockwell v Crestwood School Dist Board of Education, 393 Mich 616 (1975) ... 658, 659, 662, 667
Rohdy v James Decker Munson Hospital, 17 Mich App 561 (1969), *lv den* 383 Mich 756 (1969) ... 607
Ronzani v State, 24 Wis 2d 512 (1964) ... 344
Ross v Ross, 35 NJ Super 242 (1955) ... 286
Roth v Bell, 24 Wash App 92 (1979) ... 43
Rouse v Gross, 357 Mich 475 (1959) ... 516
Rowan v United States Post Office Dep't, 397 US 728 (1970) . . 162-164
Rumptz v Leahey, 26 Mich App 438 (1970) ... 600
Russell v Catherwood, 33 AD2d 592 (1969) ... 685
Russell v Salem Transportation Co, 61 NJ 502 (1972) . . 16, 24, 36, 37, 39, 42, 43
Russell v Young, 452 SW2d 434 (Tex, 1970) ... 614
S S Kresge Co v Unemployment Compensation Comm, 349 Mo 590 (1942) ... 684

PAGE
Sabatier v Travelers Ins Co, 184 So 2d 594 (La App, 1966) 43
Sam v Balardo, 85 Mich App 20 (1978) 414, 417, 425, 427
Sams v Olah, 225 Ga 497 (1969) 127, 146
Saunders v People, 38 Mich 218 (1878) 388
Schneider v Schneider, 17 NY2d 123 (1966) 447
Schram v Burt, 111 F2d 557 (CA 6, 1940) 286
Scott v Burger King Corp, 95 Mich App 694 (1980) 32
Scruggs v Meredith, 134 F Supp 868 (D Hawaii, 1955), *rev'd* *Meredith v Scruggs*, 244 F2d 604 (CA 9, 1957) 18
Semanishin v Metropolitan Life Ins Co, 46 NJ 531 (1966) 629
Shavers v Attorney General, 402 Mich 554 (1978) 505
Shearer v Dunn County Farmers Mutual Ins Co, 39 Wis 2d 240 (1968) 288, 289
Shelley v Kraemer, 334 US 1 (1948) 45
Shelton v Tucker, 364 US 479 (1960) 108
Sherbert v Verner, 374 US 398 (1963) 107, 108
Sherman v United States, 356 US 369 (1958) 388, 389
Shock Bros, Inc v Morbark Industries, Inc, 97 Mich App 616 (1980) 697
Shockley v Prier, 66 Wis 2d 394 (1975) 31
Shurpit v Brah, 30 Wis 2d 388 (1966) 608
Simon v Security Ins Co, 390 Mich 72 (1973) 282, 283
Simpson v Burton, 328 Mich 557 (1950) 464
Simpson v United States, 435 US 6 (1978) 343, 352
Slater v State, 316 So 2d 539 (Fla, 1975) 344
Smigel v Southgate Community School Dist, 388 Mich 531 (1972), *sub nom* Warczak v Detroit Board of Education, 389 Mich 755 (1972) 99, 100
Snyder v Massachusetts, 291 US 97 (1934) 534
Sorrells v United States, 287 US 435 (1932) 388- 390
Sperry v Florida *ex rel* Florida Bar, 373 US 379 (1963) 139
Stachowiak v Subczynski, 93 Mich App 245 (1979) 463
Stanley v Georgia, 394 US 557 (1969) 104, 111
State *ex rel* Johnson v Broderick, 75 ND 340 (1947) 429
State *ex rel* Wayne Prosecuting Attorney v Levenburg, 406 Mich 455 (1979) 242
State *ex rel* Wikberg v Henderson, 292 So 2d 505 (La, 1974) 344
State Bar Grievance Administrator v Estes, 390 Mich 585 (1973) 318
State Bar Grievance Administrator v Gillette, 393 Mich 26 (1974), *(After Remand)*, 394 Mich 1 (1975) 319
State Bar Grievance Administrator v Posler, 390 Mich 581 (1973) 314
State Bar Grievance Administrator v Williams, 394 Mich 5 (1975) 319, 320
State Bar of Michigan v Daggs, 384 Mich 729 (1971) 312
State Bar of Michigan v Lansing, 361 Mich 185 (1960) 128, 130
State v Boone, 40 Md App 41 (1978) 694
State v Briggs, 533 SW2d 290 (Tenn, 1976) 344
State v Carlson, 5 Wis 2d 595 (1958) 344
State v Clayton, 109 Ariz 587 (1973) 344
State v DeSanto, 157 NJ Super 452 (1978) 344
State v Fender, — W Va — (1980) 692
State v Honie, 310 A2d 872 (Del, 1973) 344

PAGE
State v Hubbard, 123 NJ Super 345 (1973) 344
State v Kelsey, 592 SW2d 509 (Mo App, 1979) 694
State v Thomas, 114 NJ Super 360 (1971), *modified* 61 NJ 314 (1972) 344
State v Thompson, 280 NC 202 (1972) 344, 345
State v Waldenburg, 9 Wash App 529 (1973) 347
State v Woods, 286 NC 612 (1975), *vacated on other grounds sub nom* Woods v North Carolina, 428 US 903 (1976) 344
Steigler v Insurance Co of North America, 384 A2d 398 (Del, 1978) 288
Stensvad v Industrial Comm, 167 Colo 140 (1968) 685
Stone v Jackson, 16 CB 199 (1855) 26
Storer v Brown, 415 US 724 (1974) 111, 112
Stowell v People, 104 Colo 255 (1939) 498
Sugarman v Dougall, 413 US 634 (1973) 107
Surtman v Secretary of State, 309 Mich 270 (1944) 475
Suter v Leonard, 45 Cal App 3d 744 (1975) 30
Swain v Alabama, 380 US 202 (1965) 323
Tabor v Carey & Leach Bus Lines, 242 Mich 9 (1928) 35
Thomas v Collins, 323 US 516 (1945) 108
Three Lakes Ass'n v Whiting, 75 Mich App 564 (1977) 698
Tidewater Oil Co v United States, 409 US 151 (1972) 446
Tobin v Grossman, 24 NY2d 609 (1969) 30
Tollett v Henderson, 411 US 258 (1973) 394- 396
Toms v McConnell, 45 Mich App 647 (1973) 34
Torcaso v Watkins, 367 US 488 (1961) 104
Town Crier, Inc v Chief of Police of Weston, 361 Mass 682 (1972) 448
Town of Southington v Francis, 159 Conn 64 (1970) 448
Townsend v Burke, 334 US 736 (1948) 530
Treece v Greyhound Bus Co, 63 Mich App 63 (1975) 601, 613
Turner v Atlantic C L R Co, 159 F Supp 590 (ND Ga, 1958) 43
Turner v Bennett, 108 SW2d 967 (Tex Civ App, 1937) 441
Turner v State, 248 Ark 367 (1970), *rev'd on other grounds sub nom* Turner v Arkansas, 407 US 366 (1972) 344
Unemployment Compensation Board of Review v Lowell, 24 Pa Commw Ct 309 (1976) 685
United Public Workers v Mitchell, 330 US 75 (1947) 108
United States *ex rel* Schlobohm v Medical Center for Federal Prisoners, 453 F Supp 618 (SD Ill, 1978) 694
United States v Bass, 404 US 336 (1971) 343
United States v Belt, 516 F2d 873 (CA 8, 1975), *cert den* 423 US 1056 (1976) 347
United States v Chisum, 312 F Supp 1307 (CD Cal, 1970) 393
United States Civil Service Comm v National Ass'n of Letter Carriers, AFL-CIO, 413 US 548 (1973) 133
United States v Cox, 464 F2d 937 (CA 6, 1972) 397
United States v Dixon, 592 F2d 329 (CA 6, 1979) 692
United States v Fioravanti, 412 F2d 407 (CA 3, 1969) 560
United States v Greene, 160 US App DC 21 (1973) 352, 361
United States v Gregorio, 497 F2d 1253 (CA 4, 1974) 530
United States v Guglielmini, 598 F2d 1149 (CA 9, 1979) 560
United States v Kramer, 289 F2d 909 (CA 2, 1961) 349

PAGE
United States v Mauro, 436 US 340 (1978) 692, 694
United States v O'Brien, 391 US 367 (1968) 134
United States v Robel, 389 US 258 (1967) 108
United States v Russell, 411 US 423 (1973) 388, 389, 402
United States v Ryder, 110 US 729 (1884) 446
United States v Simpson, 144 US App DC 259 (1970) 560
United States v Skillman, 442 F2d 542 (CA 8, 1971) 559
United States v Standard Accident Ins Co, 280 F2d 445 (CA 1, 1960) 447
United States v Thompson, 319 F2d 665 (CA 2, 1963) 429
United States v Tucker, 404 US 443 (1972) 530
United States v Weston, 448 F2d 626 (CA 9, 1971) 529
United States v Williams, 341 US 58 (1951) 383
United States v Wynn, 415 F2d 135 (CA 10, 1969) 560
Virginia R Co v System Federation No 40, 84 F2d 641 (CA 4, 1936) 130
Wallace v Wallace, 225 Ga 102 (1969) 129
Waller v Florida, 397 US 387 (1970) 350
Warner v Brigham, 90 Mich App 640 (1979), *lv den* 407 Mich 907 (1979) 504, 506
Washington v Jones, 386 Mich 466 (1971) 504
Wayne County Board of Road Comm'rs v GLS LeasCo, 394 Mich 126 (1975) 605, 606
Wayne County Civil Service Comm v Board of Supervisors, 384 Mich 363 (1971) 656, 657, 662, 663, 665, 666
Wayne County Prosecutor v Recorder's Court Judge, 406 Mich 374 (1979), *app dis sub nom* Brintley v Michigan, 444 US 948 (1979) 54, 342, 343, 356, 357, 360, 362- 364
Way v Root, 174 Mich 418 (1913) 287
Welch v Humphrey, 200 Md 410 (1952) 448
West Virginia Board of Education v Barnette, 319 US 624 (1943) 104, 169
Whalen v United States, 379 A2d 1152 (DC App, 1977) 351
Whalen v United States, 445 US 684 (1980) ... 342, 343, 351, 356- 359, 363, 365
Whittlesey v Miller, 572 SW2d 665 (Tex, 1978) 26
Williams v Rhodes, 393 US 23 (1968) 108, 111, 112
Williams v State, 437 SW2d 82 (Mo, 1969) 402
Wilson v Ohio River Co, 211 F Supp 666 (WD Pa, 1962) 626
Wilson v Review Board of Employment Security Division, — Ind App — (1977), *vacated* — Ind App — (1978) 685
Wilson v Stilwill, 408 Mich 898 (1980) 597
Wilson v Stilwill, 92 Mich App 227 (1979) 597
Winchester v Meads, 372 Mich 593 (1964) 512
Wise v Daniel, 221 Mich 229 (1922) 512- 514
Wood County v Board of Vocational, Technical & Adult Education, 60 Wis 2d 606 (1973) 448
Wood v Detroit Edison Co, 409 Mich 279 (1980) 705, 708- 711
Wooley v Maynard, 430 US 705 (1977) 111, 112
Workman v Detroit Automobile Inter-Ins Exchange, 404 Mich 477 (1979) 549, 553, 554
Wrobel v Cotman, 372 Mich 383 (1964) 611

PAGE
Wycko v Gnodtke, 361 Mich 331 (1960) 13, 31
Ybarra v Spangard, 25 Cal 2d 486 (1944) 608, 609
Young v Pridd, Cro Car 89 (1627) 25
Zamsky v Pittsburgh Public Parking Authority, 378 Pa 38 (1954) 614
Zoellner v Zoellner, 46 Mich 511 (1881) 113

LAWS AND RULES CITED AND CONSTRUED

PAGE

CONSTITUTION OF UNITED STATES

Am I 84-86, 90-96, 98-107, 109-112, 114, 116-118, 120-124, 126, 131, 133-138, 141-143, 145, 147-149, 151, 154, 155-160, 167-172, 175, 177, 178
Am IV 397, 399
Am V 91, 94, 148, 170, 341, 342, 354-358, 364, 383, 395
Am VIII 356
Am XIV. 22, 44, 45, 96, 100, 101, 103, 105, 111, 132, 133, 142, 168, 341, 342, 354-356, 534
———, § 1 96
Art I, § 8, cl 3 ..... 92, 94, 122, 130, 141, 142

CONSTITUTION OF MICHIGAN 1850

Art 4, § 47 ..... 193, 194
Art 6, § 3 254

CONSTITUTION OF MICHIGAN 1908

Art 5, § 28 196
Art 6, § 9 ..... 190, 191

CONSTITUTION OF MICHIGAN 1963

Art 1, § 2 ..... 22, 44
———, § 12 182
———, § 15 ..... 341, 354, 356-358, 364, 383
———, § 16 356
———, § 17 ..... 356, 534
Art 2, § 1 232
Art 3, § 2 ..... 122, 142
———, § 7 ..... 339, 507
Art 4, § 7 258
———, § 24 ..... 122, 142, 449, 474, 476
———, § 25 ..... 474, 475, 477
———, § 30 ..... 122, 142, 153, 155, 156
———, § 45 193-201
———, § 48 ..... 651, 654, 664- 667
Art 5, § 14 ..... 186, 190, 193, 198, 200
Art 6, § 2 232

PAGE

CONSTITUTION OF MICHIGAN—CONT'D

———, § 4 ..... 229-233, 240, 248, 253-256, 259, 260
———, § 5 ..... 88, 128
———, §§ 8, 12, 16 232
———, § 23 248
———, § 25 ..... 230, 240
———, § 30 .... 223, 229-232, 234-236, 240-243, 245, 247, 249, 250, 252-256, 258-262, 264, 265
———, § 30(2) 223
Art 7, § 22 ..... 659, 661
Art 10, § 1 283
Art 11, § 6 ..... 657, 663- 669
———, § 7 ..... 230, 233, 240, 258

UNITED STATES STATUTES

Federal Election Campaign Act of 1971 134
Federal Employers Liability Act 625, 626
Federal judicial code (1948) 446
Hatch act, § 9 134
Jones Act 623-627, 631
National Labor Relations Act, § 8(d) 652
Posse Comitatus Act 57, 59, 60
Postal Revenue and Federal Salary Act of 1967, Title III 162
Railway Labor Act 91-95, 102, 147, 148
———, § 2, Eleventh 93-95
Reconstruction Act of 1867
Sherman act, § 1 142
2 USC 431 *et seq.* 134
5 USC 7324(a)(2) 134
15 USC 1 142
18 USC 1385 ..... 57-59, 61
28 USC 1404(a) 626, 629
29 USC 158(d) 652
29 USC 207(a)(1) 678, 687
29 USC 213(a)(1) 687
29 USC 216(b) 688
39 USC 3008 164
———, subds (a), (b) 162
39 USC 4009 162
45 USC 51 *et seq.* 625
45 USC 152(11) 147, 148
46 USC 688 ..... 623, 625

COMPILED LAWS 1857

4016 425

COMPILED LAWS 1915

12323(2), 12323(3) 416

COMPILED LAWS 1948

41.81 434
601.48, 601.61 88

PAGE

COMPILED LAWS—CONT'D

609.12 450
609.13 434
609.27 451
620.29 452
691.51, 691.52 88

MICHIGAN COMPILED LAWS

4.101 117
8.3a 653
38.71 *et seq.* 658
38.101 659
38.401 *et seq.* 656
38.501 *et seq.* 649
117.1 *et seq.* 659
117.36 660
123.841, 123.842(e) 654
335.341(1)(a) 376, 526
380.1531 *et seq.*, 388.551, 388.553 110
408.384a 678, 687
408.393 688
421.2 689
421.8(2) 677
421.29 682
421.29(1)(a) 676, 681
421.29(1)(e) 675, 680
421.29(6) 678
423.201 *et seq.* 649
423.202 102
423.206 658
423.210 101
423.210(1) 99
423.211 137
423.213 654
423.215 ..... 652, 654, 662
433.11 *et seq.* 542
436.22 ..... 13, 550
500.2832 ..... 276, 279
500.3101 *et seq.* 10, 542
500.3105(1) 636
500.3106 637
500.3107-500.3110 549
500.3109, 500.3109a, 500.3116, 500.3116(2) 551
500.3116(4) 549
500.3123(1)(a) 640
500.3135 ..... 505, 543
500.3135(1) 548, 549
500.3135(2)(b) 549
557.1 285
570.151 *et seq.* 728-731
600.102 423
600.215, 600.219 ..... 86, 113, 122

PAGE

MICHIGAN COMPILED LAWS—CONT'D

600.901 *et seq.* 154, 437
600.901 ..... 88, 127, 426
600.904 ..... 88, 125, 166
600.2001 283
600.2901(1) 15
600.2912 ..... 419, 422, 437, 442, 451, 452
600.2922 13
600.2922(2) 22, 32
600.4401 166
600.5805 ..... 414, 416
600.5805(3) 412, 414, 416-420, 425, 427, 430, 433, 436, 437, 445
600.5805(4) 414
600.5805(7) 414, 415, 419, 437
600.5805(8) 414
600.5838 ..... 419, 420, 437, 452
600.5851 14
722.21-722.29 573
722.23 ..... 576, 584
722.541 576
750.83 558
750.84 53
750.89 701
750.92 ..... 376, 526
750.110 497
750.227b 52, 53, 180, 357, 360, 364, 558
750.249 205
750.316 ..... 335, 338, 348, 353, 361, 363, 364
750.349 ..... 296-299, 302, 303
750.422 376
750.520b 297, 363, 701
750.520b(1) 296
750.520b(1)(c) 360, 362, 363
750.520c(1)(c) 360
750.520d 296
750.529 ..... 52, 180, 336, 353, 455
767.44, 767.73 384
768.4 344
769.8 190
771.10 655
780.601 *et seq.* 692
800.71 *et seq.* 186
800.73 188
800.74 ..... 189, 198
800.75 189
800.283 473

MICHIGAN STATUTES ANNOTATED

2.181 117
2.212(1) 653
4.147(1) *et seq.* 692
5.1191(1) *et seq.* 656

PAGE

MICHIGAN STATUTES ANNOTATED—CONT'D

5.2071 *et seq.* 659
5.2116 660
5.3331 654
5.3332(e) 654, 655
5.3351 *et seq.* 649
15.1921, 15.1923 110
15.1971 *et seq.* 658
15.2001 659
15.41531 *et seq.* 110
17.255(4a) 678, 687
17.255(13) 688
17.455(1) *et seq.* 649
17.455(2) 102
17.455(6) 658
17.455(10) 101
17.455(10)(1) 99
17.455(11) 137
17.455(13) 654
17.455(15) 652, 654, 662
17.502 689
17.508(2) 677
17.531 682
17.531(1)(a) 676, 681
17.531(1)(e) 675, 680
17.531(6) 678
18.789(1) *et seq.* 542
18.993 ..... 13, 550
18.1070(41)(1)(a) 376, 526
24.12832 ..... 276, 279
24.13101 *et seq.* 10, 542
24.13105(1) 636
24.13106 637
24.13107-24.13110 549
24.13109, 24.13109(1), 24.13116, 24.13116(2) 551
24.13116(4) 549
24.13123(1)(a) 640
24.13135 ..... 505, 543
24.13135(1) 548, 549
24.13135(2)(b) 549
25.311 576
25.312(1)-25.312(9) 573
25.312(3) 576, 584
26.161 285
26.331 *et seq.* 728-731
27A.102 423
27A.215, 27A.219 ..... 86, 113, 122
27A.901 *et seq.* 154, 437
27A.901 ..... 88, 127, 426
27A.904 ..... 88, 125, 166
27A.2001 283
27A.2901(1) 15

PAGE

MICHIGAN STATUTES ANNOTATED—CONT'D

27A.2912 ..... 419, 422, 437, 442, 451, 452
27A.2922 13
27A.2922(2) 22, 32
27A.4401 166
27A.5805 ..... 414, 416
27A.5805(3) 412, 414, 416-420, 425, 427, 430, 433, 436, 437, 445
27A.5805(4) 414
27A.5805(7) 414, 415, 419, 437
27A.5805(8) 414
27A.5838 ..... 419, 420, 437, 452
27A.5851 14
28.278 558
28.279 53
28.284 701
28.287 ..... 376, 526
28.305 497
28.424(2) 52, 53, 180, 357, 360, 364, 558
28.446 205
28.548 ..... 335, 338, 348, 353, 361, 363, 364
28.581 ..... 296-299, 302, 303
28.664 376
28.788(2) 297, 363, 702
28.788(2)(1) 296
28.788(2)(1)(c) 360, 362, 363
28.788(3)(1)(c) 360
28.788(4) 296
28.797 ..... 52, 180, 336, 353, 455
28.984, 28.1013 384
28.1027 344
28.1080 190
28.1140 655
28.1437(1) *et seq.* 186
28.1437(3) 188
28.1437(4) 189, 198
28.1437(5) 189
28.1623 473

SESSION LAWS

1848 PA 38 ..... 13, 22, 23, 31, 32, 47
1857 PA 99 195
1905 PA 168 432
——— 184 ..... 190, 192, 193, 198
1909 PA 17 ..... 473, 474, 476, 477
——— 279 ..... 659, 660
1915 PA 314 ..... 416, 425, 426, 428, 433, 436, 437
———, ch 9, § 13 432
1931 PA 259 728-733
1933 (Ex Sess) PA 8 ..... 13, 23
1933 PA 252 195
1935 PA 58 ..... 88, 121-124, 126, 128- 130
——— 78 ..... 649-651, 654, 661-663, 667, 668

PAGE

SESSION LAWS—CONT'D

1936 (Ex Sess) PA 1 ..... 677, 678, 686, 688, 689
———, § 29 685
———, § 29(1)(a) 676, 677
———, § 29(1)(d) 679
———, § 29(1)(e) 675-677, 679, 687
———, § 29(3) 676
———, § 29(6) 678, 679, 686- 688
———, § 29(7)(b) 679, 687
1937 (Ex Sess) PA 4 ..... 658, 659, 662
1941 PA 370 ..... 656, 657, 662
1947 PA 34 88
——— 336 ..... 99, 649, 655-664, 667, 668
———, § 6 658
1961 PA 141 ..... 692, 693
———, Art IV(c) 693, 694
——— 236 ..... 412, 414, 416, 419, 420, 423-426, 428-430, 432, 433, 437, 439, 442, 443, 448, 453
———, §§ 901, 904 88
———, § 2912 ..... 426, 429, 437, 451, 452
———, § 5803 ..... 450, 451
———, § 5805 ..... 421, 426, 429, 433, 434, 438, 450
———, § 5805(3) 428, 431, 434, 436-438, 442, 443, 451- 453
———, § 5807 ..... 450, 451
———, § 5823 451
———, § 5838 ..... 426, 429, 434, 437, 452
———, §§ 5851-5856 421
1964 PA 154 ..... 678, 687
——— 170 476
1965 PA 281 ..... 677, 683
———, § 29(6) 684
———, § 29(7) 683
——— 379 ..... 651, 656
———, § 15 ..... 651-653, 655
1967 PA 282 720
1970 PA 91 ..... 576, 583
———, § 3 ..... 573, 576, 579, 582- 584
———, § 3(a)-(j) 584
———, § 3(d), (e), (h) 582
———, § 7(c) 573, 576-579, 582, 584
———, § 8 ..... 573, 577
——— 155 477
1972 PA 105 ..... 473, 474, 476, 477
——— 294 ... 10, 19, 503-508, 541, 542, 544-546, 549-554, 636, 638, 641
———, § 3105 ..... 548, 637
———, § 3105(1) 637-639, 641
———, § 3106 ..... 637, 638, 641
———, § 3106(a)-(c) 637, 640
———, §§ 3107-3110 549
———, § 3116 ..... 551, 553
———, § 3121 547
———, § 3123 639

PAGE

SESSION LAWS—CONT'D
———, § 3135 ..... 505, 508, 542, 547, 549, 552- 554
———, § 3135(1) 544, 548- 550
———, § 3135(2) 544, 546- 551
1973 PA 25 ..... 99, 100
1975 PA 110 677
——— 142 420
———, § 5838 421
1977 PA 164 ..... 474, 476, 477
1978 PA 461, § 3116(2) 552, 553
——— 495 ..... 412, 414
1979 PA 147, § 3135(2)(d), (3), (4), (5) 543, 544
1980 PA 28 ..... 335, 353, 362
——— 303 197
——— 358 677
——— 519 ..... 186, 188-190, 193- 201
———, § 3 ..... 189, 198
———, § 4 ..... 189, 198, 200

LEGISLATIVE BILLS
House Bill 6049 188

LEGISLATIVE JOURNALS
7 Congressional Record 4245, 4247 (1878) 60
Michigan House of Representatives Analysis, Analysis of Senate Bill 227 (June 25, 1975) 421

OTHER STATES AND COUNTRIES—STATUTES
Cal Const, art 6, § 18(d) 257
District of Columbia Code 351
Illinois Election Code 136, 169
Kan Stat Ann, § 23-205 (1980 Cum Supp) 26
Mo Rev Stat § 288.050.1, subds (1) and (2) 684
1939 Mo Rev Stat, § 9431 684
NJ Const, art 6, § 6, ¶ 4 257
NJ Judiciary Law, art 2A, § 47 (McKinney) 257
NJ Stat Ann 2A:1B-9 257
NY Const, art 6, § 22(h) 257
NC Gen Stat § 7-A-376 258
Ohio Rev Code § 4141.25 689
Okla Const, art 7-A, § 4(d) 257
Pa Cons Stat Ann, tit 42, § 3305 258
Tex Const, art 5, § 1-a(9) 258

GENERAL COURT RULES 1963
101, 111, 111.1 85
111.1(3) 86
117.2(1) 85, 99
209 86
303 248
403 697
404 697

PAGE

GENERAL COURT RULES—CONT'D

511 ..... 324, 325
511.2 324
511.4, 511.5 323
511.6 ..... 324, 325
516.1 208
517.1 582
529.1 605
785.7 481
785.7(1)(a) 385
785.7(1)(g) 480, 481
785.7(1)(g), subds (v), (vi) 386
785.7(6) 501
785.8 527
785.8(2) 530
785.12 527
797 728
797.2 ..... 730, 731
851(6) 86, 113, 122
853.2(1)(a) 575
853.2(4) .. 61, 182, 326, 466, 471, 477, 482, 488, 495, 500, 508, 521, 561, 566, 699, 703, 709
866 237
866.3(c) 197
908 127
912.2 386
930 ..... 231, 248, 251, 260
932 ..... 231, 240, 260
932.4 234-236
932.4(d) 247
932.16 ..... 239, 248
932.22, subds (d), (e) 249
932.23 240
932.24(a) 239
932.25 237
950 *et seq.* 115
956.1, 957, 959 313
964.1, 964.9(a) 312
964.10 314
964.13 252
965 246
967.4 ..... 318, 319
971.5 316

MICHIGAN RULES OF EVIDENCE

Rules of Evidence 312, 723
403 ..... 464, 465, 602, 617
405(a) 470, 471
407-409, 411 617
604 482
609 522
609(a)(2) 520

PAGE

MICHIGAN RULES OF EVIDENCE—CONT'D
611 602
707 ..... 463, 464
801 494
801(c) 464
804 494

OTHER COURT RULES
FRE 803(18) 463, 464

ORDINANCES
Warren City Charter 649, 667
———, § 7.18 649

REGULATION OF THE PROFESSION
Administrative Order 1977-4, 400 Mich lxvii (1977) 323
Board of Law Examiners Rule 5(D) 121
Bylaws of the State Bar of Michigan, art V, 59 Mich Bar J 49r, 52r-54r (April, 1980) 147
Code of Judicial Conduct, Canon 1 225
———, Canon 2(A) 160
Code of Professional Responsibility and Canons, DR 1-102(A), subds (4), (5), (6) 309
———, DR 6-101 312
———, DR 6-101(A), subds (1), (2), (3) 309
———, DR 7-101(A), subds (1), (2), (3) 309
15 Mich State Bar J 7-8 (1936) 89
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State Bar Rule 1 ..... 109, 124
——— 2 ..... 89, 426
——— 3 89
——— 3(a) 426
——— 4 89
——— 5, 6 150
——— 15 115
——— 16.16 319
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———, Rules 2, 4 121
———, § 1, 273 Mich xxxv (1935) 89, 125, 126
———, §§ 2-4, 273 Mich xxxv, xxxvi 89
———, § 16, 273 Mich xlv (1935) 125

UNIFORM AND MODEL STATUTES
Uniform Motor Vehicle Accident Reparations Act 546
———, § 5 ..... 546, 547
———, § 5(a) 546
———, §§ 5(a)(1), 7 547
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TEXTS CITED

PAGE

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———, Standard Nos. 3.1, 3.2 263
———, Commentary to Standard No. 6.7, pp 52-53; Standard Nos. 8.1-8.8, pp 60-63 229
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41 Am Jur 2d, Husband and Wife, § 16, p 30 285
———, ———, § 57, pp 62-63 284
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———, ———, § 194, p 392 419
———, ———, § 237, p 418 430
———, ———, § 325, p 472 447
———, ———, § 330, pp 474-475 435
24 ALR3d 450, Anno: *Insured's Fraud—Coinsured's Rights* 282
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69 ALR3d 528, Anno: *Child's right of action for loss of support, training, parental attention, or the like, against a third person negligently injuring parent* 12
98 ALR3d 169, 192-195, 245-247, Anno: *Interstate Agreement on Detainers Act* 694
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PAGE

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PAGE

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———, ———, ———, p 19 434
———, ———, ———, p 28 452
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———, § 600.5805, Committee Comment, p 822 ..... 433, 434, 436, 438, 450, 452
———, ———, Historical Note, p 822 432
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———, ———, 75 Yale LJ 313-317 (1965)..... 364
———, ———, 75 Yale LJ 319 (1965)..... 361
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———, ———, pp 1749-1760 666
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PAGE
———, ———, ———, 31 (1979) 26
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———, ———, § 28, p 140 26
———, ———, § 39, pp 214, 217 608
———, ———, § 124, p 874 20
———, ———, ———, pp 874-876 25
———, ———, ———, pp 881, 887 21
———, ———, § 125, p 888, fn 38; p 894 21
———, ———, ———, p 896 16
———, ———, § 127, p 902 47
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———, p iii 187
———, p 22 188
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———, ———, ———, p 314 ..... 719, 723
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———, ———, 78 Mich L Rev 1002-1004 (1980) 365

PAGE
———, ———, 78 Mich L Rev 1026-1030 (1980) 364
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ADMINISTRATIVE ORDER
No. 1981-3

Entered on August 28, 1981, effective on September 1, 1981.—REPORTER.

FORMS TO BE USED TEMPORARILY BY THE THIRTY-SIXTH DISTRICT.

Directed to the thirty-sixth district court.

On order of the Court, it appearing that there is a need for continued use of existing notices, summons, praecipes, and other forms used by the common pleas court and the traffic and ordinance division of recorder's court until new district court forms can be printed, the thirty-sixth district court is directed to use such existing forms, clearly stamped with the words "Thirty-Sixth District Court", until further order of the Court, to be effective September 1, 1981.

AMENDMENTS TO THE GENERAL COURT RULES OF 1963

Adopted June 17, 1981, effective July 17, 1981.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 785. CRIMINAL PROCEDURE.

.1—.3 (Unchanged.)

.4 Advice on the Assistance of Counsel; Appointment; Joint Representation.

(1) (Unchanged.)

(2) If the defendant requests a lawyer and the court finds that he is financially unable to provide a lawyer, the court shall appoint a lawyer to represent him. The order of appointment authorizes the lawyer

(a) to represent the defendant in the trial court, including in proceedings leading to possible revocation of youthful trainee status;

(b) to pursue interlocutory appeals to the Court of Appeals, when the lawyer believes the case warrants; and

(c) to respond to prosecutor appeals to the Court of Appeals, either interlocutory or as of right.

(3) Even though a defendant has waived the assistance of a lawyer, the court shall advise him

at each subsequent proceeding *(e.g.,* preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) of his right to a lawyer at public expense. Before the court proceeds,

(a) the defendant must reaffirm that he does not want a lawyer's assistance; or

(b) if he is eligible for and then requests the appointment of a lawyer, the court must appoint one; or

(c) if he wants to retain a lawyer and has the financial ability to do so, the court must allow him a reasonable opportunity to retain a lawyer.

If the defendant is not represented by a lawyer, the record must affirmatively show at each proceeding that advice on the right to a lawyer at public expense was given and that the defendant waived that right.

(4) (Unchanged.)

.5—.13 (Unchanged.)

Staff Comment: The amendment is intended to clarify that an accused is entitled to the assistance of counsel, and to advice regarding that right, in proceedings leading to the possible revocation of status as a youthful trainee under MCL 762.12; MSA 28.853(12).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Adopted June 17, 1981, effective July 24, 1981.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 790. PRETRIAL RELEASE.

.1—.3 (Unchanged.)

.4 Money Bail; Satisfaction of Money Bail.

(a) (Unchanged.)

(b) If the court finds that the defendant's appearance cannot otherwise be assured, it may require the defendant to post a surety bond or cash in the full amount of the bail, at the defendant's option. In making this finding, the court shall consider the factors listed in subrule .5 and state the reasons why a surety bond, or cash in the full amount of the bail, is necessary.

(c) Unless the court requires bail as provided in subrule (b), the court shall advise the defendant of the option to satisfy the monetary requirement of bail under (1) or (2).

(1) The defendant may post cash in the full amount of the bail set by the court or a surety bond written by a licensed surety bondsman.

(2) The defendant, or any person other than an attorney acting in the defendant's behalf or a surety referred to in (1), may deposit with the clerk or peace officer having custody of the defendant, currency equal to 10 percent of the bail, but at least $10. The court may require additional security or other conditions of the defendant.

(d) The court may accept the equivalent of cash as provided by law.

.5 (Unchanged.)

.6 Termination of Money Bail.

(a) If the conditions of the bail are met and the defendant is discharged from all obligations in the case, the court shall discharge the surety, return the cash (or its equivalent) posted in the full amount of the bail, or return 90 percent of the deposited money and retain 10 percent if there has been a deposit of 10 percent of the bail, whichever is applicable.

(b)-(c) (Unchanged.)

.7 (Unchanged.)

Staff Comment: The changes require the court to advise the defendant of the option to post cash, a 10 percent deposit, or a surety bond under GCR 1963, 790.4(c) and allow a defendant to post cash in the full amount of the bail in lieu of surety bond under GCR 790.4(b). The court may allow posting of the equivalent of cash as set forth in MCL 765.12; MSA 28.899. GCR 790.6 makes explicit that the court must return cash posted in the full amount when a defendant fulfills the obligations of the bail as stated in GCR 790.6.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Adopted March 25, 1981, effective May 14, 1981.—REPORTER.

RULE 791. PROBATION REVOCATION.

.1 Issuance of Warrant; Summons.

(a) If reasonable cause exists to believe that a person has violated a condition of probation, the court may:

(1) if the alleged violation is other than a criminal offense and the court determines that arrest is unwarranted, direct that a summons (or its equivalent) to appear for arraignment on the probation violation charge be served on the probationer; or

(2) issue a warrant for the arrest of the probationer.

(b) The person arrested for an alleged probation violation is to be brought promptly before the court for arraignment on the charge.

.2 Appearance Before Court. At the arraignment on the probation violation, the court shall, speaking directly to the probationer and receiving the probationer's response,

(a) assure that the probationer receives written notice of the alleged violation;

(b) advise the probationer of the right to a hearing on the charges and that he or she may ask the court to be admitted to bail pending the hearing;

(c) advise the probationer that he or she has the right to the assistance of a lawyer and that if the probationer is financially unable to provide a lawyer and wants a lawyer, the court will appoint one for the probationer at public expense;

(d) advise the probationer that the court will set a date for a violation hearing and that if the probationer asks for and is entitled to a lawyer at public expense the court will make that appointment before the hearing; and

(e) advise the probationer that if the revocation hearing does not take place within 12 days after arraignment, a probationer in custody in this state based on an alleged probation violation is to be released from custody pending a revocation hearing.

.3 Advice on Assistance of Counsel; Appointment. Even though a probationer has waived the assistance of a lawyer at arraignment, the court shall advise the probationer at each subsequent proceeding *(e.g.,* revocation hearing, sentencing) of the right to a lawyer at public expense. Before the court proceeds,

(a) the probationer must reaffirm that he or she does not want a lawyer's assistance;

(b) if the probationer is eligible for and then requests the appointment of a lawyer, the court must appoint one; or

(c) if the probationer wants to retain a lawyer and has the financial ability to do so, the court must allow him or her a reasonable opportunity to retain a lawyer.

If the defendant is not represented by a lawyer, the record must affirmatively show at each proceeding that advice on the right to a lawyer at public expense was given and that the probationer waived that right.

.4 Revocation Hearing.

(a) Unless the probationer waives a revocation hearing under rule 791.5, the evidence against the probationer must be disclosed to him or her.

Except as otherwise provided in rule 791.4(b), the court that granted probation shall hold the hearing within a reasonable time after the arraignment.

(b) Whenever the alleged violation of probation consists of an offense with which the probationer is charged in a criminal proceeding, the court may continue the probation revocation hearing until the conclusion of the criminal proceeding.

(c) At the hearing the probationer has the right to appear, present evidence, and cross-examine witnesses. The burden of establishing the probation violation is by a preponderance of the evidence. The rules of evidence other than those with respect to privileges do not apply.

(d) In deciding whether a violation has occurred, the court shall consider only evidence which relates to the charge and shall comply with rule 517.1.

.5 Pleas of Guilty.

(a) A probationer may plead guilty at arraignment or thereafter to the violation as charged with the consent of the court that granted probation.

(b) Before the court accepts a guilty plea, it shall, speaking directly to the probationer and receiving the probationer's response,

(1) personally advise the probationer that by pleading guilty the probationer is giving up the right to a contested revocation hearing, the right to be represented by a lawyer, and the right to an appointed lawyer if the probationer is unable to afford a lawyer;

(2) personally advise the probationer of the maximum possible sentence for the offense that led to probation;

(3) satisfy itself that the plea is understandingly, voluntarily, and knowingly made; and

(4) establish support for a finding that the probationer is guilty of the violation charged.

.6 Sentencing. If the court finds that the probationer has violated the conditions of probation or that the probationer has pled guilty to the violation as charged, the court may continue probation, modify the conditions of the existing probation, extend the probation period, or impose a jail or prison sentence. If the court revokes probation, the court may not impose a prison sentence on the probationer until it has received a current presentence report and complied with rule 785.8.

.7 Review. The probationer has an appeal as of right from the imposition of a sentence of incarceration after a finding of probation violation.

Staff Comment: The new rule 791 is for the most part a restatement of the statutory and case law in Michigan concerning the procedure to be followed in probation revocation proceedings. Probation officers are required to "petition the court for a probation revocation hearing when the alleged violation is serious". 1979 AC R 791.9930(1). Under proposed subrule 791.1 the court, on a finding of probable cause that a probation violation has occurred, may issue a warrant for the probationer's arrest. *People v Leroy Jackson, Jr.,* 63 Mich App 241, 246-247 (1975). Issuance of a summons or its equivalent in lieu of an arrest warrant is implicitly authorized by MCL 771.4; MSA 28.1134. If the summoned probationer does not appear, the court may issue a bench warrant for the probationer's arrest. Subrule 791.2 represents an effort to assure that the probationer is advised at the initial stages of proceedings of the right to a contested

hearing, assistance of counsel, and written notice of the charges against the probationer. See MCL 771.4; MSA 28.1134; *In re McLeod,* 348 Mich 434 (1957); *People v Ojaniemi,* 93 Mich App 200 (1979); *People v Kitley,* 59 Mich App 71 (1975). Subrule 791.4 incorporates the minimum due process requirements articulated by the United States Supreme Court in *Gagnon v Scarpelli,* 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973). Several portions were patterned after proposed FR Crim P 32.1(a) on revocation.

Rule 791.4(b) allows the court discretion to continue a revocation hearing based on a criminal offense until the underlying criminal charge is disposed of.

Subrule 791.4(d) adopts the decision in *People v Nesbitt,* 86 Mich App 128 (1978), relative to findings of facts and conclusions of law.

Subrule 791.5 is a codification of the law as recognized in *People v Rial,* 399 Mich 431 (1976); *People v Hooks,* 89 Mich App 124 (1979); *People v Michael Brown,* 72 Mich App 7 (1976); and *People v Kitley,* 59 Mich App 71 (1975), except that before accepting a plea the trial judge must state the maximum sentence the probationer may receive if probation is revoked, and establish a factual basis for the plea (which need not stem from an admission of guilt by the probationer in open court). Subrule 791.6 makes it clear that a trial judge need not revoke probation even on a finding of a violation. *People v Rocha,* 86 Mich App 497 (1978).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Adopted August 18, 1981, effective on September 18, 1981.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 815. FILING AND SERVING BRIEFS AND RECORD.

.1 Appellant's Brief.

(1) Five duplicate typewritten or printed copies of the appellant's brief shall be filed with the clerk of the Court of Appeals within 60 days after the filing of the claim of appeal, or 60 days after filing in court of the stenographer's transcript, whichever date shall be later. A 30-day extension for filing of the appellant's brief may be had upon

written stipulation of the parties. A copy of such stipulation shall promptly be filed with the clerk of the Court of Appeals and with the clerk of the trial court. Any extension of time for filing of the appellant's brief for a longer period than 90 days from the filing of the claim of appeal or the transcript, whichever date shall be later, shall be had only upon order of the Court of Appeals upon motion for cause shown.

(2)-(5) (Unchanged.)

.2 Appellee's Brief.

(1) Within 40 days after service upon him of the appellant's brief, the appellee shall file with the clerk of the Court of Appeals five duplicate typewritten or printed copies of his brief. A 30-day extension may be had upon written stipulation of the parties. A copy of such stipulation shall promptly be filed with the clerk of the Court of Appeals and with the clerk of the trial court. Any extension of time for filing of the appellee's brief for a longer period than 70 days from the date of filing of the appellant's brief shall be had only upon order of the Court of Appeals upon motion for cause shown.

(2) (Unchanged.)

.3—.5 (Unchanged.)

Adopted on August 17, 1981, effective on September 1, 1981.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 925. CHIEF JUDGE RULE.

.1 Applicability. Except as provided in subrule 925.7, this rule applies to all trial courts: that is

the judicial circuits of the circuit court, the districts of the district court, the probate court in each county or a probate district established by law, the municipal courts, and the recorder's court of the city of Detroit.

.2—.6 (Unchanged.)

.7 Executive Chief Judge. (Applicable only in the third judicial circuit and recorder's court of the city of Detroit.)

(a)(1) In the circuit court in the third judicial circuit and the recorder's court of the city of Detroit, an executive chief judge shall be chosen by a majority vote of the joint executive committee created under subrule 925.8(a). The first executive chief judge selected shall serve until January 1, 1982. Beginning January 1, 1982, the executive chief judge shall serve a term of two years.

(2) If the joint executive committee has not selected an executive chief judge by January 1 of an even-numbered year, the chief justice shall appoint one.

(3) The executive chief judge shall select a member of the joint executive committee to serve as executive chief judge pro tempore. The executive chief judge may remove the executive chief judge pro tempore.

(4) If the office of executive chief judge is vacated, the executive chief judge pro tempore shall become the executive chief judge for the remainder of the term unless the joint executive committee selects a successor under subsection .7(a)(1) within 30 days after the vacancy occurs.

(5) The names, titles, and dates of selection of the executive chief judge and executive chief judge

pro tempore must be filed with the state court administrator immediately on selection.

(6) The executive chief judge may be removed by the chief justice.

(b) The executive chief judge shall have the authority and duties of a chief judge as provided by this rule with respect to both courts. In addition, the executive chief judge shall have the following authority and duties:

(1) to fix the compensation of the employees of the state judicial council who serve in the circuit court in the third judicial circuit and the recorder's court within appropriations provided by the state, except as otherwise provided by law;

(2) to prepare and forward to the chief justice and the state court administrator monthly reports on case flow in the courts;

(3) to contract for space, equipment, and services, except as otherwise provided by law;

(4) to create or merge divisions of the courts with the approval of the joint executive committee; and

(5) to consolidate departments or functions of the courts with the approval of the joint executive committee.

(c) The executive chief judge may not direct a judge of the third judicial circuit to serve as a judge in the recorder's court or a judge of the recorder's court to serve as a judge in the third judicial circuit.

(d) The exercise of the authority to hire and set the compensation of employees, to set the hours of court, and to determine the number of employees required to be present to perform administrative work is subject to the personnel policies and procedures established by the state judicial council and to MCL 600.593; MSA 27A.593.

(e) Insofar as practicable, the executive chief judge shall delegate the authority and duties that relate only to the internal operation of the individual courts to the respective chief judges of the third circuit and the recorder's court.

.8 Joint Executive Committee. (Applicable only in the third judicial circuit and recorder's court of the city of Detroit.)

(a) The circuit court in the third judicial circuit and the recorder's court of the city of Detroit shall have a joint executive committee composed of

(1) the chief judge of the recorder's court;

(2) the chief judge of the circuit court in the third judicial circuit;

(3) two judges of the circuit court in the third judicial circuit appointed by the chief judge of that circuit;

(4) two judges of the recorder's court appointed by the chief judge of the recorder's court; and

(5) a judge of either the circuit court in the third judicial circuit or the recorder's court selected by a majority vote of the judges of those combined courts.

(b) Each member of the joint executive committee serving on September 1, 1981, shall serve until January 1, 1982. Beginning January 1, 1982, each member of the joint executive committee shall serve for a term of two years. However, the member selected under subsection .8(a)(5) serving from September 1, 1981, to January 1, 1982, shall also serve a full two-year term beginning January 1, 1982.

(c)(1) The chief judges elect (see rule 925.3) shall announce their joint executive committee appointments 30 days before the terms of appointees are to begin.

(2) The election of the member under subsection .8(a)(5) must be held 30 days before the member's term is to begin.

(d) The names and dates of selection of the members of the joint executive committee must be filed with the state court administrator immediately on selection.

(e) The judges selected as members of the joint executive committee may meet before the beginning of their terms for the sole purpose of choosing one of the members to serve as executive chief judge.

(f) The joint executive committee shall advise and assist the executive chief judge in establishing the policies to be executed by the executive chief judge.

Adopted July 9, 1981, effective immediately.—REPORTER.

(The present language is repealed and replaced by the following unless otherwise indicated below:)

RULE 928. CONTINGENT FEES IN CLAIMS OR ACTIONS FOR PERSONAL INJURY AND WRONGFUL DEATH.

1. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, express or implied, whereby his compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule 928.2 is deemed to be fair and reasonable. The

receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of Canon 2, DR 2-106(A) of the Code of Professional Responsibility and Canons.

.2 The maximum allowable fee for the claims and actions referred to in subrule 928.1 is one-third of the amount recovered.

.3 The amount referred to in subrule 928.2 shall be computed on the net sum recovered after deducting from the amount recovered all disbursements properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed and any interest included in or upon the amount of a judgment shall be deemed part of the amount recovered.

.4 An attorney may enter into contingent fee arrangements calling for less compensation than that provided by subrule 928.2.

.5—.7 (Unchanged.)

.8 The July 9, 1981, amendment to subrule 928.2 applies to contingent fee agreements entered into after that date.

Staff Comment: The amendment changes the former sliding scale of maximum contingent fees to a flat one-third maximum as to contingent fee agreements entered into after July 9, 1981. The prior schedule found in former subrule 928.2 provided:

".2 The following is the schedule of reasonable fees referred to in subrule 928.1:

"(1) Not to exceed 40% of the first $5,000 recovered, not to exceed 35% on the next $20,000 recovered, not to exceed 25% on the next $225,000 recovered, not to exceed 20% on the next $250,000 recovered, and not to exceed 10% on any amount recovered over $500,000.

"(2) Alternatively, the attorney and client may agree to a contingent fee of one-third of the entire recovery that does not exceed $250,000 and 20% of the next $250,000, and not to exceed 10% of any amount recovered over $500,000."

This staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Adopted April 29, 1981, effective April 30, 1981.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 959. ATTORNEY DISCIPLINE BOARD.

.1—.2 (Unchanged.)

.3 Internal Rules.

(a)-(b) (Unchanged.)

(c) The board shall meet as often as necessary to maintain a current docket, provided that it shall meet no less than every two months at a time and place the chairperson designates.

(d) (Unchanged.)

.4 (Unchanged.)

AMENDMENTS TO THE DISTRICT COURT RULES

Adopted on August 17, 1981, effective on August 18, 1981.—REPORTER.

DC RULE 790. PRETRIAL RELEASE.

Pretrial release is governed by GCR 1963, 790.

Staff Comment: New DCR 790 is meant to clarify that GCR 1963, 790 is applicable in the district court.

Adopted on August 17, 1981, effective on August 18, 1981.—REPORTER.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

DC RULE 4005. MISCELLANEOUS PROVISIONS.

.1—.6 (Unchanged.)

.7 Process Servers.

(a)-(c) (Unchanged.)

(d) Levies. In levying under an execution of this court, process servers shall reasonably inform the person owning or having charge of the property levied upon of the facts and circumstances of the execution, and shall inquire of such person whether or not the property is exempt from levy. A diligent effort shall be made to locate the person

owning or having charge of property about to be levied upon.

(e)-(g) (Unchanged.)

.8—.11 (Unchanged.)

Staff Comment: The amendment corrects typographical errors in DCR 4005.7.

AMENDMENTS TO LOCAL COURT RULES

FOURTH JUDICIAL CIRCUIT

Approved on September 21, 1981, effective on September 28, 1981.—REPORTER.

RULE 502. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

.4 Calendars.

(a) Each judge's court clerk shall prepare and maintain a calendar of actions ready for trial and actions in which no progress has been made within one year (dormant calendar).

(b) The calendar shall be classified as follows:

(1) criminal cases,

(2) jury civil cases,

(3) nonjury civil cases,

(4) divorce cases, and

(5) actions in which no steps or proceedings have been taken within one year.

(c) As trial schedules are determined by the court, trial notices shall be mailed to each party or the attorney of record for each party in each case scheduled.

(d) Once each quarter, at least 5 days before the date set for the call of the dormant calendar, dormant calendar notices shall be mailed to each

party or the attorney of record for each party in each case in which no steps or proceedings have been taken within one year.

(e) Proof of service of trial notices and dormant calendar notices shall be placed in the court file.

THIRTY-SIXTH DISTRICT

Adopted on August 17, 1981, effective on September 1, 1981.—REPORTER.

RULE 102. NOTICE OF DISMISSAL ON EXPIRATION OF SUMMONS.

The clerk shall give notice of the entry of an order dismissing an action under DCR 102.5(a)(2) by publishing a list of dismissals in the official newspaper of the Wayne circuit court.

RULE 104. SERVICE OF PROCESS BY MAIL.

If the manner of service used requires sending a copy by mail, the party requesting issuance of the summons is responsible for the mailing and for timely filing of proof of service with the court.

RULE 113. PRAECIPE.

A praecipe in the form provided by the court shall be filed at the commencement of every action, and shall include the full name, address, and telephone number of the plaintiff; the name, state bar number, address, and telephone number of the plaintiff's attorney, if any; the full name and address of each defendant, if known, or such other

means of identification as shall be effective; and the type of action being commenced.

RULE 504. SETTLEMENTS FOR MINORS.

When an action brought on behalf of a minor by a next friend or guardian is brought before the judge for discontinuance or entry of a consent judgment, the following provisions apply:

(a) In claims for personal injury, the minor must be present in court so that the judge may have an opportunity to observe the nature of the injury.

(b) If the judge is not satisfied as to the extent of an injury, a doctor may be required to testify.

(c) The judge shall pass on the fairness of any settlement.

(d) If the proposed settlement or judgment is for more than the bond set by the probate judge, the settlement may be approved but the judgment shall not be entered until the probate judge has passed on the sufficiency of the bond.

(e) If the settlement or judgment requires payment to the minor either of a lump sum of more than $5000, or of installments amounting to more than $5000 in any single year during his or her minority, a conservator must be appointed by the probate court before the entry of the judgment or discontinuance.

(f) If the settlement or judgment does not require payment of more than $5000 to the minor in any single year, the money may be paid in accordance with the provisions of MCL 700.403; MSA 27.5403.

(g) The attorney fee in such actions shall not be more than one-third the amount of the settlement or judgment.

RULE 520. DEFAULT.

.1 At any time within 14 days after the entry of a default, the plaintiff may prove his or her claim in an amount not exceeding that set forth in the statement of claim served on the defendant. The time for taking a default judgment may be extended 30 days, but only if an application for this extension is made within the 14-day period for taking a default judgment.

.2 If the plaintiff fails to seek a default judgment within the time provided by this rule, the action will be dismissed without prejudice. However, if another defendant in the action has filed a responsive pleading or motion, judgment against the defendant in default may be entered at the time of trial or other disposition of the action as to the defendant who has responded.

RULE 523. PAYMENT OF JUDGMENT IN INSTALLMENTS.

.1 Installment Payment Order. If the court finds that the defendant is unable to pay the judgment with funds other than those earned as wages, the court may order that the defendant pay the judgment in installments, at such times and in such amounts as the court finds the defendant is able to pay. An order for installment payments may be made at the defendant's request at the time of entry of the judgment with the parties or counsel for the parties present, on a stipulation by the parties, or on motion of the defendant in the manner provided in this rule.

.2 Motion, Notice.

(a) At any time after entry of the judgment, the defendant may file a motion for permission to pay the judgment in installments.

(b) The motion shall be supported by the affidavit of the defendant showing the defendant's inability to pay the judgment with funds other than those earned as wages, and setting forth the name and address of the defendant's employer, and the amount of wages and the date of payment.

(c) On the filing of the motion, the clerk shall set a date and time for hearing and issue a notice to the plaintiff of the motion and the hearing. The clerk shall mail the notice to the plaintiff at least 4 days before the day set for hearing.

.3 Hearing. At the hearing the plaintiff may cross-examine the defendant as to the facts set forth in the motion and affidavit.

.4 Order. After the hearing the judge may order the defendant to pay to the clerk of the court or directly to the plaintiff a certain amount weekly, biweekly, or monthly to be applied to the judgment.

.5 Amendment of Order. On motion of a party, with notice to the opposing party, the court may alter the amounts and times of payment of the installments.

.6 Stay of Garnishment.

(a) The filing of a motion under subrule 523.2 prevents a garnishment of the wages of the defendant for 14 days. If the court has not ruled on the motion within that time, it may extend the length of this prohibition.

(b) The garnishment of the wages of the defendant is prohibited while an order for installment payments is in effect.

.7 Termination of Order. If the defendant fails to make the installment payments as required by the order, on motion by the plaintiff, the court may terminate the installment payment order and remove the prohibition on wage garnishments.

.8 Other Remedies Not Affected. Proceedings under this rule do not affect a plaintiff's right to take any steps to enforce a judgment except garnishment of the wages of a defendant.

RULE 738. WRIT OF GARNISHMENT.

A writ of garnishment must be served within 14 days after it was issued.

RULE 3001. MAGISTRATES.

.1 Qualifications. A person appointed a thirty-sixth district court magistrate must be an attorney licensed to practice law in Michigan.

.2 Duties. In addition to the authority provided in MCL 600.8511 and 600.8512; MSA 27A.8511 and 27A.8512, thirty-sixth district court magistrates have the authority provided in this subrule.

(a) A district judge may refer any civil infraction formal hearing, ordinance violation proceeding, or misdemeanor prosecution within the jurisdiction of the district court to a magistrate for a report and recommendation.

(b) In exercising this authority the magistrate may administer oaths and examine witnesses and shall conduct proceedings in accordance with relevant statutes and rules.

(c) Either party to a matter assigned to a magistrate under this subrule may elect to have a district judge preside over the proceeding.

(d) Compliance by the defendant with the magistrate's recommendation constitutes acceptance of the recommendation and waives the right to appeal or other review of the report and recommendation by a district judge, except that if the recommendation includes a jail sentence the recommendation must be approved by a district judge.

(e) If the defendant does not accept the recommendation, the case must be assigned to a judge for arraignment, hearing, or trial, as is appropriate in the particular case.

.3 Control of Magisterial Action. The authority to control magisterial action provided in DCR 3001.3 shall be exercised by the chief judge or by another judge designated by the chief judge.

RULE 4005. BAILIFFS AND COURT OFFICERS.

.1 DCR 4005.7 and this rule apply to bailiffs and court officers appointed to serve process in the thirty-sixth district court.

.2 The chief judge may authorize the clerk to rotate without discrimination all process except writs of execution, attachment, and claim and delivery among all duly qualified bailiffs and court officers who are actively engaged in the serving of process and who have filed written notice with the clerk of their willingness to serve process. The chief judge may specifically direct exceptions to the assignment system.

.3 A bailiff or court officer may not transfer any process issued to him or her without making a record of the transfer.

.4 In making a return of service of process, the bailiff or court officer shall give the address where

the defendant was served or, if the defendant was not served at a particular address, the circumstances under which service was made.

.5 Proof of service on each defendant shall be filed with the clerk not more than 5 days after service was made.

.6 A bailiff or court officer may not execute against a liened vehicle or other property when it is apparent that the property cannot be publicly auctioned at a price above that of the lien. If property is seized and it becomes apparent that the property cannot be disposed of to satisfy any part of the judgment, it shall be returned forthwith. If the defendant must petition for the return of the property, the court shall award to the defendant proper costs and attorney fees. Also, any towing and storage costs or other costs incurred shall not be chargeable to the defendant.

.7 A bailiff or court officer may not employ anyone to tow a car seized on execution whose charge is excessive, and may not store a car seized on execution in a garage whose charge is excessive. Charges for towing or storage may not exceed the actual amount charged for the service. The court shall determine the reasonableness of fees when they are questioned. On request of a bailiff or court officer, a plaintiff may be required to post a reasonable cash bond in an amount determined necessary by the court.

.8 A bailiff or court officer may not accept or solicit any emolument, fee, or bonus from any litigant or other person in excess of the statutory fee for performing any act as a bailiff or court officer, unless the payment is authorized by an order of the chief judge or a judge designated by

the chief judge after application by the person wishing to make such a payment.

.9 Notice of sales, bills of sale, bailiff fees, and all charges in connection with a sale, and a complete record of all sales of property seized by a bailiff or court officer under process issued out of the thirty-sixth district court shall be filed with the clerk on the next succeeding court day.

.10 Reports of Nonservice. If a summons is unserved 90 days after the date of issue, the bailiff or court officer assigned to serve the summons must file a written report stating the reason service has not been effected. This report must be received by the clerk's office within 95 days after the date of issue. Failure to timely file the report is cause for suspension of rotation until the report is filed.

If a summons remains unserved at the expiration of 180 days after the date of issue, a return of nonservice must be filed with the clerk's office. Failure to file the return within 5 days after the date due is cause for the clerk to suspend further rotation of process to the bailiff or court officer assigned to serve the summons.

SEVENTY-NINTH JUDICIAL DISTRICT

Approved March 25, 1981, effective April 15, 1981.—REPORTER.

RULE 754. SUMMONS IN SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES; DATE OF APPEARANCE.

.1 The summons in a summary proceeding to recover possession of real estate shall command the defendant to appear as follows:

(a) within 10 days after service of the summons on the defendant in proceedings under MCL 600.5726; MSA 27A.5726; or

(b) within 5 days after service of the summons on the defendant in all other proceedings under chapter 57 of the Revised Judicature Act.

.2 A summons issued under subrule .1 remains in effect until served or quashed, or until the action is dismissed, but additional summonses as needed for service may be issued at any time at the plaintiff's request.

.3 This rule is adopted in lieu of MCL 600.5735(2); MSA 27A.5735(2) as provided for in MCL 600.5735(4); MSA 27A.5735(4).

THIRD JUDICIAL CIRCUIT

RULES 1, 2, 3.1, 3.3, 4, 8.1, 8.2, 12, and 20 were repealed on August 18, 1981, effective on September 1, 1981.—REPORTER.

AMENDMENTS TO RECORDER'S COURT RULES

RULES 1-5, 7-9, 11-14A were repealed on August 18, 1981, effective on September 1, 1981.—REPORTER.

AMENDMENTS TO RECORDER'S COURT TRAFFIC AND ORDINANCE DIVISION RULES

RULES 1-31 were repealed on August 18, 1981, effective on September 1, 1981.—REPORTER.

AMENDMENTS TO THE COMMON PLEAS COURT RULES

RULES 1-46 were repealed on August 18, 1981, effective on September 1, 1981.—REPORTER.

BERGER v WEBER

Docket No. 61348. Argued October 3, 1979 (Calendar No. 10).—Decided March 30, 1981. Rehearing denied *post,* 1155.

Christine V. Berger and Wayne D. Berger brought an action against Albert E. Weber, Becker Leasing Company, Inc., and Star of the West Milling Company for damages arising when Christine Berger's automobile was struck by a truck owned and operated by the defendants. Wayne Berger also sought damages as the next friend of the plaintiffs' retarded minor daughter Denise for her loss of society, companionship, love, and affection of her mother, who was severely injured in the accident. The Ingham Circuit Court, Thomas L. Brown, J., entered judgment on a verdict for the parents, but granted a summary judgment for the defendants as to Denise's claims on the ground that a child has no cause of action for the loss of a parent's society and companionship. The Court of Appeals, D. E. Holbrook, Jr., P.J., and V. J. Brennan and Bronson, JJ., affirmed the judgment for the parents, but reversed the summary judgment, deciding that a child has such a cause of action where the parent is "severely" injured (Docket No. 27377). Defendants appeal. In an opinion by Justice Kavanagh, joined by Justices Williams, Fitzgerald, and Moody, the Supreme Court *held:*

1. Lack of precedent cannot absolve a common-law court from responsibility for adjudicating each claim that comes before it on its own merits. Here the child's claim must be

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 6, 7, 12, 13] 59 Am Jur 2d, Parent and Child § 111.

Child's right of action for loss of support training, parental attention, and the like against a third person negligently injuring parent. 69 ALR3d 528.

[2, 4-6, 7] 15A Am Jur 2d, Common Law § 3.

20 Am Jur 2d, Courts §§ 64, 67.

[3, 7, 12] 41 Am Jur 2d, Husband and Wife § 447 *et seq.*

[4-7] 57 Am Jur 2d, Negligence § 10.

[8] 57 Am Jur 2d, Negligence §§ 33, 127, 132.

[9-11, 13] 57 Am Jur 2d, Negligence §§ 165 *et seq.,* 175.

[12] 16A Am Jur 2d, Constitutional Law § 793.

considered in the light of conditions pertinent to modern society, and the reasons urged for denying the cause of action must be weighed. Existing judicial and legislative policies warrant recognizing a child's cause of action for loss of the society and companionship of a parent injured by negligence. The reasons advanced by the defendants do not justify denying the cause of action the plaintiff seeks.

2. The distinction urged by the defendants, that a spouse's action for loss of consortium includes the impairment or destruction of the sexual relations of the couple and that no similar element exists in the child's claim, is not significant enough to deny the child's claim. Sexual relations are but one element of the spouse's action for loss of consortium. The other elements—love, companionship, affection, society, comfort, services, and solace—are similar in both relationships and in each are deserving of protection. The prospect of multiple suits is also not a reason to deny the claim. Multiple actions arising out of the same tortious act may result whenever the act injures more than one person or property owned by more than one person, or when the injured persons are minors. When a new cause of action is created, litigation may be increased. However, the rights of a new class of tort plaintiffs should be forthrightly judged on their own merits.

3. It is not anomalous to allow a child to recover for negligent invasion of his family interest when he is specifically prohibited from recovering for intentional, direct invasion of his family interest under the statute which bars suits for alienation of affections. One may recover for negligent injury or death of a spouse, and a child may recover for the death of a parent caused by negligence. The real anomaly would be to allow a child to recover for the loss of a parent's society and companionship which attends the parent's death but to deny it when the loss attends the parent's injury. Recognizing the child's cause of action may result in increased insurance costs, but compensating a child who has suffered emotionally because of the deprivation of a parent's love and affection may provide the child with the means of adjustment to the loss. The child receives the immediate benefit of the compensation, but society will also benefit if the child is able to function without emotional handicap.

4. The injury here is no more remote than the injury sustained when the parent is negligently killed. While the loss of society and companionship is an intangible loss to the child, it is a genuine one, and requiring the jury to evaluate the child's damages is no more speculative than evaluating other types of

intangible losses, *e.g.,* pain and suffering, loss of society and companionship in wrongful death actions, and loss of a spouse's consortium. Rather than having juries make blind calculations of the child's loss in determining an award to the parent, an independent action for the child which resulted in a double recovery could be openly argued in court, and the jury could be instructed to consider the child's loss separately. The award would accrue directly to the child rather than being lumped with that of the parent who may or may not spend it for the child's benefit.

5. Children have been prevented from recovering for loss of parental consortium by judicial decision. The Court should remove the obstacle; the cause of action here is not so complex that the Court should defer action to the Legislature. A child may recover for loss of a parent's society and companionship caused by tortious injury to the parent, and the action is not limited to cases of "severely" injured parents. The need for any limitations on the action beyond those attendant upon the comparable cause of action by a spouse should await demonstration.

Affirmed as modified.

Justice Levin, joined by Chief Justice Coleman and Justice Ryan, dissented. He would not authorize such an action.

1. The 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. The bounds of recovery, no less than the conditions of liability, are judicially drawn and subject to judicial alteration. Decisions delineating the extent of tort liability, however, are more than exercises in logic: they are pronouncements of social policy which should reflect the often subtle balance of interests involved. Logic and even abstract justice must defer to overall policy in the appraisal of the justification for judicial changes in the common law.

2. Twenty years ago the Court concluded that the interest of a wife in compensation for the loss of her injured husband's society and companionship outweighed the interest of a negligent defendant in freedom from liability for such loss, although his liabilities as a result of his negligent act must have some reasonable limitation. The Court now balances the interest of an injured person's child in monetary redress for injury to the parent-child relationship against the consequences of imposing yet another potential liability upon a negligent defendant—a liability the additional cost of which will be spread among the citizens of the state through increased insurance premiums. In

responding, it is not enough to invoke analogies. An independent re-examination of the policy considerations implicated by the creation of such a separate cause of action is called for.

3. The action for loss of consortium is a historical curiosity, which originated at a time when a husband was considered to possess a proprietary right in his wife's services, and conduct of a third person which impaired her ability to render services was regarded as causing him pecuniary loss. The earliest English cases upholding a husband's right to bring an action for injury to himself resulting from wrongful conduct in respect to his wife involved intentional torts. Then the courts, without apparent recognition that they were extending the common law, permitted husbands to recover for loss of consortium resulting from negligently inflicted injury as well as intentional injury. And, beginning in 1950, a series of American courts extended to wives the right to recover from a negligent tortfeasor for loss of spousal consortium. The first step having been taken, the second logically followed, although equality between husband and wife could as well have been achieved by abolishing the husband's action as by recognizing the wife's. The soundness of the first step has, however, been questioned, and the Court should not proceed further along the same path merely because to do so would appear to be logical.

4. The concepts of duty and proximate cause, reserved for judicial determination, serve to limit the scope of a defendant's liability for negligence. Both depend in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable. Foreseeability is not, however, the only criterion. It is foreseeable that any injured person will be party to a number of relationships the other parties to which will suffer losses, tangible and intangible, should the relationship be interrupted. Not every loss can be made compensable in money damages, and legal causation must terminate somewhere. In delineating the extent of a tortfeasor's responsibility for damages, the courts must locate the line between liability and non-liability at some point, a decision which is essentially political. The Court does not indicate that it is prepared to draw a line somewhere or anywhere. Instead, it quotes with approval a statement of the Court of Appeals that the rights of a new class of plaintiffs in tort should be judged on their own merits, rather than engaging in speculation as to where it will all end—as if the merits of the plaintiff's claim can be resolved in the abstract, focusing solely on the justness and fairness from the child's point of

view of recognizing a right of recovery in this sympathetic case without regard to countervailing considerations of policy and thoughtful consideration of where it will all end.

5. The analogy to the wrongful death act suggests that a like analogy may be drawn in future cases where a sibling or other member of that class who would be permitted to recover under the wrongful death act if an injured person dies seeks to recover for loss of the society and companionship of an injured person who survives. Distinctions between the parent-child relationship and other relationships can indeed be made, but the Court's analysis, which minimizes the distinctions that could be drawn in this case, holds little promise for drawing such distinctions in other cases. Moreover, the elements—love, companionship, affection, society, comfort, services and solace—which the Court identifies as similar in the marital and parent-child relationships are also present in other relationships: brothers and sisters, a child and a grandparent, or a cohabiting unmarried couple. The concept of allowing a person to recover for consequential loss resulting from physical injury to another person is an idiosyncracy in the law. Reasonable limits on liability for the consequences of negligent acts must be imposed. Review of the policy considerations leads to the conclusion that they do not favor redrawing the line between liability and non-liability to create a separate cause of action for loss of parental consortium.

6. The balance between the child's interest in compensation for the loss of society and companionship of an injured parent and the tortfeasor's interest in freedom from additional liability, with due consideration to the social consequences of each alternative, weighs against recognition of the child's claim. That conclusion is influenced by considerations including the uncertainty that recognizing the proposed cause of action will yield a significant social benefit, the additional economic burden imposed upon the general public by expanding recovery to a new category of indirect injury likely to be associated with a large percentage of accidents, the nature of the loss asserted, the lack of immediate connection between the plaintiff and the defendant, and the difficulty of objective demonstration and evaluation of the child's injury.

7. It is preferable to minimize the number of actions which can be brought for damages arising out of a single tortious act. The wisdom of creating a new cause of action depends in part upon whether other legal avenues are adequate to redress part or all the asserted loss. Where the primary victim recovers for his own injuries, the most direct consequences of the

accident are compensated and the party at fault does not escape liability. In the context of actions not brought by the primary victim, however, objections to the uncertainty of the intangible loss alleged and to the inherent inadequacy of money damages as compensation loom larger, especially since the primary victim may also recover a sum for intangible, uncertain injuries. Considerations which would not deter a court from compensating a primary victim may thus, notwithstanding the present anomaly of recovery for spousal consortium, support a refusal further to expand the scope of liability.

8. In contrast to the intangibility of the alleged injury and the difficulty of appraising it stands the certainty that creating a new basis for recovery will impose an added economic burden upon society. Since virtually every serious injury to a parent would engender a claim for loss of consortium on behalf of each of his or her children, the expense of settling or litigating such claims would be sizeable. In the typical automobile accident case, because of policy limits, the less serious the parent's injury, the more likely it is that money will be available to pay claims for loss of parental consortium. The benefits of recognizing the child's cause of action will be unevenly and adventitiously distributed, more so than ordinarily.

9. There is a limit to the range of injuries and the dollar amount of recovery which can be spread throughout society by means of the interaction of the tort litigation and insurance systems. Increasing the load on the reparation system by recognizing causes of action in secondary victims in addition to the primary victim's action must increase insurance premiums, decrease participation in the system by marginal insureds, and perhaps decrease the amount that an insurer will willingly pay to the primary victim, thereby increasing litigation. It is problematic whether the means of adjustment can be purchased with money, whether awards will be so applied, or whether compensation will be received before the passage of time or the parent's recovery has worked a better adjustment.

10. The Equal Protection Clauses of the United States and Michigan Constitutions do not require recognition of a child's cause of action for loss of parental consortium when the parent does not die simply because the spouse's action is judicially recognized or because the wrongful death act gives the child the right to recover when the parent dies. The Court would not be justified in invoking a more rigorous standard of equal protection review than to require that the classification bear a reasonable relation to the object of the action for loss of consortium—a modified form of the "middle tier" or "means"

test. One may reasonably distinguish the husband-wife relationship from the parent-child relationship in deciding whether to provide a remedy for loss of an injured person's society and companionship. Limiting the action for loss of an injured person's society and companionship to the spouse assures that the typically greater loss will be compensated without unduly burdening the judicial system or engendering excessive social costs. Nor does it violate equal protection to deny the children of negligently injured parents the right to recover losses for which the children of fatally injured parents are compensated under the wrongful death act. There are two significant distinctions between the child whose parent is killed and one whose parent is disabled, both of which flow from the fact that in the latter case the living victim retains his or her own cause of action. Allowing recovery under the wrongful death act for the lost affection and society of the deceased assures that a meaningful remedy will be available in every case. But where the parent injured on account of the tortfeasor's conduct survives, so does the parent's cause of action for the injuries inflicted, and the availability of some reparation for disadvantage to the child and to the victim's family furnishes a sufficient basis for allowing the child to recover for lost society and companionship in the case of a parent's death but not in the case of parental injury.

11. The injured parent should be permitted, in his or her own action, to recover certain damages resulting from the effect of the parent's injury upon the child. Injury which removes a parent from the home for a substantial period, or which disables the parent from providing the degree of affection, society, and companionship previously provided to the child, may necessitate expenditures by the parent to obtain for the child services or companionship that the parent would normally have provided. Although the child should have no independent right of recovery, the cost of substitute services should be recoverable in the injured parent's action.

82 Mich App 199; 267 NW2d 124 (1978) affirmed.

OPINION OF THE COURT

1. ACTIONS — PARENT AND CHILD — LOSS OF SOCIETY.

A child may recover for loss of a parent's society and companionship caused by a negligent injury to the parent.

2. COMMON LAW — COURTS.

Lack of precedent cannot absolve a common-law court from

responsibility for adjudicating each claim that comes before it on its own merits.

3. ACTIONS — PARENT AND CHILD — HUSBAND AND WIFE — LOSS OF SOCIETY.

The elements of love, companionship, affection, society, comfort, service and solace are similar in the relation of husband and wife, and that of parent and child; in each case they are deserving of protection, and compensating a child who has suffered emotionally because of the deprivation of a parent's love and affection may provide the child with the means of adjustment to the loss without emotional handicap.

DISSENTING OPINION BY LEVIN, J.

4. NEGLIGENCE — COMMON LAW — COURTS.

The 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; the bounds of recovery, no less than the conditions of liability, are judicially drawn and subject to judicial alteration.

5. NEGLIGENCE — COMMON LAW.

Decisions delineating the extent of tort liability are more than exercises in logic: they are pronouncements of social policy which should reflect the often subtle balance of interests involved; logic and even abstract justice must defer to overall policy in the appraisal of the justification for judicial changes in the common law.

6. ACTIONS — NEGLIGENCE — LOSS OF SOCIETY — COMMON LAW.

It is not enough for the Court to invoke analogies in balancing the interest of an injured person's child in monetary redress for injury to the parent-child relationship against the consequences of imposing yet another potential liability upon a negligent defendant; an independent re-examination of the policy considerations implicated by the creation of such a separate cause of action is called for.

7. ACTIONS — NEGLIGENCE — LOSS OF SOCIETY — COMMON LAW.

The soundness of extending the common law to permit recovery from a negligent tortfeasor for loss of spousal consortium has been questioned and the Court should not proceed further and permit a child to recover for loss of a parent's society and

companionship caused by a negligent injury to the parent merely because to do so would appear to be logical; the common law is free neither of some anomalies nor of everything illogical, but that is no reason for extending them.

8. NEGLIGENCE — DUTY — PROXIMATE CAUSE.

The concepts of duty and proximate cause, reserved for judicial determination, serve to limit the scope of a defendant's liability for negligence; both depend in part on whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable, but foreseeability is not the only criterion.

9. ACTIONS — NEGLIGENCE — SECONDARY VICTIMS — CONSEQUENTIAL LOSS.

The concept of allowing a person to recover for consequential loss resulting from physical injury to another person is an idiosyncracy in the law; reasonable limits on liability for the consequences of negligent acts must be imposed, a decision which is essentially political.

10. ACTIONS — NEGLIGENCE — TORTS — SECONDARY VICTIMS — CONSEQUENTIAL LOSS.

The extension for tort recovery beyond the primary victim remains the exceptional case, despite the increased acceptance of the spouse's action for loss of consortium; to the extent that a second tort victim's loss is likely to be duplicated in the primary victim's recovery, courts should be wary of creating additional claims deriving from the same tortious act, particularly where all injuries are localized within the same family unit.

11. ACTIONS — NEGLIGENCE — SECONDARY VICTIMS — LOSS OF SOCIETY.

There is a limit to the range of injuries and the dollar amount of recovery which can be spread across society through the interaction of the tort litigation and insurance systems; where recognition is sought for a new cause of action subjecting a negligent defendant to liability to a child of the victim, the inadequacy of monetary damages to make whole the loss suffered, considered in light of the social cost of paying such awards, and of the uncertainty that paying them will produce any social benefit, constitutes a strong reason for refusing to recognize the asserted claim.

12. CONSTITUTIONAL LAW — EQUAL PROTECTION — ACTIONS — PARENT AND CHILD — LOSS OF SOCIETY — PERSONAL INJURY — WRONGFUL DEATH.

The Equal Protection Clauses of the United States and Michigan Constitutions do not require recognition of a child's cause of action for loss of parental consortium when the parent does not die simply because the spouse's action is judicially recognized or because the wrongful death act gives the child the right to recover when the parent dies (US Const, Am XIV; Const 1963, art 1, § 2; MCL 600.2922[2]; MSA 27A.2922[2]).

13. ACTIONS — PERSONAL INJURY — SECONDARY VICTIMS — LOSS OF SOCIETY — DAMAGES.

An injured parent should be permitted, in his or her own action, to recover certain damages resulting from the effect of the parent's injury upon the child; injury which removes a parent from providing the degree of affection, society, and companionship previously provided to the child, may necessitate expenditures by the parent to obtain for the child services or companionship that the parent would normally have provided, and although the child should have no independent right of recovery, the cost of substitute services should be recoverable in the injured parent's action.

Church, Wyble, Kritselis, Anderson & Robinson, P.C. (by *Thomas H. Hay* and *William N. Kritselis),* for plaintiffs.

Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark (by *Roger F. Wardle* and *Mary Ann Zito)* for defendants.

Amicus Curiae:

Lopatin, Miller, Bindes, Freedman, Bluestone, Erlich & Rosen (by *Michael Gagleard)* for Michigan Trial Lawyers Association.

KAVANAGH, J. This action arose out of an automobile collision involving plaintiff Christine Berger and defendant-appellant Albert Weber.[1] It is

[1] This cause of action occurred before the no-fault insurance act, MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.,* became effective.

alleged that as a result of the accident, the plaintiff Christine Berger sustained severe and permanent psychological and physical injuries. Plaintiffs Wayne and Christine Berger filed a complaint on their own behalf and sought damages for medical expenditures, loss of income and loss of consortium. As next friend, Wayne Berger sought damages on behalf of his minor daughter,[2] Denise, for loss of society, companionship, love and affection of her mother Christine Berger.

A jury awarded Wayne and Christine Berger $142,000. The trial court granted defendants' motion for summary judgment as to the issue of liability for the minor daughter's loss of society and companionship. The Court of Appeals affirmed the jury award and reversed the ruling on the child's cause of action, holding that a child may maintain a cause of action for loss of parental society and companionship when a parent is "severely" injured. 82 Mich App 199, 201; 267 NW2d 124 (1978).

We granted leave to speak to the propriety of recognizing a cause of action for loss of parental society and companionship when a parent is negligently injured. After considering the competing policy considerations, we are satisfied that such a cause of action should be enforced.

I

Such a cause of action was unknown at common

[2] Denise Berger was born severely retarded and physically handicapped in October of 1966. She died on July 16, 1977. No claim has been made on behalf of the Bergers' son who was born in November of 1964.

law and only one other jurisdiction recognizes this cause of action.[3]

In Michigan the Court of Appeals previously addressed the issue and concluded that a child does not have such a cause of action because of the lack of "statutory or prior judicial authority". *Hayrynen v White Pine Copper Co,* 9 Mich App 452, 455-456; 157 NW2d 502 (1968). Our Court by way of dicta, has stated in two cases that a child does not have an independent cause of action against a third party who negligently injures his parent.[4]

Lack of precedent cannot absolve a common-law court from responsibility for adjudicating each claim that comes before it on its own merits. As Justice SMITH observed in *Montgomery v Stephan,* 359 Mich 33, 38; 101 NW2d 227 (1960), "[o]ur oath is to do justice, not to perpetuate error". Here we must consider the child's claim in light of conditions pertinent to modern society and weigh the reasons urged for denying the cause of action.

II

Plaintiffs assert that denying the action for loss of society and companionship to a child is inconsis-

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[3] *Ferriter v Daniel O'Connell's Sons, Inc,* — Mass —; 413 NE2d 690 (1980); Anno: *Child's right of action for loss of support, training, parental attention, or the like, against a third person negligently injuring parent,* 69 ALR3d 528; *Borer v American Airlines, Inc,* 19 Cal 3d 441; 138 Cal Rptr 302; 563 P2d 858 (1977).

[4] In *Cugell v Sani-Wash Laundry Co,* 280 Mich 286, 289; 273 NW 571 (1937), our Court said: "A minor has no severable and personal right of action for injuries to his parent." Previously in *Blair v Seitner Dry Goods Co,* 184 Mich 304, 313; 151 NW 724 (1915), *overruled on other grounds Montgomery v Stephan,* 359 Mich 33; 101 NW2d 227 (1960), our Court stated that "[t]he minor children of an injured father and those of an injured mother may suffer on account of the injury, but it has never been considered that they had an action therefor".

tent with the public policy of this state. They point out that Michigan has long recognized a cause of action for loss of consortium in favor of spouses[5] and that parents have an independent cause of action for loss of services and other pecuniary damages resulting from negligent injuries to their minor children. *Jakubiec v Hasty,* 337 Mich 205; 59 NW2d 385 (1953); *Gumienny v Hess,* 285 Mich 411; 280 NW 809 (1938). In *Wycko v Gnodtke,* 361 Mich 331; 105 NW2d 118 (1960), these pecuniary damages were held to include the loss of society and companionship of a child who died from negligently inflicted injuries.[6] More importantly, children may recover for the loss of society and companionship of a parent who is negligently killed under the wrongful death act, MCL 600.2922; MSA 27A.2922. They may also recover for such loss under the dramshop act (MCL 436.22; MSA 18.993), *Podbielski v Argyle Bowl, Inc,* 392 Mich 380, 386; 220 NW2d 397 (1974).

We are satisfied that existing judicial and legislative policies warrant recognizing a child's cause of action for loss of society and companionship of a negligently injured parent. After carefully reviewing the reasons cited by the defendants, we are convinced that they do not justify denying the cause of action the plaintiff seeks.

III

Defendants-appellants urge several reasons for

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[5] *Montgomery, supra.* Consortium is defined as love, companionship, affection, society, comfort, sexual relations, services, solace and more. *Id.,* 36. The wife's cause of action was created after judicial recognition that the wife's role in the family unit had evolved from the status of servant to the status of equal partner. Therefore, the reasons for denying the wife compensation at common law no longer existed in modern society. *Id.,* 48-49.

[6] It was recognized that the concept of a minor child as a breadwinner was a legal fiction in today's society. The Court indicated that the child "has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship". *Wycko,* 339-340.

not recognizing a child's cause of action. The first argument is that the differences between the marital relationship and the parent-child relationship call for different treatment. They assert that a spouse's action for loss of consortium is based to a large extent on the impairment or destruction of the sexual relations of the couple and no similar element exists in the child's claim. We are not persuaded that this distinction is significant enough to deny the child's claim. Sexual relations are but one element of the spouse's consortium action. The other elements—love, companionship, affection, society, comfort, services and solace—are similar in both relationships and in each are deserving of protection.

Defendants-appellants next contend that allowing a child to maintain an independent cause of action when his or her parent is negligently injured will result in a burden to the individual defendant and to our court system. Under MCL 600.5851; MSA 27A.5851, if a person's claim accrues when he is a minor, he is entitled to bring the cause of action at any time through his 19th birthday. The prospect of multiple suits will discourage settlements.

Multiplicity of actions arising out of the same tortious act are a present reality in tort law. Multiple actions may result whenever a single tortious act injures more than one person or property owned by more than one person. Whenever the persons are minor children the tortfeasor is faced with the minority savings provision in MCL 600.5851; MSA 27A.5851.

So too when a new cause of action is created, litigation may be increased. However, as the Court of Appeals aptly pointed out, "[t]he rights of a new class of tort plaintiffs should be forthrightly judged

on their own merits, rather than engaging in gloomy speculation as to where it will all end". (Citation omitted.) 82 Mich App 199, 210.

Another objection to the child's cause of action raised by defendants-appellants is that it would be anomalous to allow a child to recover for negligent invasion of his family interest when he is specifically prohibited from recovery for intentional, direct invasion of his family interest under MCL 600.2901(1); MSA 27A.2901(1), which bars suits for alienation of affections.

We do not regard this as anomalous. One may recover for negligent injury or death of a spouse and a child may recover for the negligent death of a parent even though both be barred from recovery for the intentional, direct invasion of the family interest occasioned by alienation of affection.

We are satisfied that the real anomaly is to allow a child's recovery for the loss of a parent's society and companionship when the loss attends the parent's death but to deny such recovery when the loss attends the parent's injury.

Defendants-appellants ask us not to recognize the child's claim because of the economic burden to the public due to increased insurance premiums. Recognizing the child's cause of action may result in increased insurance costs, but compensating a child who has suffered emotional problems because of the deprivation of a parent's love and affection may provide the child with the means of adjustment to the loss. The child receives the immediate benefit of the compensation, but society will also benefit if the child is able to function without emotional handicap. This may well offset any increase in insurance premiums.

Traditional arguments for not recognizing the

child's cause of action claim that the damages to the child are too remote and speculative and that compensating the child will result in double recovery because juries already consider the child when making damage awards to the injured parent.

The Court in *Montgomery, supra,* was asked to deny the wife a cause of action because the injury suffered by the wife was too remote from defendant's act to be made the subject of a cause of action. The Court was unpersuaded by this argument and noted that the remoteness of such injury never bars the husband's cause of action. Like the *Montgomery* Court, we see no reason why the child's injury is any more remote than the injury in the spouse's cause of action. More importantly, the injury here is no more remote than the injury sustained when the parent is negligently killed.

We are not convinced that the injury to the child is too speculative to award damages. Courts, law review commentators and treatise writers all recognize that the child suffers a genuine loss.[7] While the loss of society and companionship is an intangible loss, juries often are required to calculate damages for intangible loss. Awards are made for pain and suffering, loss of society and companionship in wrongful death actions, and for loss of spousal consortium. Evaluating the child's damages is no more speculative than evaluating these other types of intangible losses.

We agree with the Court of Appeals that because double recovery could result when making

[7] *Borer v American Airlines, Inc,* 19 Cal 3d 441; 138 Cal Rptr 302; 563 P2d 858 (1977); *Hill v Sibley Memorial Hospital,* 108 F Supp 739 (D DC, 1952); *Hankins v Derby,* 211 NW2d 581 (Iowa, 1973); *Hoffman v Dautel,* 189 Kan 165; 368 P2d 57 (1962); *Russell v Salem Transportation Co,* 61 NJ 502; 295 A2d 862 (1972). See also Prosser, Torts (4th ed), § 125, p 896; Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent,* 56 Boston U L Rev 722, 740-741 (1976).

awards to parents, this is a further reason for adopting an independent action for the child.

"Rather than having juries make blind calculations of the child's loss in determining an award to the parent, a child's loss could be openly argued in court and the jury could be instructed to consider the child's loss separately. The award would accrue directly to the child rather than be lumped in with that of the parent who may or may not spend it for the child's benefit." (Citation omitted.) 82 Mich App 210.

Finally, defendants-appellants urge us to leave this matter to the Legislature. Actions by parents for loss of a child's services and medical expenses and actions for loss of spousal consortium were created and developed by the judiciary. At the present time, children are prevented from recovering for loss of parental consortium by judicial decision. The Court should remove the obstacle. We do not regard the cause of action contemplated here so complex that we should defer action to the Legislature.

IV

The importance of the child to our society merits more than lip service. Convinced that we have too long treated the child as a second-class citizen or some sort of non-person, we feel constrained to remove the disability we have imposed.

We hold today that a child may recover for loss of a parent's society and companionship caused by tortious injury to the parent.

We do not adopt the Court of Appeals limitation to instances of "severely" injured parents of minor children. The need for and extent of limitations beyond those attendant upon the comparable

cause of action by a spouse should await demonstration.

Affirmed as modified.

WILLIAMS, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with KAVANAGH, J.

LEVIN, J. *(to reverse).* The issue is whether a child has a cause of action for loss of the society and companionship of a parent who has been negligently injured, but not fatally. Until recently, courts refused to extend the common law to allow a child to maintain such an action. One jurisdiction now allows such an action,[1] and today this Court becomes the second court of last resort to conclude that the common law should be expanded to permit a child to recover money damages for the lost society and companionship of a negligently injured parent.

We would hold with the overwhelming majority of jurisdictions which have considered or reconsidered the question—many in recent years—that such an action should not be authorized and would reverse the decision of the Court of Appeals.

I

Plaintiff Christine Berger was the wife of Wayne Berger and the mother of two children at the time a truck driven by defendant Albert Weber struck

[1] *Ferriter v Daniel O'Connell's Sons, Inc,* — Mass —; 413 NE2d 690 (1980). The only prior decision recognizing such an action was *Scruggs v Meredith,* 134 F Supp 868 (D Hawaii, 1955), *rev'd Meredith v Scruggs,* 244 F2d 604 (CA 9, 1957), after an intervening decision of the Hawaii Supreme Court reached the opposite result. *Halberg v Young,* 41 Hawaii 634; 59 ALR2d 445 (1957). Other decisions rejecting the claim that a child has a cause of action for loss of parental society and companionship are listed in fn 64, *infra.*

her automobile from behind.[2] She suffered no visible injuries as a result of the accident, but she subsequently experienced neck pain, severe headaches and a number of emotional problems. She was treated with medication and physical therapy and was hospitalized for a time.

Christine and Wayne Berger commenced an action seeking damages for Christine's medical expenses, loss of income, and pain and suffering, and Wayne's loss of consortium. The complaint was subsequently amended to allege a cause of action on behalf of the Bergers' minor daughter, Denise,[3] for loss of her mother's society, companionship, love and affection resulting from Christine's injuries.[4] Christine sought judgment in the amount of $750,000 and Wayne and Denise $500,000 each.

The judge, granting defendants' motion for partial summary judgment, dismissed the claim asserted on behalf of Denise. Defendants admitted liability and the question of damages was tried to a jury. Defendants contended that Christine had suffered no more than a neck sprain in the accident and that her subsequent difficulties were caused solely by pre-existing emotional problems.

[2] The truck was owned by defendant Becker Leasing Company, Inc., and was being driven by Weber in the course of his employment with defendant Star of the West Milling Company. The accident occurred on March 13, 1973, before the effective date of the no-fault motor vehicle liability act.

[3] Denise Berger was born on October 2, 1966. According to plaintiffs' opening statement at trial, Denise began to have seizures when she was six weeks old. It soon became evident that her mental development would be severely limited and doctors advised the Bergers to institutionalize her. Instead, they chose to care for her at home although she continued to require the attention given an infant.

Denise died on July 16, 1977.

[4] It appears that the problems Christine Berger experienced after the automobile accident adversely affected the quantity and quality of parental care she provided Denise. No claim has been filed on behalf of the Bergers' other child, Paul, who was a normal 11-year-old at the time of trial.

The jury assessed Christine's damages at $137,000 and Wayne's at $5,000. The Court of Appeals rejected defendants' allegation of instructional error and, on plaintiffs' cross-appeal, reversed the grant of summary judgment on Denise's claim, holding that "a child may maintain a cause of action for loss of parental society and companionship *when a parent is 'severely' injured*".[5] (Emphasis supplied.) We granted leave to appeal to consider whether such a cause of action should be recognized.[6] In affirming the Court of Appeals, this Court says:

"We do not adopt the Court of Appeals limitation to instances of 'severely' injured parents of minor children. The need for and extent of limitations beyond those attendant upon the comparable cause of action by a spouse should await demonstration."[7]

II

At common law a husband whose wife had been injured could bring a separate action to recover for his loss of consortium resulting from her injury. Consortium was a loosely defined concept comprised of the husband's rights to "services, society and sexual intercourse of the wife".[8] A father could maintain an action for loss of an injured

[5] *Berger v Weber,* 82 Mich App 199, 201; 267 NW2d 124 (1978).

[6] 403 Mich 846 (1979).

[7] *Ante,* p 17.

[8] Prosser, Torts (4th ed), § 124, p 874. On the meaning of consortium see, generally, 1 Harper & James, Law of Torts, § 8.9, pp 635-643; Holbrook, *The Change in the Meaning of Consortium,* 22 Mich L Rev 1 (1923); Lippman, *The Breakdown of Consortium,* 30 Colum L Rev 651 (1930).

In *Montgomery v Stephan,* 359 Mich 33, 35-36, 43-44; 101 NW2d 227 (1960), this Court criticized efforts to separate consortium into "material" and "sentimental" aspects and treated it as an indivisible concept.

child's services.[9] But a wife or child could not recover if deprived of a husband's or father's services or society, for the common law recognized no right to such services or society in the "inferior" parties to the relationship.[10]

In most jurisdictions the common law has been altered to permit a wife to recover for loss of consortium. This case presents the question whether a child should be permitted to bring a comparable action.

The advocates of a child's action for loss of what has been termed "parental consortium" maintain that recognition of the child's right to recover is mandated by logic, compassion, and modern sensitivity to the independent identity of the child, the importance of family relationships, and the fairness of compensating persons injured by another's negligent conduct. They point to this Court's eloquent vindication of the wife's action for loss of

[9] Prosser, *supra,* § 125, p 888, fn 38.

[10] "We may observe that, in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing during her coverture. The child hath no property in his father or guardian; as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an *appeal* [italics in original], and which will be considered in the next book. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and, if he receives his part of the stipulated contract, he suffers no injury, and is therefore intitled *[sic]* to no action, for any battery or imprisonment which such master may happen to endure." 3 Blackstone, Commentaries (1st ed), pp 142-143.

See, also, Prosser, *supra,* § 124, pp 881, 887; § 125, p 894; Note, *Judicial Treatment of Negligent Invasion of Consortium,* 61 Colum L Rev 1341, 1344, 1346 (1961).

consortium[11] and to the wrongful death act, which enables a child to recover for loss of the society and companionship of a deceased parent in a wrongful death action,[12] and assert that justice, public policy, and the Equal Protection Clause require that a child also be allowed to recover for loss of a parent's society and companionship.

The opponents of the proposed cause of action argue that it will (1) spawn multiple lawsuits arising out of the same injury, with consequent multiplication of awards; (2) discourage settlement of parents' claims since the claims of minor children cannot thereby be extinguished; (3) encourage double recovery since juries already take the loss suffered by the injured person's family into account in computing damages; (4) lead to further extensions of tort liability as plaintiffs with other relationships to the injured person seek recognition of their losses; and (5) impose upon the public the unwarranted economic burden of increased insurance premiums to fund insurers' costs in paying and litigating such claims. They also contend (6) that the child's damages are speculative, remote, and not susceptible of monetary compensation; (7) that the child-parent relationship is distinguishable from the marital relationship; and (8) that the Legislature is in the best position to determine whether the new cause of action should be instituted and what limits should be placed upon it.

The Court, building on judicial recognition of causes of action for loss of spousal consortium and for parental loss of a child's services and other pecuniary damages, and on statutes permitting a child to recover for loss of the society and compan-

[11] *Montgomery v Stephan, supra.*

[12] MCL 600.2922(2); MSA 27A.2922(2).

ionship of a deceased parent or where such loss is occasioned by violation of the dramshop act, states that it is "satisfied that existing judicial and legislative policies warrant recognizing a child's cause of action for loss of society and companionship of a negligently injured parent". It proceeds to examine some of the arguments advanced by the defendants, rejecting them primarily because analogous causes of action are allowed to be maintained despite similar arguments. It finds it anomalous that a child can recover under the wrongful death act for loss of a deceased parent's society and companionship and that the courts have failed to supplement that act by allowing a child to maintain a common-law action for such loss where the parent survives the injury. It states the child has been treated as a "second-class citizen or some sort of non-person".[13] In contrast with its approach in examining the arguments of the defendants, it does not scrutinize the arguments of proponents of the cause of action and fails to subject them to critical analysis.

III

A

This Court has observed that "[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".[14] (Emphasis in original.) The bounds of recovery, no less than the conditions of liability, are judicially drawn and subject to judicial alteration.

Decisions delineating the extent of tort liability

[13] *Ante,* p 17.

[14] *Moning v Alfono,* 400 Mich 425, 436; 254 NW2d 759 (1977).

are, however, more than exercises in logic. They are pronouncements of social policy which should reflect the often subtle balance of the interests involved.[15] The Supreme Court of New Jersey observed:

> "[L]ogic (and even abstract justice) must defer to overall policy in the appraisal of the justification for judicial changes in the common law."[16]

Twenty years ago this Court concluded that a wife's interest in compensation for the loss of her injured husband's society and companionship outweighed a negligent defendant's interest in freedom from liability for such loss, although his "liabilities as a result of his negligent act must have some reasonable limitation".[17] Today we balance the interest of an injured person's child in monetary redress for injury to the parent-child relationship against the consequences of imposing yet another potential liability upon a negligent defendant—a liability the additional cost of which will be spread among the citizens of the state through increased insurance premiums. In responding, it is not enough to invoke analogies. An independent re-examination of the policy considerations implicated by the creation of such a separate cause of action is called for.

B

The action for loss of consortium is an historical curiosity. It originated at a time when a husband

[15] Prosser, *supra*, §§ 3-4, pp 14-23. See, also, *Montgomery v Stephan*, *supra*, p 46. *Cf. Moning v Alfono*, *supra*, pp 453-459.

[16] *Russell v Salem Transportation Co*, 61 NJ 502, 506; 295 A2d 862 (1972).

[17] *Montgomery v Stephan*, *supra*, p 46.

was considered to possess a proprietary right in his wife's services, and conduct of a third person which impaired her ability to render services was regarded as causing him pecuniary loss.[18] The earliest English cases upholding a husband's right to bring an action for injury to himself resulting from wrongful conduct in respect to his wife involved intentional torts. The complaint alleged, for example, that the defendant had committed an assault and battery upon the wife,[19] or had abducted her.[20] The courts analogized the husband's loss of his wife's "company" to the master's loss of the services of a battered servant.[21]

Recognition of the husband's loss of consortium as an element of damages accompanied the evolution of a variety of actions for intentional interference with the marriage relationship: enticement or harboring (inducing a wife to live apart from her husband); criminal conversation (adultery); alienation of affections.[22]

The question before us emanates from yet another line of cases where the courts, without apparent recognition that they were significantly extending the common law, permitted husbands to recover for loss of consortium resulting from negligently inflicted injury as well as from intentional

[18] On the early history of the husband's action for loss of consortium, see Popescul, *Action Per Quod Consortium Amisit,* 43 Sask L Rev 27, 28-33 (1979).

[19] *Chomley v Conge,* 4 Leon 88; 74 Eng Rep 748 (1586); *Guy v Livesey,* Cro Jac 501; 79 Eng Rep 428 (1618); *Young v Pridd,* Cro Car 89; 79 Eng Rep 679 (1627). Because she had no separate legal existence during coverture, the wife could sue for her injuries only if her husband joined in the action. 1 Blackstone, Commentaries (1st ed), p 431; 3 *id.,* p 140.

[20] *Hyde v Scyssor,* Cro Jac 538; 79 Eng Rep 462 (1619); *Young v Pridd, supra.*

[21] *Guy v Livesey, supra; Hyde v Scyssor, supra.*

[22] See 3 Blackstone, *supra,* p 139; Prosser, *supra,* § 124, pp 874-876; Popescul, *supra,* pp 30-31.

injury.[23] And, beginning in 1950, a series of American courts extended to wives the right to recover from a negligent tortfeasor for loss of spousal consortium.[24] The first step having been taken, the second logically followed, although equality between husband and wife could as well have been achieved by abolishing the husband's action as by recognizing the wife's.[25]

The soundness of the first step has been questioned,[26] and we should not proceed further along the same path merely because to do so would appear to be logical. Confronted with the question whether a wife should be permitted to recover for loss of consortium, Lord Chief Justice Goddard said:

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[23] See, *e.g., Stone v Jackson,* 16 CB 199; 139 Eng Rep 732 (1855); *Brockbank v Whitehaven J R Co,* 7 H & N 835; 158 Eng Rep 706 (1862); *McKinney v Western Stage Co,* 4 Iowa 420 (1857); *Hopkins v Atlantic & St L R Co,* 36 NH 9 (1857). This development was an outgrowth of the practice of allowing actions for loss of a servant's services or a wife's consortium to be brought either in trespass or upon the case. See *Chamberlain v Hazelwood,* 5 M & W 515; 151 Eng Rep 218 (1839); Popescul, *supra,* p 31. The action on the case was the forerunner of the modern negligence action, and the significance of negligence as a distinct theoretical basis of liability was only beginning to be recognized at this time. Prosser, *supra,* § 28, p 140.

[24] The first case to take this step was *Hitaffer v Argonne Co,* 87 US App DC 57; 183 F2d 811 (1950). Subsequent cases are listed in Love, *Tortious Interference With the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship,* 51 Ind L J 590, 596, fn 20 (1976). *Whittlesey v Miller,* 572 SW2d 665, 668, fn 6 (Tex, 1978), lists nine states as not yet recognizing the wife's action. Four of those states have since adopted the majority rule. *Hopson v St Mary's Hospital,* 176 Conn 485; 408 A2d 260 (1979); Kan Stat Ann § 23-205 (1980 Cum Supp), *Nicholson v Hugh Chatham Memorial Hospital, Inc,* 300 NC 295; 266 SE2d 818 (1980); *Lundgren v Whitney's, Inc,* 94 Wash 2d 91; 614 P2d 1272 (1980).

[25] A number of courts, including this one, had at one time concluded that abolition of the husband's action was required by the enactment of statutes recognizing the separate legal existence of married women. See *Blair v Seitner Dry Goods Co,* 184 Mich 304, 313-314; 151 NW 724 (1915), overruled by *Montgomery v Stephan, supra.*

[26] Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 Law & Contemporary Problems 219, 229 (1953); *Neuberg v Bobowicz,* 401 Pa 146; 162 A2d 662 (1960).

"[I]f the matter were now res integra the law, * * * I am tempted to say 'certainly,' would refuse to give an action to the husband merely for loss of consortium due to *negligence.* It is too late now for the courts to deny an action which has existed for hundreds of years. It is an anomaly at the present day that a husband can obtain damages for an injury to his wife, but *English law is free neither of some anomalies nor of everything illogical, but this is no reason for extending them."* (Emphasis supplied.)[27]

In a negligence action the plaintiff is almost always a person who alleges personal injury or property damage caused by the defendant's breach of a duty of care. In contrast, a family member who seeks compensation for loss of consortium seeks to recover in respect to physical injury to another.

The jurisprudential concepts of duty and proximate cause, reserved for judicial determination, serve to limit the scope of a defendant's liability for negligence.

It has been said that "[d]uty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person".[28] What relationship, then, obligates an actor with respect to the interests of a member of an injured person's family so as to create a duty to that person?

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[27] *Best v Samuel Fox & Co,* [1952] AC 716, 733.

Lord Porter agreed and said:

"If the change is to be made I should prefer to abolish the husband's right rather than to grant the like remedy to the wife." *Id.,* p 728.

See, also, *id.,* p 735 (opinion of Lord Morton of Henryton).

We do not wish to be understood as endorsing abolition of a spouse's action for loss of consortium, which is perhaps too firmly entrenched to be disturbed. That the common law developed an aberration is not, however, a reason for its continued expansion.

[28] *Moning v Alfono, supra,* pp 438-439.

While that inquiry was overlooked when the action for loss of consortium became associated with actions for negligent injury to a wife as well as with actions for intentional interference with the marriage relationship, it was much on the minds of the English Lords who refused to permit a wife to bring an action for loss of consortium caused by negligence. The Lords described the husband's action as "an anomaly" "founded on the proprietary right which from ancient times it was considered the husband had in his wife",[29] and remarked upon its inconsistency with general principles regarding the scope of a defendant's liability for the consequences of his negligent actions.

A court's resolution of the questions of duty and proximate cause "depend[s] in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable".[30]

Plaintiffs assert that it is manifestly foreseeable that serious physical injury caused by a tortfeasor's negligence will be accompanied by loss to the victim's immediate family of the society and companionship of the injured person. It is argued that since this Court has, at least implicitly, determined that a wife's or husband's loss is not so remote that it is beyond the ambit of proximate cause and that breach of a duty owed the victim will be deemed a breach of a duty to the victim's spouse, the loss suffered by the victim's children must likewise fall within the sphere of liability.

Foreseeability is not, however, the only criterion

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[29] *Best v Samuel Fox & Co, supra,* pp 733, 731 (opinion of Goddard, L.C.J.).

[30] *Moning v Alfono, supra,* p 439.

for measuring the limits of liability for negligent conduct. It is foreseeable that any injured person will be party to a number of relationships—with the members of his household (who may not form a traditional nuclear family), with relatives, with friends and neighbors, with employer, employees, or co-workers—and that the other party to the relationship will suffer losses, tangible and intangible, should the relationship be interrupted. Lord Goddard observed:

"It may often happen that an injury to one person may affect another; a servant whose master is killed or permanently injured may lose his employment, it may be of long standing, and the misfortune may come when he is of an age when it would be very difficult for him to obtain other work, but no one would suggest that he thereby acquires a right of action against the wrongdoer."[31]

Even if it is accepted that policy considerations weigh more heavily in favor of recovery where family relationships regarded as fundamental to society are implicated, the anomalous character of the common-law action for loss of consortium[32] should deter us from extending it beyond the marital relationship, "the closest entity recognized by society",[33] to other relationships. There may be appealing analogies between the relationships of husband and wife and parent and child, but "[r]ea-

[31] *Best v Samuel Fox & Co, supra,* p 731.

[32] We do not suggest that further extension of the right to recover for loss of consortium should be denied because consortium originated as a property interest. We so conclude, rather, because policy considerations dictate that the circumstances under which one can recover in respect to injury to another should be extremely limited.

[33] *Albert v McGrath,* 107 US App DC 336, 338; 278 F2d 16, 18 (1960).

soning from one analogy to another can carry one into infinity".[34]

In refusing to recognize a child's action for loss of parental consortium, a California Court of Appeal said:

"Plaintiff's claim, viewed in the abstract and divorced from its surroundings, carries both logical and sympathetic appeal. * * *

"Nevertheless, our decision must take into account considerations in addition to logical symmetry and sympathetic appeal. As pointed out by Judge Breitel, every injury has ramifying consequences and losses, like the rippling of the waters, without end.[35] * * * [N]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere. In delineating the extent of a tortfeasor's responsibility for damages * * *, the courts must locate the line between liability and non-liability at some point, a decision which is essentially political."[36]

The Court does not indicate that it is prepared to draw a line somewhere or anywhere and indeed quotes with approval a statement of the Court of Appeals that " '[t]he rights of a new class of tort plaintiffs should be forthrightly judged on their own merits, rather than engaging in gloomy speculation as to where it will all end,' "[37]—as if the merits of plaintiff's claim can be resolved in the

[34] *Production Steel Strip Corp v Detroit,* 390 Mich 508, 537; 213 NW2d 419 (1973) (opinion of LEVIN, J.).

[35] " 'While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.' *Tobin v Grossman,* 24 NY2d 609, 619; 301 NYS2d 554, 561; 249 NE2d 419, 424 (1969)." *Suter v Leonard,* 45 Cal App 3d 744, 746, fn 1; 120 Cal Rptr 110, 111, fn 1 (1975).

[36] *Suter v Leonard, supra.*

[37] *Ante,* p 14.

abstract, focusing solely on the justness and fairness from the child's point of view of recognizing a right of recovery in this sympathetic case without regard to countervailing policy considerations and thoughtful consideration of "where it will all end".

The Court's decision does not in terms limit its holding to the creation of a cause of action for *minor* children who lose the society and companionship of an injured parent. Parents often continue to provide their children with society, companionship, nurturance and guidance long after the children themselves become parents. Some children never leave their parents' homes. Other children, whether married or single, become the devoted caretakers and companions of aged parents, whose society and companionship play a prominent role in their lives. The class of cases in which deprivation of parental consortium can be asserted is more extensive than might at first appear.

And now that we recognize a child's cause of action for loss of the society and companionship of a negligently injured parent, will we not also be called upon to compensate a parent's corresponding loss when a child is injured?[38]

The Court's analogy to the wrongful death act

[38] Compare *Baxter v Superior Court of Los Angeles County,* 19 Cal 3d 461; 138 Cal Rptr 315; 563 P2d 871 (1977) (denying recovery), with *Shockley v Prier,* 66 Wis 2d 394; 225 NW2d 495 (1975) (permitting recovery). At present, Michigan law recognizes a distinct cause of action in favor of the parents of a wrongfully injured child, but recovery is limited to the parents' loss of services and expenses incurred. *Gumienny v Hess,* 285 Mich 411; 280 NW 809 (1938). Compare *Bias v Ausbury,* 369 Mich 378, 380; 120 NW2d 233 (1963) (Ohio law).

The Court alludes in this regard to *Wycko v Gnodtke,* 361 Mich 331; 105 NW2d 118 (1960), but as it acknowledges, that case concerned the measurement of the "pecuniary loss" recoverable under the wrongful death act by the parents of a deceased minor child, not the damages recoverable by the parents of a child who survives negligently inflicted injury.

suggests that a like analogy may be drawn in future cases where a sibling or other member of "that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate",[39] and who would therefore be permitted to recover under the wrongful death act if an injured person dies, seeks to recover for loss of the society and companionship of an injured person who survives. Distinctions between the parent-child relationship and other relationships can indeed be made, but the Court's analysis, which minimizes the distinctions that could be drawn in the instant case, holds little promise for drawing such distinctions in other cases. Moreover, the "elements—love, companionship, affection, society, comfort, services and solace—"[40] which the Court identifies as similar in the marital and parent-child relationships are also present in other rela-

[39] MCL 600.2922(2); MSA 27A.2922(2).

Where a deceased person is not survived by a spouse or children, "next of kin" who are potential heirs-at-law may recover under the wrongful death act for loss of society and companionship. To that extent, the common law might be thought to be "anomalous" if it does not countenance a cause of action for such loss if the injured relative survives. Furthermore, this Court is presently considering whether the brothers and sisters of a deceased person who was survived by a spouse and both parents may recover for loss of society and companionship. *Crystal v Hubbard,* 92 Mich App 240; 285 NW2d 66 (1979), *lv granted* 408 Mich 895 (1980), construed the act as excluding siblings from the "next of kin" entitled to recover under those circumstances. But in *Scott v Burger King Corp,* 95 Mich App 694, 703; 291 NW2d 174 (1980), another panel of the Court of Appeals held that any family member who could potentially (as distinguished from would actually) inherit the deceased's personal property in case of intestacy might recover for loss of society, companionship and support.

Should this Court decide that brothers and sisters or other potential heirs are entitled to such recovery, irrespective of whether a closer blood relative also survives, will it not be once again "anomalous" to deny recovery for loss of society and companionship where the sibling or relative survives the injury?

[40] *Ante,* p 14.

tionships: brothers and sisters, a child and a grandparent, or a cohabiting unmarried couple.[41]

The concept of allowing a person to recover for consequential loss resulting from physical injury to another is an idiosyncracy in the law. Reasonable limits on liability for the consequences of negligent acts must be imposed. Upon review of the policy considerations we conclude that they do not favor redrawing the line between liability and non-liability to create a separate cause of action for loss of parental consortium.

IV

In concluding that the balance between the child's interest in compensation for the lost society and companionship of an injured parent and the tortfeasor's interest in freedom from additional liability, with due consideration to the social consequences of each alternative, weighs against recognition of the child's claim, we are influenced by a number of considerations including the uncertainty that recognizing the proposed cause of action will yield a significant social benefit, the additional economic burden imposed upon the general public by expanding recovery to a new category of indirect injury likely to be associated with a large percentage of accidents, the nature of the loss asserted, the lack of immediate connection between the plaintiff and the defendant, and the

[41] Loss of society and companionship may not be thought to be significant where the relationship can be characterized as a short-lived "affair". But today some couples, for whatever reasons, continue relationships for many years, perhaps until death do them part. Nor is this a phenomenon observed only among the young; it has been observed that such relationships are increasingly frequent among the elderly, who may seek to form quasi-marital relationships following the death of a spouse.

difficulty of objective demonstration and evaluation of the child's injury.

One leading commentator has suggested that the interests protected by tort law may be classified into "interests of personality", "property interests", and "relational interests".[42] Loss of consortium is a harm to a relational interest which occurs when the other party to the relationship suffers physical harm (invasion of an interest of personality). Because loss of consortium is not an injury to the person who bore the direct impact of the defendant's negligence but to another person whose relationship to the primary victim is diminished as a consequence, it may be regarded as a secondary layer of tort liability superimposed upon the defendant's liability to the primary victim.[43] There are few other instances where a *secondary* tort victim has been permitted to recover for a *negligently* inflicted injury to a *relational* interest unaccompanied by physical injury to himself.[44]

It is preferable to minimize the number of actions which can be brought for damages arising out of a single tortious act. The wisdom of creating a new cause of action depends in part upon whether other legal avenues are adequate to redress part or all of the asserted loss. Despite the increased acceptance of the spouse's action for loss of consortium, the extension of tort recovery be-

[42] Green, *Relational Interests,* 29 Ill L Rev 460 (1934).

[43] *Cf. Adams v Southern Pacific Transportation Co,* 50 Cal App 3d 37, 43; 123 Cal Rptr 216, 219 (1975), speaking of "secondary victims" who have "no direct spatial or legal relationship with the alleged wrongdoer".

[44] A possible exception is recovery for loss of the deceased's society and companionship in a wrongful death action, but the absence of the primary victim renders the wrongful death action a special case. See Part V-B. Another possible exception is an action for mental suffering, absent physical injury, occasioned by witnessing the negligent infliction of injuries on one's child. *Toms v McConnell,* 45 Mich App 647; 207 NW2d 140 (1973).

yond the primary victim remains the exceptional case. To the extent that a secondary tort victim's loss is likely to be duplicated in the primary victim's recovery, courts should be wary of creating additional claims deriving from the same tortious act, particularly where all injuries are localized within the same family unit.

Today the victim of a personal injury can recover for a broad variety of intangible losses in addition to conventional "pain and suffering". Without intimating a view as to the accuracy of their conclusions, we note that two federal courts,[45] a student commentator,[46] and a practitioner[47] agree that "loss of life's enjoyments constitutes an element of compensable damages under the law of [Michigan]".[48] One court observed that the plaintiff's social and recreational activities centered on his family, with whom he shared "dancing, ice skating, walking through the nearby woods or the Lake Michigan shore, family picnics, mushroom hunting, and shopping".[49] That analysis demonstrates that loss of the enjoyment of life may include curtailment of shared family activities;

[45] *Gowdy v United States,* 271 F Supp 733 (WD Mich, 1967); *Pierce v New York C R Co,* 409 F2d 1392 (CA 6, 1969).

[46] Comment, *Loss of Enjoyment of Life—Should It Be a Compensable Element of Personal Injury Damages?,* 11 Wake Forest L Rev 459, 467 (1975).

[47] An outline of the elements of damages recoverable in bodily injury cases includes "[i]mpaired enjoyment of life" as one of 16 specific subheadings. Michigan Law of Damages (Wade ed, Ann Arbor: Institute of Continuing Legal Education), p 10-8.

[48] *Pierce v New York C R Co, supra,* p 1398, citing *Remey v Detroit U R Co,* 141 Mich 116; 104 NW 420 (1905) (postponement of marriage), *Cawood v Earl Paige & Co,* 239 Mich 485, 490; 214 NW 402 (1927) (Court observed that plaintiff "will no longer be permitted to enjoy many of the things in life which it may well be said 'make life worth living' "); *Tabor v Carey & Leach Bus Lines,* 242 Mich 9; 217 NW 792 (1928) (aspiring musician surrendered his ambition to play in orchestra following injury to his arm).

[49] *Gowdy v United States, supra,* p 750.

moreover, the pangs of separation from family during hospitalization may be taken into account as a part of the injured person's mental suffering. In fact, if not in form, juries today may compensate personal injury plaintiffs for the overall reduction in the quality of family life, including the impairment of family relationships.

When a close link between two persons is disrupted, it is difficult to distinguish the injury suffered by each. As the California Supreme Court noted: "[T]o ask the jury, even under carefully drafted instructions, to distinguish the loss to the mother from her inability to care for her children from the loss to the children from the mother's inability to care for them may be asking too much."[50] To permit a child to recover for loss of an injured parent's society and companionship while the parent is also compensated for injury to the relationship creates a substantial risk of double recovery because of the difficulty of distinguishing the respective losses of the parties.

As the Supreme Court of New Jersey observed,

> "The asserted social need for the disputed cause of action may well be qualified, at least in terms of the family as an economic unit, by the practical consideration * * * that reflection of the consequential disadvantages to children of injured parents is frequently found in jury awards to the parents on their own claims under existing law and practice."[51]

Moreover, where the primary victim recovers for his own injuries, the most direct consequences of the accident are compensated and the party at fault does not escape liability. Fundamental objec-

[50] *Borer v American Airlines, Inc,* 19 Cal 3d 441, 448; 138 Cal Rptr 302, 307; 563 P2d 858 (1977).

[51] *Russell v Salem Transportation Co, supra,* p 507.

tives of tort law—compensation of innocent parties, allocation of loss to responsible parties (or broader distribution of loss if the tortfeasor is insured), and deterrence of negligent conduct—are all served in some measure and will not be vitiated if the defendant's liability is not extended further.

Courts have sometimes cited the uncertainty of the damages which would be recovered in an action for loss of parental society and companionship as a reason for refusing to recognize the action.[52] A common but inadequate rejoinder is that other elements of tort damages, notably pain and suffering, are equally uncertain.[53]

Courts have generally been willing to tolerate substantial uncertainty in the calculation of damages where such was thought necessary to enable the primary tort victim to receive adequate compensation. That bodily pain and mental anguish defy objective valuation and that money is a poor palliative seem inadequate justifications for denying a victim who has been crippled or disfigured a monetary remedy. In the context of actions not brought by the primary victim, however, objections to the uncertainty of the intangible loss alleged and to the inherent inadequacy of money damages as compensation loom larger, especially since the primary victim may also recover a sum for intangible, uncertain injuries. Considerations which would not deter a court from compensating a primary victim may thus, notwithstanding the anomaly of recovery for spousal consortium, sup-

[52] *E.g., Russell v Salem Transportation Co, Inc, supra,* p 507; *Duhan v Milanowski,* 75 Misc 2d 1078, 1083; 348 NYS2d 696, 702 (1973).

[53] Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent,* 56 Boston U L Rev 722, 734 (1976); *Borer v American Airlines, Inc, supra,* pp 454-455 (Mosk, J., dissenting).

port a refusal further to expand the scope of liability.

Denise Berger's misfortune highlights the difficulties that juries will encounter in valuing loss of parental society and companionship and that courts will face when asked to review jury verdicts. On the one hand, Denise was uniquely dependent on others and her mother necessarily played an overwhelmingly important role in her life; on the other hand, her cognitive faculties—and perhaps her ability to experience loss of her mother's society and companionship—were severely impaired and the range of activities she could share with her mother was drastically limited. Is her loss greater or less than a normal child's? What significance should be attached to the ability of other family members, *e.g.,* her father and brother, to care for her?

In contrast to the intangibility of the alleged injury and the difficulty of appraising it stands the certainty that creating a new basis for recovery will impose an added economic burden upon society. The California Supreme Court observed, "since virtually every serious injury to a parent would engender a claim for loss of consortium on behalf of each of his or her children, the expense of settling or litigating such claims would be sizable".[54] The Supreme Court of New Jersey perceptively described the problem:

"If the claim were allowed there would be a substantial accretion of liability against the tortfeasor arising out of a single transaction (typically the negligent operation of an automobile). Whereas the assertion of a spouse's demand for loss of consortium involves the joining of only a single companion claim in the action with that of the injured person, the right here debated

[54] *Id.,* p 447.

would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award. The defendant's burden would be further enlarged if the claims were founded upon injuries to both parents. Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant as well as in terms of the total cost of such enhanced awards to the insured community as a whole."[55]

While the creation of other new causes of action may have affected only a handful of cases and thus generated marginal additional costs,[56] recognizing a separate right of recovery in members of a tort victim's family creates a potential for additional liability in a large number of cases.[57] And a tort victim is likely to have more children than spouses.

The cost of this innovation in the law will be exacerbated if recognition of the cause of action is not limited to cases where, as alleged here, the parent is "severely" injured or disabled for an extended period—the Court eschews such a limitation. Absent some such limitation, claims could be lodged by children whose parent had been hospitalized for a period of months, perhaps even weeks, after an accident, or had been rendered

[55] *Russell v Salem Transportation Co, supra,* p 506.

[56] *E.g.,* actions for "wrongful birth" or emotional distress at witnessing negligent infliction of injury on a family member.

[57] Belli & Wilkinson in *Loss of Consortium: Academic Addendum or Substantial Right?,* 16 Trial (No. 2) 20 (February, 1980), suggest that "presently it may well be *malpractice* for an attorney to fail to become informed as to the marital status of a client and not advise the non-injured spouse of his or her *loss of consortium* rights". (Emphasis in original.) Now that a child's action for loss of consortium has been recognized, an attorney might be equally obligated to advise the children of an injured parent (or perhaps the parent and spouse) of their right to maintain an action for loss of consortium, with the consequence that many would accept the implicit invitation to advance the claim.

physically incapable of participating in some formerly shared activities. Such claims might outnumber the more substantial ones and exceed them in aggregate dollar amount as well. The administrative expense of reviewing children's claims and the cost of settling or litigating them will be considerable and will require significant increases in insurance premiums.

The Court acknowledges that insurance costs may rise, but suggests that an offsetting benefit for "any" increase may be realized:

> "[C]ompensating a child who has suffered emotional problems because of the deprivation of a parent's love and affection may provide the child with the means of adjustment to the loss. The child receives the immediate benefit of the compensation, but society will also benefit if the child is able to function without emotional handicap. This may well offset any increase in insurance premiums."[58]

It is doubtful that recognizing a child's cause of action will produce such auspicious results. Because few automobile drivers carry adequate liability insurance, most children who are deprived of a parent's companionship will not be benefitted. Policy limits are likely to be exhausted in the full or partial satisfaction of the injured parent's claim and the spouse's loss of consortium claim, without regard to children's claims for loss of parental consortium. Even fewer drivers have sufficient resources to satisfy such claims themselves. To be sure, some fortunate plaintiffs—for example, a child whose parent happens to be injured in a collision with a common carrier's truck instead of an ordinary citizen's automobile, or in an indus-

[58] *Ante*, p 15.

trial accident where a third party is responsible, or by a major manufacturer's product—will be able to recover against "deep-pocket" defendants. But in the typical auto accident case, the less serious the parent's injury, the more likely it is that money will be available to pay claims for loss of parental consortium. The benefits of recognizing the child's cause of action will be unevenly and adventitiously distributed, more so than ordinarily.[59]

There is a limit to the range of injuries and the dollar amount of recovery which can be spread across society through the interaction of the tort litigation and insurance systems. Increasing the load on the reparation system by recognizing causes of action in secondary tort victims in addition to the primary victim's action must increase insurance premiums, decrease participation in the system by marginal insureds, and perhaps decrease the amount that an insurer will willingly pay to the primary victim, thereby increasing litigation.

The proposed cause of action might seem less objectionable if its costs and benefits could be forecast more definitely. We cannot predict that the sums distributed to children whose parents are themselves entitled to compensation for injury will

[59] A court does not ordinarily concern itself with the collectibility of a judgment in deciding whether liability should be imposed upon a wrongdoer. The nature of the tort reparation system is such that some injured persons obtain judgments and some do not, and some judgments are collectible while others are not. But in deciding the policy question whether to recognize a new cause of action imposing additional liability in circumstances where liability to closely related plaintiffs already exists, it is appropriate to consider whether permitting such recovery will generally provide a remedy for otherwise uncompensated injury, or whether only a handful of those on whose behalf the cause of action is claimed will realize the additional benefit. Automobile accidents are the predominant cause of serious injury in our society, and it is unlikely that the average motorist will increase his automobile insurance coverage in response to today's decision.

produce a distinct social benefit in more than a handful of cases.[60]

The Court suggests that allowing the child to recover "may provide the child with the means of adjustment to the loss".[61] But it is problematic whether the means of adjustment can be purchased with money, whether awards will be so applied, or whether compensation will be received before the passage of time or the parent's recovery has worked a better adjustment. More accurate than a vision of minor children restored to emotional health by the services of parent substitutes and mental health professionals is the scenario depicted by the California Supreme Court:

"[M]onetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women."[62]

The California Supreme Court observed that, where recognition is sought for "a wholly new

[60] *Borer v American Airlines, Inc, supra,* p 447.

[61] *Ante,* p 15.

[62] One court has suggested that allowing minor children to recover separately may cause family discord:

"Whether or not, under the proposed added cause of action, the aggregate damages awarded the family by a jury for the injured parent, the spouse and the minor children would generally exceed substantially total family awards under existing law and practice, as anticipated above, one can question the desirability in social policy of the expectable result of actions including the proposed cause of action whereby a portion of the total family recovery, be such recovery large or small, would be segregated and made unavailable for control and disposition by the parents as managers of the family finances. There might also arise the cognate possibility of conflicts within the family in relation to settlements over apportionment of any lump sum tendered by the defense as between the injured parent, the spouse and each of the children." *Russell v Salem Transportation Co, supra,* p 507.

cause of action, unsupported by statute or precedent", "the inadequacy of monetary damages to make whole the loss suffered, considered in light of the social cost of paying such awards", and of the uncertainty that paying them will produce any social benefit, "constitutes a strong reason for refusing to recognize the asserted claim".[63]

It is significant that, although Federal and state courts in approximately 20 jurisdictions have considered the question presented in this case, only one other jurisdiction recognizes a child's right of action for loss of parental society and companionship.[64] While many of the decisions withholding recognition relied upon the lack of common-law precedent, deferred to the legislature, or employed arguments which failed to make an explicit policy judgment, such substantial unanimity of result, even among courts not noted for their timidity in the development of tort law,[65] evidences some con-

[63] *Borer v American Airlines, Inc, supra,* p 447.

[64] *Ferriter v Daniel O'Connell's Sons, Inc,* fn 1, *supra. Contra, Early v United States,* 474 F2d 756, 758-759 (CA 9, 1973) (Alaska law); *Pleasant v Washington Sand & Gravel Co,* 104 US App DC 374, 375-376; 262 F2d 471 (1958); *Meredith v Scruggs, supra* (Hawaii law); *Turner v Atlantic C L R Co,* 159 F Supp 590 (ND Ga, 1958) (South Carolina law); *Hill v Sibley Memorial Hospital,* 108 F Supp 739 (D DC, 1952); *Jeune v Del E Webb Construction Co,* 77 Ariz 226, 227; 269 P2d 723 (1954); *Borer v American Airlines, Inc, supra,* p 451; *Clark v Suncoast Hospital, Inc,* 338 So 2d 1117, 1118-1119 (Fla App, 1976); *Halberg v Young, supra; Hankins v Derby,* 211 NW2d 581, 584-585 (Iowa, 1973); *Hoffman v Dautel,* 189 Kan 165, 167-169; 368 P2d 57 (1962); *Sabatier v Travelers Ins Co,* 184 So 2d 594, 595 (La App, 1966); *Eschenbach v Benjamin,* 195 Minn 378; 263 NW 154 (1935); *Bradford v Union Electric Co,* 598 SW2d 149 (Mo App, 1979); *Hoesing v Sears, Roebuck & Co,* 484 F Supp 478 (D Neb, 1980); *General Electric Co v Bush,* 88 Nev 360, 368; 498 P2d 366, 371 (1972); *Russell v Salem Transportation Co, supra,* p 506; *Duhan v Milanowski, supra; Gibson v Johnston,* 75 Ohio Law Abstract 413; 144 NE2d 310, 313 (Ohio App, 1956); *Roth v Bell,* 24 Wash App 92, 101-104; 600 P2d 602 (1979). The Michigan Court of Appeals reached the same result in *Hayrynen v White Pine Copper Co,* 9 Mich App 452; 157 NW2d 502 (1968).

[65] See the opinions of the New Jersey and California Supreme Courts in the *Russell* and *Borer* cases, *supra.*

sensus regarding the impolicy of subjecting a negligent defendant to liability to members of the victim's family other than the spouse.

V

The Equal Protection Clauses of the United States and Michigan Constitutions[66] do not require recognition of a child's cause of action for loss of parental consortium.

Plaintiffs argue that the right to recover for loss of consortium grows out of society's interest in protecting the integrity of the family unit and its constituent relationships, and that the injury to a family relationship sustained by the child of a negligently injured parent cannot rationally be distinguished from the loss suffered by the parent's spouse. They also contend that allowing a child to recover for loss of society and companionship in a wrongful death action if a parent is fatally injured, yet denying a child the right to recover the same element of damages if a parent's injury is not fatal—a state of affairs the Court views as anomalous—deprives children whose parents are nonfatally injured of the equal protection of the laws. Plaintiffs thus challenge as under-inclusive two distinct classifications, one stemming from judicial recognition of a cause of action in the spouse but not in the child, the other a by-product of legislative supplementation of the common law to create a remedy for the next of kin of persons fatally injured through the fault of another.

A

The acts of a state court, as well as those of a state legislature, must comply with the dictates of

[66] US Const, Am XIV; Const 1963, art 1, § 2.

the Fourteenth Amendment.[67] It is unclear whether a court faced with an equal protection challenge to a judicially established rule of law should employ the same measure of scrutiny it would apply had that rule been promulgated by the Legislature. Plaintiffs urge that a more exacting review is required.[68]

The traditional "rational basis" test reflects a deference to the judgment of the coordinate branch of government charged with enacting statutes, which generally draw distinctions and fall upon some more heavily than upon others. What alternative test plaintiffs would have this Court employ under the circumstances of this case is not evident.

This is not a proper case for strict scrutiny, *i.e.*, requiring a demonstration that the classification is necessary to further a compelling state interest. Assuming that a direct state interference with a family relationship may be subjected to strict scrutiny because a fundamental interest is at stake, a classification which limits the availability of a tort remedy for injury done to family relationships

[67] *Shelley v Kraemer,* 334 US 1, 17; 68 S Ct 836; 92 L Ed 1161 (1948).

[68] Plaintiffs direct our attention to *Deems v Western Maryland R Co,* 247 Md 95, 102; 231 A2d 514 (1967), where the court said, in overruling prior decisions that a wife could not recover for loss of consortium:

"[W]hen this Court is asked to examine a legal doctrine which it has laid down in past decisions in the light of a constitutional claim not previously raised, our function is somewhat different than it is when the constitutionality of a statute is attacked. In the latter situation, there is the presumption of the validity of the legislative enactment. The action reviewed is that of a separate depository of the sovereign power. When a court must review its own decisions, the action is one of self-examination."

However, the *Deems* court went on to conclude, not that the failure to recognize the wife's action violated equal protection, but that policy considerations weighed in favor of its recognition. The opinion did not articulate a standard for a court to employ in the process of "self-examination".

does not constitute an interference with the relationship. Nor does distinguishing among family relationships constitute a suspect classification triggering strict scrutiny.

We would not be justified in invoking a more rigorous standard of review than to require that the classification bear a reasonable relation to the object of the action for loss of consortium—a modified form of "middle tier" or "means" scrutiny.[69]

One may reasonably distinguish the husband-wife relationship from the parent-child relationship in deciding whether to provide a remedy for loss of an injured person's society and companionship. Spousal consortium includes an element of sexual relations not present in the parent-child relationship. Close society and companionship between spouses typically endures for the length of the marital relationship, ideally for a lifetime, while the interaction of parent and child often, though not always, attenuates as the child matures.[70] Injury to one's spouse may have a more devastating impact upon one's daily life and family responsibilities than injury to a parent. Finally, because the average parent has more than one child, the recognition of the child's action poses greater problems of multiplicity of claims and complication of litigation. Limiting the action for loss of an injured person's society and companionship to the spouse assures that the typically greater loss will be compensated without unduly

[69] See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv L Rev 1 (1972); Nowak, Rotunda & Young, Constitutional Law, pp 525-526.

Of course, judge-made classifications may, as here, result from the evolution of the common law rather than from conscious judicial division of some larger class.

[70] *Cf. Garza v Kantor,* 54 Cal App 3d 1025, 1028; 127 Cal Rptr 164 (1976).

burdening the judicial system or engendering excessive social costs.

B

Nor does it violate equal protection to deny the children of negligently injured parents the right to recover losses for which the children of fatally injured parents are compensated under the wrongful death act. As the California Supreme Court has noted, there are "two significant distinctions between the child whose parent is killed and one whose parent is disabled, both of which flow from the fact that in the latter case the living victim retains his or her own cause of action".[71]

Whether or not it was an accurate historical statement, Lord Ellenborough's famous dictum that "[i]n a civil court, the death of a human being could not be complained of as an injury"[72] was accepted as declaratory of the common law. The harshness of this rule and its apparent incentive to inflict death rather than injury inspired legislatures to create statutory remedies for "the most grievous of all injuries".[73] Allowing recovery for the lost affection and society of a fatally injured person assures that a meaningful remedy will be available in every case without regard to whether that person was a wage earner or contributed to the support of the spouse, parent or child in whose interest the action is maintained. "Recovery for loss of affection and society in a wrongful death action thus fulfills a deeply felt social belief that a tortfeasor who negligently kills someone should

[71] *Borer v American Airlines, Inc, supra,* p 451.

[72] *Baker v Bolton,* 1 Camp 493; 170 Eng Rep 1033 (1808).

[73] Prosser, *supra,* § 127, p 902.

not escape liability completely, no matter how unproductive his victim."[74]

But where the parent injured by the tortfeasor's conduct survives, so does the parent's cause of action for the injuries inflicted. If the primary victim of the accident may bring an action, there is no need to permit other family members to recover in order to provide some compensation for the family and to prevent the tortfeasor from escaping liability altogether.

Further, where the parent survives the injury, certain aspects of the child's loss, *e.g.,* impairment of the parent's ability properly to care and provide for his children, can be compensated in the parent's own action. But where the parent dies, compensation for loss of parental care and services can be recovered only through a wrongful death action. Whether or not this compensation encompasses recovery for the child's loss of society and companionship in addition to more pecuniary items such as lost wages from which support would have been furnished, the availability of some reparation for disadvantage to the child and to the victim's family furnishes a sufficient basis for allowing the child to recover for lost society and companionship in the case of a parent's death but not in the case of parental injury.[75]

VI

Although we would not permit the child of a negligently injured parent to bring a separate action for loss of the parent's society and companionship, we would permit the injured parent, in his or her own action, to recover certain damages

[74] *Borer v American Airlines, Inc, supra,* p 452.

[75] The Eighteenth Century English common law recognized precisely the same distinction. See fn 10, *supra.*

resulting from the effect of the parent's injury upon the child. Injury which removes a parent from the home for a substantial period, or which disables the parent from providing the degree of affection, society and companionship previously provided the child, may necessitate expenditures by the parent to obtain for the child services or companionship that the parent would normally have provided. Although the child should have no independent right of recovery, the cost of substitute services should be recoverable in the injured parent's action.

VII

We would reverse the decision of the Court of Appeals and affirm the summary judgment granted by the trial court.

COLEMAN, C.J., and RYAN, J., concurred with LEVIN, J.

PEOPLE v JOHNSON

PEOPLE v TAVOLACCI

Docket Nos. 62147, 62854. Argued March 4, 1980 (Calendar Nos. 1, 2). —Decided March 30, 1981. Rehearing denied *post*, 1155.

Walter Johnson was convicted on his plea of guilty in Recorder's Court of Detroit, Samuel H. Olsen, J., of armed robbery and possessing a firearm while committing or attempting to commit a felony. The defendant testified that he took money from the cash register of a bar in Detroit while his codefendant Edgar Johnson kept the patrons at bay with a .38-caliber revolver. The Court of Appeals, Beasley and Mahinske, JJ. (N. J. Kaufman, P.J., dissenting), reversed as to Walter Johnson's conviction of the felony-firearm charge on the ground that there was an insufficient factual basis for it (Docket Nos. 77-2389, 77-2398). The people appeal.

Timothy R. Tavolacci was convicted on his plea of guilty in Livingston Circuit Court, Bert M. Hensick, J., of assault with intent to do great bodily harm and possessing a firearm while committing or attempting to commit a felony. The defendant testified that he had been a party to a plan to kill an undercover narcotics officer. The defendant, using the pretense of making a deal for drugs, arranged to have the narcotics officer come to a pool hall in Howell to meet Randy Harmon and Frederick Budziak, who then drove the narcotics officer to a field near Oak Grove. Budziak pointed a shotgun at the narcotics officer, who was able to disarm him so that the plan failed. The defendant remained in Howell during the attempt to kill the narcotics officer. The Court of Appeals, Cynar, P.J., and R. B. Burns and Breighner, JJ., affirmed the convictions, holding that the defendant was guilty as aiding and abetting the felony-firearm offense (Docket No. 78-1177). Defendant appeals. *Held:*

1. The defendants in these appeals did not personally possess a firearm during the commission of the felonies. A defendant

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 21 Am Jur 2d, Criminal Law §§ 115, 122, 124.

[2] 21 Am Jur 2d, Criminal Law §§ 131, 132.

may be guilty of violating the felony-firearm statute, notwithstanding the lack of personal possession of the firearm, if he is shown to have aided and abetted another person who has such possession. Because in a felony-firearm prosecution the possession of the firearm is a distinct crime from the underlying felony, the aiding and abetting charge must be established in each crime to support conviction of each one.

2. To convict one of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in possession during the commission of a felony, it must be established that the defendant procured, counselled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained. In neither of these cases does the record show that the defendant assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony.

3. Accordingly, the cases are remanded to the trial courts. The prosecutors shall be given an opportunity to establish the necessary assistance by the defendants.

The decision of the Court of Appeals is modified as to defendant Johnson and reversed as to defendant Tavolacci.

85 Mich App 654; 272 NW2d 605 (1978) modified.

88 Mich App 470; 276 NW2d 919 (1979) reversed.

1. WEAPONS — FIREARMS — FELONY — AIDING AND ABETTING.

A defendant may be guilty of violating the felony-firearm statute, notwithstanding the lack of personal possession of the firearm, if he is shown to have aided and abetted another person who had such possession (MCL 750.227b, 767.39; MSA 28.424[2], 28.979).

2. WEAPONS — FIREARMS — FELONY — AIDING AND ABETTING.

Possession of a firearm while committing or attempting to commit a felony is a separate crime from the underlying felony; therefore, where the defendant is charged in a felony-firearm prosecution as aiding and abetting another person, the aiding and abetting must be established in each crime to support conviction of each one (MCL 750.227b, 767.39; MSA 28.424[2], 28.979).

3. CRIMINAL LAW — AIDING AND ABETTING — POSSESSION.

To convict a defendant of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in possession during the commission of a felony, it must be established that the defendant procured, counselled, aided, or abet-

ted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained (MCL 767.39; MSA 28.979).

Frank J. Kelley, Attorney General, and *Robert A. Derengoski,* Solicitor General, for the people.

William L. Cahalan, Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea Solak,* Assistant Prosecuting Attorney, for the people in *Johnson.*

Frank R. Del Vero, Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General, for the people in *Tavolacci.*

Raymond L. Miller and *Michael P. Hubbarth* for defendant Johnson.

J. David Reck, P.C., for defendant Tavolacci.

KAVANAGH, J.

PEOPLE v WALTER JOHNSON

Defendant Walter Johnson and codefendant Edgar Johnson held up a bar in the City of Detroit. Defendant Walter Johnson took money from the cash register while his codefendant kept the patrons at bay with a revolver. The defendants left the bar and divided the money.

On March 7, 1977 defendant Walter Johnson entered a plea of guilty as charged to the offenses of robbery armed, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of or attempt to commit a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to not less than 25 nor more than 75 years on the armed-

robbery count and the mandatory 2-year imprisonment on the felony-firearm count.

PEOPLE v TAVOLACCI

Defendant Timothy Tavolacci had agreed to bring Jack McAleer, an undercover officer from the Washtenaw Area Narcotics Team, to a pool hall in Howell, Michigan, under the pretense of making a drug deal. According to the plan defendant was to introduce McAleer to Randy Harmon and Frederick Budziak who were to take him to a remote field and kill him. On May 17, 1977, defendant brought McAleer to the pool hall and introduced him to Harmon and Budziak. McAleer, Harmon and Budziak drove to a field outside of Oak Grove in Cohoctah Township, Livingston County. Budziak took a shotgun out of the trunk of the car and pointed it at McAleer. McAleer was able to disarm Budziak and the plan failed. Defendant remained in the pool hall during this time and eventually went to the home of a friend where he later received word of the frustrated attempt.

Defendant pled guilty of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and to possession of a firearm during the commission of or attempt to commit a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to a term of imprisonment of not less than four nor more than ten years on the assault charge and a mandatory two-year term of imprisonment on the felony-firearm charge.

In the instant cases the defendants did not personally possess a firearm during the commission of the felonies. On appeal the prosecutors have contended that a defendant may be guilty of violating MCL 750.227b, notwithstanding the lack of actual personal possession, if he is shown to

have aided and abetted another who has such possession.

Because in a felony-firearm prosecution the possession of the firearm is a distinct crime from the underlying felony, *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374; 280 NW2d 793 (1979), the aiding and abetting charge must be established in each to support conviction of each.

To convict one of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in one's possession during the commission of a felony, it must be established that the defendant procured, counselled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained. See *People v Doemer,* 35 Mich App 149; 192 NW2d 330 (1971); *People v Francis,* 71 Cal 2d 66; 450 P2d 591; 75 Cal Rptr 199 (1969).

In neither of the instant cases does the record show that the defendant assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony.

Accordingly, we remand these cases to the trial courts. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgments of conviction of felony-firearm in these cases shall be affirmed. If the prosecutor is unable to do so, the judgments of conviction of felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the guilty

pleas and the court shall decide these matters in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975).

COLEMAN, C.J., and WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with KAVANAGH, J.

PEOPLE v BURDEN

PEOPLE v JONES

Docket Nos. 64876, 64877. Decided March 30, 1981. On application by the people for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgments of the Court of Appeals and of the circuit court and remanded the case to the Marquette Circuit Court for further proceedings.

Patrick C. Burden and Joyce Jones were charged with delivery of controlled substances. The Marquette Circuit Court, John E. McDonald, J., granted the defendants' motion to exclude the testimony of Michael Hall, a member of the United States Air Force, on the ground that his participation in the case as an informant for the State Police violated the Federal Posse Comitatus Act. The Court of Appeals, Bronson and T. M. Burns, JJ. (D. F. Walsh, P.J., dissenting), affirmed (Docket Nos. 78-4440, 78-4441). The people apply for leave to appeal. In a per curiam opinion signed by Chief Justice Coleman and Justices Williams, Fitzgerald, Ryan, and Moody, the Supreme Court *held:*

1. The Posse Comitatus Act was passed to preclude the use of military personnel, acting as a military force, to assist in the execution of the laws. It was not intended to prevent a serviceman, acting as would any other citizen, from assisting civilian authority in enforcing the law. In this case, Hall was not in military uniform, acting under military orders or exercising any military authority. He was not a regular law-enforcement agent of the military nor does the record suggest that his usefulness to civilian authorities was in any way enhanced by virtue of his being a military man. His assistance was given to the State Police because he was led to believe that it would result in favorable treatment on charges that he sold three ounces of marijuana.

2. One must look to the nature of the assistance rendered the civilian authority in each case to determine if the aid may be characterized as military. Although the fundamental tenet of non-interference by the military in civilian affairs must be vigorously upheld, Hall's aid in this case was of a personal

nature, unrelated to his status as a military man, and was not of the kind sought to be precluded by the statute.

The judgments of the Court of Appeals and of the circuit court are reversed and the case is remanded to the circuit court for further proceedings.

Justice Kavanagh, joined by Justice Levin, dissented. He would deny leave to appeal because he is satisfied the trial court committed no error and the opinion of the Court of Appeals gives ample reason for affirming.

94 Mich App 209; 288 NW2d 392 (1979) reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Gary L. Walker,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General, Prosecuting Attorneys Appellate Service, for the people.

Rush M. Shortley for defendants.

PER CURIAM. The defendants have been charged with delivery of controlled substances to Michael Hall, a member of the United States Air Force, who was acting at the time in cooperation with the Michigan State Police. The question is whether the State Police's use of Hall violated the United States Posse Comitatus Act.[1]

I

Michael Hall was on active duty with the United States Air Force in 1977; he was stationed at K. I. Sawyer Air Force Base in Marquette County. When a warrant was issued charging him with selling three ounces of marijuana, he agreed to cooperate with the State Police in making purchases of controlled substances from the defendants. It was his personal decision that it would be in his best interest to cooperate as an informant.

[1] 18 USC 1385.

His willingness to assist the State Police, although condoned, was not induced, required or ordered by Air Force officials. Hall was led to believe his assistance would result in favorable treatment with respect to his own charge. The base commander was briefed as to Hall's involvement and merely approved his participation. He is said to have purchased lysergic acid diethylamide (LSD) and phencyclidine (PCP) from the defendants on July 26, 1977. The defendants were each charged with two counts of delivery of controlled substances.

At the preliminary examinations, Hall testified that when defendant Burden made LSD and THC (another controlled substance) available for purchase, he contacted the State Police. The State Police gave him $60 in marked $20 bills, searched him and his vehicle, and followed him to a mobile home occupied by the defendants. While the police watched, he entered the mobile home and made a purchase. Defendant Jones obtained what he thought was the THC from a bedroom and defendant Burden, the LSD from outside. Hall then paid Burden for the controlled substances.

The defendants filed a motion to prohibit testimony of Michael Hall on the basis that Hall's participation in state law enforcement in Michigan violated the Federal statute. The circuit court agreed with the defense and ordered the exclusion of Hall's testimony in this prosecution. The Court of Appeals affirmed,[2] with Judge WALSH dissenting.

II

The Federal statute in question provides:

[2] 94 Mich App 209; 288 NW2d 392 (1979).

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

The statute dates from the post-Civil-War period, and Judge WALSH explained its purpose well:

"The enactment of the Posse Comitatus Act in 1878 was primarily the result of southern outrage at the use of Federal troops in the South following the Civil War. With the end of armed hostility between the North and South came a period of political domination by Northerners of their fellow citizens in the South. Large numbers of Federal troops were extensively used in the South to enforce the law and to support the new carpetbag governments. The Reconstruction Act of 1867 implemented Congressional belief that military rule was necessary in the southern states. It was the 'outrageous meddling' of Federal troops in the 1876 presidential elections in the South which precipitated the proposal and passage of the act." 94 Mich App 218-219; 288 NW2d 392 (1979).

Examination of the Senate debate on the enactment is illuminating. The proponents were seeking to overrule an Attorney General's opinion on which these post-Civil-War actions had been based.[3] Senator Merrimon of North Carolina said:

"The people are interested in the law; it is their law; it is their duty to execute it, and the Army, their Army —for it is their Army at last—is only to be used in extreme cases and in the last resort. * * *

[3] Attorney General Caleb Cushing had said that the posse comitatus included every person over the age of 15, whatever his occupation, "including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a [civilian] sheriff or marshal". 6 Opinions of the Attorneys General of the United States 466, 473 (May 27, 1854).

"Now, sir, we know by sad experience that the Army has been used not once, but time and time again, in a way that not a court in this nation would sanction. The Army has not only been used in the collection of the internal revenue in a way not authorized by law, but it has been used and prostituted to control elections repeatedly. * * * The object of this section is to prevent a like prostitution of the Army in the future."[4]

Senator Windom asked if the act would prevent a soldier from coming to the defense of one who is being murderously assaulted; Senator Merrimon responded:

"If a soldier sees a man assaulting me with a view to take my life, he is not going to stand by and see him do it; he comes to my relief not as a soldier, but as a human being, a man with a soul in his body, and as a citizen."[5]

But, said Senator Merrimon, "If there had been a thousand soldiers there they could not have interposed as soldiers" and "[a] general * * * could not have commanded" them to act. Similarly, Senator Hill of Georgia said:

"Of course, there are occasions in all countries where under the laws it is the duty of every man to save life, to save property, to suppress crime. * * * But that is not the question involved here. The question is not involved in this section whether soldiers would be guilty of crime when they would suppress a crime like any other citizen would suppress it. The point is in their character as an army."[6]

We agree with the analysis of Judge WALSH:

[4] 7 Congressional Record 4245 (1878).

[5] *Id.*

[6] *Id.*, 4247.

"In cooperating with and assisting the civilian police agency, Hall was not acting as a member of the military. He was acting only as a civilian. His military status was merely incidental to and not essential to his involvement with the civilian authorities. He was not in military uniform. He was not acting under military orders. He did not exercise either explicitly or implicitly any military authority. Moreover, Hall was not a regular law-enforcement agent of the military, * * * nor does the record suggest that Hall's usefulness to civilian authorities was in any way enhanced by virtue of his being a military man. As we read the record, the assistance rendered by Hall was in no way different from the cooperation which would have been given by a private citizen offered the same opportunity to avoid criminal prosecution. To paraphrase Senator Hill, Hall's character as 'part of the Army or the Air Force' was irrelevant to the assistance he rendered to the civilian authorities."

One must look to the nature of the assistance rendered the civilian authority in each case to determine if the aid may be characterized as military. Although we share with the learned trial judge the firm conviction that the fundamental tenet of non-interference by the military in civilian affairs must be vigorously upheld, we conclude that Hall's aid under the facts of this case was of a personal nature, unrelated to his status as a military man. His activity was not of the kind sought to be precluded by the United States Congress when it enacted this statute.

Consequently, in lieu of granting leave to appeal, under GCR 1963, 853.2(4), we reverse the judgments of the Court of Appeals and the circuit court and remand the case to Marquette Circuit Court for further proceedings.

COLEMAN, C.J., and WILLIAMS, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

KAVANAGH, J. *(dissenting).* I would deny leave to appeal.

I am satisfied that the trial court committed no error in excluding the testimony of Airman Hall, and the opinion of Judge T. M. BURNS for the Court of Appeals, 94 Mich App 209; 288 NW2d 392 (1979), gives ample reason for affirming his decision.

LEVIN, J., concurred with KAVANAGH, J.

FALK v STATE BAR OF MICHIGAN

Docket No. 60722. Argued June 5, 1979 (Calendar No. 5).—Decided April 29, 1981. Rehearing denied *post,* 1157, without prejudice to plaintiff's presenting the issues raised in further proceedings in this pending case.

Allan Falk, a member of the State Bar of Michigan, brought an original action in the Supreme Court against the State Bar of Michigan which the Court treated as an action for a writ of superintending control. The complaint essentially seeks an order relieving the plaintiff of paying that part of his State Bar dues which relates to activities of the State Bar which he alleges to be "unlawful and unconstitutional" as an infringement on his First Amendment rights. Maurice E. Schoenberger, J., appointed as master, conducted a hearing and made findings of fact on the issues presented. The case was then argued in the Supreme Court.

The Court announced in a per curiam decision that there was no majority of the Court for a decision which would determine the matter, and ordered that a master be appointed to conduct an additional evidentiary hearing. A record shall be further developed as to the Young Lawyers Section and Lawyers Wives of Michigan, the Lawyer Placement Service, the commercial sale of the State Bar's mailing list, and, particularly, activities of the State Bar addressed to influencing legislation.

In addition, three separate opinions were filed:

Justice Ryan, joined by Justices Fitzgerald and Moody, would hold that the state may exact compulsory dues, and require association, to support only those duties and functions of the

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REFERENCES FOR POINTS IN HEADNOTES

[1-3, 5-12, 14, 16-18, 21-27, 29-33] 7 Am Jur 2d (Rev), Attorneys at Law § 7.

16A Am Jur 2d (Rev), Constitutional Law § 541.

[4] 16A Am Jur 2d (Rev), Constitutional Law § 558.

[13, 15] 7 Am Jur 2d (Rev), Attorneys at Law § 12.

[19, 20] 7 Am Jur 2d (Rev), Attorneys at Law §§ 8, 9.

Validity and construction of rules setting up client security fund. 53 ALR3d 1298.

Maintenance of lawyer reference system by organization having no legal interest in proceedings. 11 ALR3d 1206.

[28] 16A Am Jur 2d (Rev), Constitutional Law § 613.

State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected. He enumerated those duties and functions in his opinion, and others which may not be supported by dues, including legislative and lobbying activities, and those activities solely designed to further the commercial interests of the membership. He would allow the bar to present further facts to the Court, through a master, only as to those activities for which the record is inadequate to demonstrate a compelling interest.

1. The Supreme Court rules concerning the integrated State Bar of Michigan in 1935 had a declaration of purposes which has not been materially altered by any restatement in the subsequent 44 years. Those purposes are: to aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this state. Since 1935, the privilege of practicing law in Michigan has been conditioned upon association with, and financial support of, the integrated State Bar of Michigan.

2. First Amendment protections are not absolute. The compelling interests of government may justify restrictions on the First Amendment freedoms of individuals, but encroachment cannot be justified upon a mere showing of a legitimate state interest. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. The means chosen must be the least restrictive of freedom of belief and association in achieving the end, and the benefit gained must outweigh the loss of constitutionally protected rights.

3. This case is concerned with the propriety of compulsion by the state to associate in, and to support financially, a public body corporate as a condition precedent to the pursuit of one's livelihood as an attorney in this state, in any active legal capacity. No alternatives, even unpalatable ones, exist for the objecting attorney. Mr. Falk's pleading raises issues involving his rights of freedom of association and freedom of belief. The requirement of association with, and financial support of, the integrated State Bar clearly has a significant effect on these rights.

4. First Amendment guarantees are made applicable to the several states through the Due Process Clause of the Fourteenth Amendment. It is well established that state action which infringes on First Amendment rights can be tolerated

only where such infringement is unavoidably required in order to further a compelling, paramount, or vital state interest. Unquestionably, the state has very strong interests in the regulation of, and maintenance of high standards in, the legal profession, since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts. Nonetheless, and although the permission to practice law may rightly be regarded as a privilege, the state's intrusion on First Amendment rights of all persons, including attorneys, must be consciously and scrupulously minimized. In the light of controlling First Amendment principles, the State of Michigan, through the combined action of the Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of individual attorneys.

5. The regulation of the practice of law, the maintenance of high standards in the legal profession and the discharge of the profession's duty to protect and inform the public are, in the context of this challenge, purposes in which the State of Michigan has a compelling interest which will justify unavoidable intrusions on the First Amendment rights of objecting attorneys. Once a person has stated a claim upon which relief can be granted under the First Amendment, the burden is on the state or its agency to show the existence of a compelling interest which cannot be achieved with less intrusion upon the affected individual's First Amendment rights. The record in this case establishes that the defendant State Bar of Michigan has shown a compelling state interest in the following functions of the State Bar, and that such functions cannot be accomplished by means less intrusive on the First Amendment rights of objecting attorneys: a) All regulatory activities, including attorney disciplinary proceedings as provided in Chapter 95 of the General Court Rules, to the extent that they are funded out of compulsory State Bar dues; all licensing-related activities such as those provided for in State Bar Rule 15; b) All continuing legal education activities presently engaged in by the State Bar which are directed to the maintenance of high professional standards among Michigan attorneys; c) The publication of the Michigan Bar Journal insofar as that publication is primarily devoted to informing the members of the State Bar on current matters relating to regulation of the profession and the improvement of professional standards; d) The Client Security

Fund insofar as it represents a discharge of a duty to protect the public from recreant members of the profession; e) Those activities designed to educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally but excluding education concerning specific legislation or promoting specific viewpoints; and f) Activities designed to make legal services more accessible including the Lawyer Referral Service and support for those legal aid organizations serving the indigent.

6. The political and legislative activities supported by the State Bar, which are wholly separable from its other activities, violate petitioner Falk's First Amendment rights of association and expression. The record clearly discloses the extent of the State Bar's legislative and lobbying activities, including rendering technical advice to the Legislature, testifying before the State Officers Compensation Commission, adopting and publishing official State Bar positions on proposed legislation, and retaining a professional lobbyist. To the extent those efforts are funded by mandatory dues, the State Bar impermissibly infringes on the First Amendment freedoms of its individual members.

7. The ultimate objective of political and legislative activity by the State Bar is to influence public decision-making. Even if the particular goal can be justified as advancing the public interest or improving the administration of justice, compelled support and association to further these activities is not constitutionally acceptable. The public interest and the administration of justice are not subject to a single interpretation. Disagreements regarding legislative or other policy choices arise not only because they result in different practical effects on individuals, but more importantly because they reflect differing ideological approaches to the subject. Such ideological beliefs, and association to promote or oppose them, lie at the core of those activities protected by the First Amendment. That petitioner Falk is entitled to express his disagreement within the organization does not wholly diminish the fact that he is being forced to associate for purposes contrary to his beliefs. The focus is not on freedom of expression within the organization, but rather on whether the state can justify the forced association in the first instance.

8. For purposes of the First Amendment, a distinction cannot be drawn between legislation aimed at issues loosely termed procedural, *e.g.,* court reorganization, rules of evidence in product liability actions and the like, and those termed substantive. In either category the choice is necessarily based on a premise

which is subject to contrary opinion or belief. Compelling a dissenter to finance the encouragement of such legislation and associate with its advancement, whether or not he or she opposes it, cannot be justified in the absence of an overriding state need and then only by means narrowly drawn. In the light of alternative methods available to the Legislature to inform its decision-making both as to substantive and procedural legislation, there is no compelling state interest to justify the State Bar's legislative activities supported by compulsory dues. Specifically, the Legislature possesses the power of subpoena, and has access to the Legislative Service Bureau and legal counsel, and there are voluntary and self-supporting sections within the State Bar from whom the Legislature can seek advice. Further, individual members of the State Bar may voluntarily support legislative and lobbying activities undertaken by the State Bar.

9. The activities of the State Bar which are designed to further the commercial and economic interests of the members cannot survive First Amendment scrutiny. Attorneys cannot be categorized as a group with homogeneous economic interests. In fact, the economic interests of different attorneys often are in direct conflict. Such conflicts, and the requirement that members contribute to an association which may, therefore, undercut their self-interests, cannot be ameliorated by the democratic process within the bar. More importantly, furtherance of the commercial interests of attorneys cannot constitute a compelling governmental interest. Since the end itself cannot be justified, the means designed to serve that end, such as the Lawyer Placement Service, must fall in the face of a First Amendment challenge. As to all other activities of the State Bar, the present record fails to demonstrate a compelling state interest which cannot be served by a means less intrusive on the First Amendment rights of an objecting individual attorney.

10. The State Bar of Michigan should be enjoined from disbursing compulsorily exacted dues for any functions of purposes other than those which are unavoidably necessary to the furtherance of compelling state interests. It might then solicit voluntary contributions from members for those purposes. The bar would be permitted to present further facts only as to those activities as to which the record is inadequate. The bar should determine the proportion of dues which does not relate to constitutional purposes and functions, and reduce the dues accordingly at the start of its next fiscal year.

Justice Williams, joined by Chief Justice Coleman, would

deny the request for relief except as for removal of Falk's name from the roster sold for commercial use. There is no showing of a violation of the plaintiff's First Amendment rights by the activities complained of, except for the sale of the use of the State Bar mailing roster for commercial purposes, which is an invasion of the plaintiff's right to privacy. There is no reference in the record to political activities by the State Bar, such as support of, or opposition to, partisan candidates and partisan issues, which would be offensive to the State Bar Rules and the First Amendment.

1. Courts have an inherent power to regulate the practice of law and to supervise those persons engaged in it to the extent necessary for their proper functioning. The provisions of the statute which created the State Bar clearly indicate that it was the intent of the Legislature to provide for the organization of an agency to perform and assist in performing functions that pertain to the judiciary. Such matters are within the inherent power of the judiciary, but because there has been legislative action on the subject, there is no necessity for the Court now to assert its inherent power to create an integrated state bar. State Bar Rule 1 with its broad injunction to aid in promoting improvements in the administration of justice is consonant with the legislative purpose that the Supreme Court provide for the "regulation" of the State Bar. There is no rule of statutory construction which would confine "regulation" of the State Bar exclusively to matters such as regulation and discipline of the profession, continuing legal education, and related licensing functions, as well as the associated administrative functions, in the sense the plaintiff advocates. The State Bar can achieve such worthy results as restoring public confidence in the State Bar, enlarging professional consciousness, energizing the State Bar's responsibility to the public, improving the administration of justice, and being the only means by which every member of the State Bar can share in its public and professional responsibility. To provide the flexibility necessary to achieve such results the Legislature must have intended "regulation" to be defined expansively. Furthermore, it is undoubted that the Court has the inherent power to include in its rules and regulations for the State Bar the purposes stated in Rule 1.

2. The First Amendment is not absolute but will give way to certain state activities which are germane to a compelling state interest where the intrusion indirectly affects the First Amendment right. The state has a compelling interest in promoting improvements in the administration of justice and advancing the science of jurisprudence in order to fulfill its function of

protecting the health, safety, and welfare of its citizens. Insofar as the State Bar Rules authorize the bar to aid in those activities, it embodies a compelling state interest. The issue is whether the activities complained of are germane to that state interest.

3. The plaintiff's major complaint is that the State Bar spends large sums of money to influence pending legislation and to fund committee study projects which result in recommendations of policy for executive, legislative, or administrative action. There is nothing in the record to indicate that the State Bar participates in partisan politics. The plaintiff argues that the State Bar is a union shop which may not coerce its members to finance "ideological expenditures". However, what the Supreme Court of the United States has proscribed is the expenditure of compulsory dues for ideological causes which are not germane to the duties for which dues are collected. The state's interest in this case is in the administration of justice and in the advancement of jurisprudence. The use of State Bar dues to influence legislation and to fund committee study projects, so long as it is confined to those subjects directly affecting the administration of justice or the advancement of jurisprudence, is germane to the state's legitimate interest and therefore survives attack under the First Amendment.

4. In comparing this case with one dealing with use of compulsory dues by a labor union, the question is not the superficial similarities between an integrated state bar and a labor union, but whether the compelling state interest justifying intrusion on First Amendment rights is the same in both cases. It is not. One is achieving labor peace through collective bargaining, the other the administration of justice. Obviously, what might be germane to collective bargaining in the case of a labor union could be quite different from what is germane to the administration of justice in the case of the State Bar. Furthermore, the plaintiff has failed to specify even one political or ideological view of his which conflicts with those of the State Bar; his challenges appear to be monetary rather than ideological. However, even if the plaintiff objects to certain State Bar views, he is still free to voice his own views on any subject in any manner he wishes. Everyone understands, or should understand, that the views expressed by the State Bar are separate and distinct from those of each member. The plaintiff may take part in the communications within the State Bar on these matters or may express his views through external means, such as the press. When taking a position on a proposed bill, rule, or administrative order, the State Bar must

confine itself to subjects directly affecting the administration of justice or the advancement of jurisprudence, but the petitioner has failed to show any specific expenditure of State Bar funds unrelated to those goals.

5. The Young Lawyers Section can help the new attorney bridge the gap between law school and the practice of law. This helps the legal system to run effectively and provides for a better distribution of legal services to the public and thus is germane to the compelling state interest in the administration of justice. The plaintiff is free to dissociate himself from the Young Lawyers Section; automatic membership does not mean that it is compulsory. Therefore, the plaintiff cannot complain that the activities of this section to train new attorneys violate his First Amendment right to freedom of association.

6. The Lawyer Referral Service and Prepaid Legal Services programs were created to make legal services more accessible to persons who otherwise might not consult lawyers. The purpose of the Client Security Fund is to protect the public by reimbursing victims who have claims against lawyers which would not be covered under professional liability insurance. These activities clearly constitute permissible public purposes within the meaning of the constitutional provision concerning appropriation of public money. The Lawyer Placement Service also provides a necessary and useful service for the legal profession and the general public. The gathering and dispersal of employment information aids the effective use and delivery of legal services where they are needed, which is also germane to the administration of justice.

7. A legal system, no matter how fair or just, is of little value if no one knows of its existence or how to use it effectively. By providing the public with pamphlets explaining the law in easily understandable language the State Bar is helping the people of Michigan gain effective access to the legal system. Similarly when the Lawyers Wives of Michigan volunteer time and effort to distribute brochures to school children, conduct essay contests for Law Day, and serve as volunteers for probate and juvenile courts, they are aiding the state legal system. Therefore, the expenditure of State Bar dues for public communications, Lawyers Wives and Children's Charter is germane to the state's compelling interest.

8. The plaintiff's complaint that justices and other judges should not be present at social occasions sponsored by the State Bar are not within the original jurisdiction of the Court, and the plaintiff is advised to seek the proper forum. As to his complaint that food and beverages are offered on particular

occasions such as the State of the Judiciary Address and Law Day, the pertinent question is whether the dining and drinking is germane to a more significant activity which fulfills the compelling state interest in the improvement of the administration of justice and the advancement of jurisprudence. For example, in connection with Law Day, the winners of an essay contest and their parents and teachers are brought to Lansing for a luncheon sponsored by the State Bar, at which the awards are presented. The luncheon is certainly a legitimate expense of an educational program to acquaint the public with the system of justice. Such expenditures, in connection with the State of the Judiciary Address and Law Day, for example, if otherwise proper, do not offend the plaintiff's First Amendment rights.

9. The Supreme Court is an inappropriate forum in which to initiate a complaint that permitting the State Bar to lobby for higher salaries for judges violates the Code of Judicial Ethics. The plaintiff also argues that such lobbying before the State Officers Compensation Commission violates his First Amendment freedoms of association and speech. Employment of competent jurists is essential for the effective administration of justice. The commission was established to insure that the state pays salaries which enable it to compete with private employers for well-qualified and dedicated persons. There is nothing improper in the State Bar aiding in the determination of what salaries are necessary to have an effective judiciary. Therefore, permitting the State Bar to express its opinion concerning judicial salaries is germane to the state's interest.

10. The plaintiff's right to privacy, the right to be left alone, inherently includes some discretion in what enters his home through the mail. Congress has recognized this by giving the addressee the right to stop mailings which he believes to be erotically arousing or sexually provocative, and the Supreme Court of the United States has indicated that the addressee should be allowed to strike his name from any mailing list. Even though the soliciting mail comes in clearly marked envelopes, the plaintiff has the right to demand that his name be excluded from the State Bar's mass merchandising mailing lists which cannot be said to be promoting the administration of justice or advancing the science of jurisprudence.

The order of superintending control should be denied, except that the State Bar shall, upon the plaintiff's request, remove his name from the mailing roster of attorneys sold for commercial use.

Justice Levin, joined by Justice Kavanagh, wrote that the

record is sufficiently developed to resolve some of the issues but not others, and that therefore the cause should be remanded for a further hearing.

1. The record is sufficiently developed to resolve the challenges to all activities of the State Bar save the Lawyer Placement Service, the commercial sale of the State Bar's mailing list, activities addressed to influencing legislation, and the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar and the public about the law and the legal system.

2. This case is not an ordinary litigation in which a party is limited to the relief to which he has proven himself entitled. Falk's petition calls for the discretionary exercise of the Court's extraordinary superintending control. Therefore, the Court must consider not merely the relative rights of the parties before the Court but, rather, the proper organization and actions of the State Bar in the light of the rights of all of its members and the interests of the state. When the Court exercises its power of superintending control, the Court has the responsibility of ensuring that it is fully informed. A more complete factual record is needed to determine the appropriate order as to the State Bar's legislative activities, the Lawyer Placement Service, the commercial sale of the State Bar's mailing list, and the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar about the law and the legal system, and therefore the cause is remanded for the purpose of developing such a record.

3. The principles of constitutional law announced by the Supreme Court of the United States may be read differingly in regard to the standard or standards of judicial scrutiny applicable to this case. Application of the constitutional principles is further hampered by the indefiniteness, on this record, of the purposes and state interests served by the State Bar. The lawyer's relation to the law could rationally support the State Bar's taking a stand on even the most basic of public policy issues. At some point, the interests of the State Bar and of the state in collective legislative activity by the State Bar must yield to the constitutional freedoms of the individual lawyer.

4. It is unnecessary at this time to determine the appropriate standard of judicial scrutiny or to articulate definitively the State Bar's purpose, since such of Falk's challenges to activities of the State Bar as can be resolved on this record are clearly permissible even under the strictest standard of review and the

narrowest construction of the State Bar's purpose. The regulatory and licensing activities of the State Bar narrowly drawn to the end of maintaining high standards of competence and honesty in the legal profession serve a compelling state interest and can be justified even if they impinge on members' First Amendment rights. Included among these activities are continuing legal education, the Michigan Bar Journal to the extent that it serves an informational function, advisory opinions on ethical questions, and disciplinary proceedings.

5. Improvement of the administration of justice includes, at the very least, activities primarily to educate the public about the law and legal services, to provide legal services to the indigent, to help the public to select legal counsel through the Lawyer Referral Service, and to provide forums for discussion of problems facing the courts and the legal profession. That the state has a compelling interest in improving the administration of justice through activities such as these needs no explication. Compulsory dues are a necessary means both to provide adequate funds and to share the burden equitably among those subject to the duty. Limiting the compulsory element to a reasonable level of dues is the least intrusive means available.

6. Some of the non-legislative activities of the State Bar challenged by Falk fall comfortably within the permissible range of this category of activities. The preparation and distribution by the Young Lawyers Section of the Juror's Manual, the distribution to junior high school students of the "You and the Law" booklet by the Lawyers Wives of Michigan, and funding of the Children's Charter, which provides a forum for discussing problems of juvenile delinquency requiring participation of third parties, are examples of clearly permissible activities. Other activities of the State Bar, including activities of the Young Lawyers Section and Lawyers Wives other than those described above, the Lawyer Placement Service, the commercial sale of the State Bar's mailing list, and particularly bar activities addressed to influencing legislation, require development of a fuller and more particularized record before their permissibility can be determined.

7. On remand, the burden will be on Falk to show specific activities which infringe upon his First Amendment rights. The burden will be on the State Bar to establish the requisite state interest, the appropriate connection between particular activities and the state interest (or, if a valid criterion for First Amendment purposes, the economic self-interest of the bar's members), and the unavailability or impracticability of alternative means of realizing the asserted state interest. The appro-

priate standard either of judicial scrutiny or definition of the state interests served by the State Bar is not now decided.

8. The parties should also address whether a fair analysis of the purposes served by those activities of the State Bar presenting close questions of constitutional conflict and of alternatives indicate that a better course would be to exercise the superintending authority of the Court by court rule to limit the activities of the State Bar to a greater degree than is absolutely compelled by the Constitution, and thereby eliminate the potential for constitutional conflict. Such an approach may not only serve the important goal of avoiding unnecessary decision of constitutional questions, but may also provide a desirable measure of flexibility in an area that will almost certainly change with time. Further, a proper respect for the "breathing room" necessary for full enjoyment of First Amendment rights suggests that the Court should be reluctant to allow bar activities to press upon the border of constitutional prohibition, absent a clearly demonstrated need.

OPINION OF THE COURT

1. ATTORNEY AND CLIENT — STATE BAR — SUPERINTENDING CONTROL.

An action for superintending control over the State Bar challenging activities supported by compulsory dues as infringing on an objecting member's First Amendment rights requires the development of an adequate record of the activities of the State Bar, and particularly those activities addressed to influencing legislation, for the Court to agree upon a decision in the matter (US Const, Ams I, XIV; Const 1963, art 6, § 4; MCL 600.215, 600.219, 600.904; MSA 27A.215, 27A.219, 27A.904; GCR 1963, 711, 851[6]).

SEPARATE OPINION BY RYAN, J.

2. ATTORNEY AND CLIENT — STATE BAR — PURPOSES.

The Supreme Court rules concerning the integrated State Bar of Michigan have as their purposes aiding in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this state (Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

3. ATTORNEY AND CLIENT — STATE BAR — MEMBERSHIP.

The privilege of practicing law in Michigan is conditioned upon association with, and financial support of, the integrated State

Bar of Michigan compelled by the state (Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 3, 4).

4. CONSTITUTIONAL LAW — FIRST AMENDMENT — DUE PROCESS — STATE ACTION.

State action which infringes on First Amendment rights can only be tolerated where such infringement is unavoidably required in order to further a compelling, paramount, or vital state interest (US Const, Ams I, XIV).

5. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact State Bar dues, and require association in the State Bar, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting attorneys (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

6. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The state has a compelling interest in the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public which justifies unavoidable intrusions on the First Amendment rights of objecting attorneys (US Const, Ams I, XIV).

7. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The State Bar of Michigan has shown a compelling state interest which cannot be accomplished by means less intrusive on the First Amendment rights of an objecting attorney than compulsory payment of State Bar dues in the following State Bar activities: all regulatory activities, including attorney disciplinary proceedings, to the extent that they are funded out of compulsory State Bar dues, and all activities related to licensing of attorneys; all continuing legal education activities presently engaged in by the State Bar which are directed to the maintenance of high professional standards; the publication of the Michigan Bar Journal insofar as it is primarily devoted to informing the members of the State Bar on current matters

relating to regulation of the profession and the improvement of professional standards; the Client Security Fund insofar as it represents a discharge of a duty to protect the public from recreant members of the profession; those activities designed to educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally; and activities designed to make legal services more accessible (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; GCR 1963, 950 et seq.; State Bar Rules 1, 15).

8. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The political and legislative activities of the State Bar, to the extent they are funded by mandatory State Bar dues, violate the First Amendment rights of an objecting attorney to freedom of association and expression; such activities include rendering technical advice to the Legislature, testifying before the State Officers Compensation Commission, adopting and publishing official State Bar positions on proposed legislation and retaining a professional lobbyist (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

9. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

Compelling a dissenting attorney to finance the encouragement of legislation and associate with its advancement cannot be constitutionally justified in the absence of an overriding state need and then only by means narrowly drawn; for purposes of the First Amendment, a distinction cannot be drawn between legislation aimed at issues loosely termed procedural and those termed substantive because in either case the choice is necessarily based on a premise which is subject to contrary opinion or belief (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

10. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

There is no compelling state interest to justify support by compulsory State Bar dues of legislative activities where the Legislature has alternative methods available to inform its decision-making, i.e., *the power of subpoena, and access to the Legislative Service Bureau and legal counsel, and to voluntary and self-supporting sections within the State Bar (US Const, Ams I,*

XIV; Const 1963, art 6, § 5; MCL 4.101, 600.901, 600.904; MSA 2.181, 27A.901, 27A.904; State Bar Rule 1).

11. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

Activities of the State Bar designed to further the commercial interests of its members, such as the Lawyer Placement Service, cannot constitute a compelling state interest that cannot be accomplished by means less intrusive upon the First Amendment rights of objecting attorneys (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

SEPARATE OPINION BY WILLIAMS, J.

12. CONSTITUTIONAL LAW — STATE BAR — INTEGRATION — INHERENT POWER.

The Supreme Court has the inherent power to regulate the practice of law and to supervise those persons engaged in it to the extent necessary for the proper functioning of the courts, but because there has been legislative action on the subject, there is no necessity for the Court to now assert its inherent power to create an integrated state bar (Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904).

13. ATTORNEY AND CLIENT — STATE BAR — REGULATION — WORDS AND PHRASES.

The broad injunction of Rule 1 of the State Bar to aid in promoting improvements in the administration of justice is consonant with the legislative purpose that the Supreme Court provide for the "regulation" of the State Bar; there is no rule of statutory construction which would confine "regulation" of the State Bar exclusively to regulation and discipline of the profession, continuing legal education, and related licensing functions, and the associated administrative functions (MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

14. ATTORNEY AND CLIENT — STATE BAR — REGULATION — LEGISLATIVE PURPOSE.

The Legislature must have intended that "regulation" of the State Bar, as used in the statute creating the integrated State Bar, be defined expansively to provide for the Supreme Court the flexibility to insure that the State Bar can achieve such worthy results as restoring public confidence in the bar, enlarging professional consciousness, energizing the bar's responsibility to the public, improving the administration of justice, and being the only means whereby every member of the State Bar

can share in its public and professional responsibility (MCL 600.901, 600.904; MSA 27A.901, 27A.904).

15. ATTORNEY AND CLIENT — STATE BAR — COURTS — INHERENT POWER.

The Supreme Court has the inherent power, independent of legislation to include in its rules and regulations the provisions of State Bar Rule 1 that the State Bar shall aid in promoting improvements in the administration of justice and advancements in jurisprudence (State Bar Rule 1).

16. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The test of claims that certain uses of compulsory State Bar dues indirectly infringe upon First Amendment rights of an attorney is whether the state has a compelling interest involved, and if so, whether the activities complained of are germane to that interest; insofar as the activities aid in promoting improvements in the administration of justice and the advancement of jurisprudence they are essential for the state's continued existence and therefore survive attack under the First Amendment (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

17. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The State Bar's use of compulsory dues to influence legislation and to fund committee study projects which result in recommendations of policy for executive, legislative, or judicial action is germane to the state's legitimate and compelling interest in the administration of justice and the advancement of jurisprudence; such activity survives attack under the First Amendment where there is nothing in the record to indicate that the State Bar participates in partisan politics and the plaintiff challenging the use of the dues does not specify any of his views which conflict with those advanced by the State Bar (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

18. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The State Bar, when it takes a position on proposed legislation, court rules, or administrative actions must confine itself to those subjects directly affecting the administration of justice or the advancement of jurisprudence; endorsing a particular candidate for office or lobbying for legislation which is unrelated to

the improvement of the administration of justice is outside of the scope of the State Bar Rules and also violates the First Amendment rights of free speech and association of State Bar members (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

19. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — STATE INTEREST.

The expenditure of compulsory State Bar dues for the Young Lawyers Section, Prepaid Legal Services programs, the Lawyer Referral Service, the Lawyer Placement Service, the Client Security Fund, public education about the law, Lawyers Wives of Michigan, Children's Charter of Michigan, certain State Bar social functions, and appearances before the State Officers Compensation Commission to support higher judicial salaries is germane to the state's compelling interest in promoting improvements in the administration of justice; therefore, those activities have not been shown to violate the First Amendment rights of free speech and association of a member of the State Bar (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

20. CONSTITUTIONAL LAW — STATE BAR — PUBLIC PURPOSE.

The State Bar Lawyer Referral Service, Prepaid Legal Services programs, the Client Security Fund and the Lawyer Placement Service clearly constitute a permissible public purpose, rather than a local or private purpose, within the meaning of the constitutional provision concerning appropriation of public money (Const 1963, art 4, § 30).

21. CONSTITUTIONAL LAW — PRIVACY — STATE BAR — MAILING LIST.

The right to privacy, the right to be left alone, inherently includes some discretion in what enters one's home through the mail; an attorney has the right to demand that his name be excluded from the mailing list, the use of which the State Bar sells to commercial advertisers, because it cannot be said to be promoting the administration of justice or advancing the science of jurisprudence (State Bar Rule 1).

SEPARATE OPINION BY LEVIN, J.

22. ATTORNEY AND CLIENT — STATE BAR — SUPERINTENDING CONTROL.

An action for superintending control over the State Bar challenging activities supported by compulsory dues as infringing on an objecting member's First Amendment rights, a matter within the Supreme Court's original jurisdiction, is not like ordinary litigation, in which a party is normally limited to the relief to

which he has proven himself entitled; the case calls for the discretionary exercise of the Court's extraordinary superintending control and considers not merely the relative rights of the parties but, rather, the proper organization and actions of the State Bar in the light of the rights of all of its members and the interests of the state (US Const, Ams I, XIV; Const 1963, art 6, § 4; MCL 600.215, 600.219, 600.904; MSA 27A.215, 27A.219, 27A.904; GCR 1963, 711, 851[6]).

23. SUPERINTENDING CONTROL — SUPREME COURT — DISCRETION.

It is the ultimate responsibility of the Supreme Court to ensure that its exercise of discretion to implement its power of superintending control is fully informed (Const 1963, art 6, § 4; MCL 600.215, 600.219; MSA 27A.215, 27A.219; GCR 1963, 711, 851[6]).

24. SUPERINTENDING CONTROL — SUPREME COURT — DISCRETION — EVIDENCE.

To allow inadequacies in the record in an action for superintending control to shape an order affecting the rights of persons other than the parties would be to cede control of the Court's discretion to the parties; if a more complete factual record is needed to determine the appropriate superintending order, it is the Court's responsibility to obtain it (Const 1963, art 6, § 4; MCL 600.215, 600.219; MSA 27A.215, 27A.219; GCR 1963, 711, 851[6]).

25. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — POLITICAL ACTIVITY.

The interests of the State Bar and of the state in collective legislative activity must yield at some point to the constitutional freedoms of the objecting individual lawyer (US Const, Ams I, XIV; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

26. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — LICENSES.

The support by compulsory dues of regulatory and licensing activities of the State Bar which are narrowly drawn to the end of maintaining high standards of competence and honesty in the legal profession can be justified as serving a compelling state interest even if they impinge on First Amendment rights of objecting members (US Const, Ams I, XIV; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

27. ATTORNEY AND CLIENT — STATE BAR — ADMINISTRATION OF JUSTICE — CONSTITUTIONAL LAW — FIRST AMENDMENT.

Improving the administration of justice properly includes at least activities primarily designed to educate the public about the law and legal services, to provide legal services to the indigent, to help the public select legal counsel intelligently through the Lawyer Referral Service, and to provide forums for discussion of problems facing the courts and the legal profession (MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

28. CONSTITUTIONAL LAW — ADMINISTRATION OF JUSTICE — STATE INTEREST.

That the state, through the Supreme Court, has a compelling interest in improving the administration of justice is sufficiently clear as not to need explication.

29. CONSTITUTIONAL LAW — ADMINISTRATION OF JUSTICE — STATE BAR — COMPULSORY DUES — FIRST AMENDMENT.

Limiting the compulsory element of membership in the State Bar to a reasonable level of dues, with no requirement of participation beyond the financial obligation, is the means available to aid in the state's compelling interest in improving the administration of justice which least intrudes on the First Amendment rights of objecting members (US Const, Ams I, XIV; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

30. CONSTITUTIONAL LAW — ADMINISTRATION OF JUSTICE — FIRST AMENDMENT — STATE BAR.

Activities financially supported by the State Bar such as the preparation and distribution by the Young Lawyers of the Juror's Manual, the provision to students of the "You and the Law" booklet by the Lawyers Wives of Michigan, and funding of the Children's Charter of Michigan, fall comfortably within the permissible range of activities which clearly aid the state's compelling interest in improving the administration of justice where an objecting lawyer claims an infringement of First Amendment rights (MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1).

31. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR — BURDEN OF PROOF.

The burden is on an objecting member to show specific activities of the State Bar which infringe upon his First Amendment rights; the burden is on the State Bar to establish the requisite state interest, the appropriate connection between particular activities and the state interest (or, if a valid criterion for First Amendment purposes, the economic self-interest of the bar's

members) and the unavailability or impracticability of alternative means of realizing the asserted state interest (US Const, Ams I, XIV).

32. ATTORNEY AND CLIENT — STATE BAR — SUPREME COURT — INHERENT POWER — CONSTITUTIONAL LAW — FIRST AMENDMENT.

It may be better for the Supreme Court to limit activities of the State Bar supported by compulsory dues which arguably infringe upon an objecting member's First Amendment rights of association and belief by court rule, and thereby eliminate the potential for constitutional conflict; such an approach may not only serve the important goal of avoiding unnecessary constitutional decisions, but may also provide a measure of flexibility in an area which will almost certainly change with time (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.904; MSA 27A.904; State Bar Rule 1).

33. CONSTITUTIONAL LAW — FIRST AMENDMENT — STATE BAR.

A proper respect for the "breathing room" necessary for full enjoyment of First Amendment rights suggests that the Supreme Court should be reluctant to allow activities of the State Bar supported by compulsory dues to press upon the border of the constitutional prohibition against infringing the First Amendment rights of an objecting attorney, absent a clearly demonstrated need (US Const, Ams I, XIV).

Allan Falk, in propria persona.

George E. Bushnell, Jr., and *Lynn H. Schecter* for defendant.

PER CURIAM. This matter comes before this Court pursuant to plaintiff's "Petition for Special Relief". In his petition the plaintiff sets forth his objections to a number of State Bar activities and asks that the petition "be granted".

Based on the record we have before us, three members of the Court are of the view that the plaintiff is entitled to partial relief and would order it to be afforded. Several issues, however, cannot be decided without further development.

Two members of the Court are of the opinion

that the plaintiff is not entitled to relief and would deny the petition.

Two members of the Court are of the view that further hearings on this matter are required, believing that the present state of the record is such that while some of the issues could be resolved based upon an evaluation of the record, several other issues should not be decided without further development.

In light of these circumstances, there being no majority of the Court at this time for a decision which would determine this matter, we order that the Honorable James H. Lincoln be appointed to conduct an additional evidentiary hearing. At this hearing the parties shall further develop the record with regard to the following bar activities: the Young Lawyers Section and Lawyers Wives,[1] the Lawyer Placement Service, the commercial sale of the bar's mailing list, and bar activities addressed to influencing legislation.

The hearing on remand shall be concluded not later than July 31, 1981 and the transcript thereof filed with the Clerk of this Court within 60 days after conclusion of the hearing. Thereafter the plaintiff shall file any additional brief he wishes to present for consideration within 30 days of the filing of the transcript and the State Bar shall file any responsive brief within 60 days of the filing of the transcript.

A majority of the Justices are in favor of the action directed by this opinion. All of the Justices agree that, there being a majority for this action, an order to effectuate these directions shall be issued.

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[1] No further evidence need be taken with regard to the preparation and distribution of the Juror's Manual, the distribution of the "You and the Law" booklet, and funding of the Children's Charter.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

RYAN, J. The issue in this case is:

To what extent, if any, may this state, through the combined actions of the Supreme Court, the Legislature, and the State Bar, compulsorily exact dues for, and require association in, an integrated bar organization over the First Amendment[1] objections of an affected individual attorney?

We would hold:

The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve a compelling state interest and which cannot be accomplished by means less intrusive upon the First Amendment rights of the objecting individuals affected.

I. FACTUAL BACKGROUND

A

This case was commenced as an original proceeding in this Court on November 30, 1977 when plaintiff attorney Allan Falk filed a pleading entitled "Petition for Special Relief" which named the State Bar of Michigan as the defendant.

The plaintiff's petition is a three-page document which sets forth a series of factual allegations and

[1] The First Amendment of the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

legal assertions expressing his First Amendment objections to various activities and expenditures of the State Bar of Michigan, to which he must belong and pay dues. While Mr. Falk brings an unusual, and relatively complex, claim to this Court, we find that his petition bears at best only a remote resemblance to a complaint under our court rules, GCR 1963, 101, 111. The petition certainly contains allegations that various activities and expenditures of the State Bar violate the plaintiff's First Amendment rights.[2] However, we are unable to discern the statement of any other claim or cause of action.[3] Further, the demand for

[2] Mr. Falk's petition makes reference to the United States Supreme Court's decision in *Abood v Detroit Board of Education,* 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), *reh den* 433 US 915; 97 S Ct 2989; 53 L Ed 2d 1102 (1977).

[3] Mr. Falk's briefs include discussion and argument relating to a tortious invasion of his privacy which he contends is caused by the State Bar's alleged distribution of its membership lists, with addresses, to various commercial entities for use in mail solicitation efforts.

Mr. Falk's original pleading nowhere states a claim, or requests relief, for tortious invasion of privacy. See GCR 1963, 111.1, 117.2(1). Adequate proofs were not presented to the fact-finder on such a claim. Further, at oral arguments, Mr. Falk acknowledged that he had never requested the State Bar to refrain from so distributing his name and address.

Since we find that no claim was pled for invasion of privacy, no relief requested, and inadequate proofs offered, we will not reach the issue, and we intimate no opinion as to its merit, if any.

Similarly, Mr. Falk's brief discusses an asserted violation of his First Amendment rights to religious freedom under the following heading:

"The use of State Bar dues monies to purchase alcoholic beverages, pork and shellfish for consumption at social functions, particularly when not all State Bar members are invited to such functions or offered alternatives of equal value for dues paid, and which are unnecessary to the accomplishment of any goal central to the viability of the State Bar as a regulatory body, violates the rights of petitioner and other State Bar members under the free exercise and establishment of religion clauses of the First Amendment."

Mr. Falk characterizes the referenced State Bar social functions as "bacchanalian revelries" which are unnecessary to the furtherance of the constitutionally permitted objectives of the State Bar.

Here again, the petition neglects to state any claim, or seek any

judgment or relief (see GCR 1963, 111.1[3]) requests only that the "petition for special relief be granted".[4] We treat the petition as a complaint for a writ of superintending control over the State Bar of Michigan, within our original jurisdiction pursuant to GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219. We further interpret the petition as seeking an order from this Court relieving the plaintiff of the obligation of paying the pro rata portion of his State Bar dues which relates to alleged "unlawful and unconstitutional activities".

Our role under these unusual circumstances is comparable to that of a trial court, responsible for making the appropriate factual determinations

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relief, for violation of the plaintiff's First Amendment religious freedoms. For that reason, and also because we are satisfied that our disposition of this case renders moot the freedom of religion issues intimated by Mr. Falk, we do not reach the merits of those asserted First Amendment infringements.

[4] Mr. Falk's briefs, but not his petition, also request that all members of the State Bar be notified, through the State Bar Journal, of their right to "opt into" this lawsuit and obtain like relief. The pendency of this action has been reported in the Michigan State Bar Journal. See 57 Mich State Bar J 224-225 (March, 1978). As of the date of the issuance of this opinion, no other member of the State Bar has "opted into" this suit. See GCR 1963, 209.

Mr. Falk, again in his briefs, and not his pleading, further requests that he be granted an attorney's charging lien on all of the dues that might be refunded in this action. It appears from the record that Mr. Falk has been excused of his obligation to pay any bar dues during the pendency of this action. This fact, coupled with the absence of any intervening plaintiffs, combine to result in the generation of no pool of bar dues refunds upon which such a lien could be imposed. Instead, our decision today requires Mr. Falk to pay that portion of his excused bar dues which relates to the constitutional purposes of the bar.

It should also be noted that this action was filed by Mr. Falk solely on his own behalf. He has expressed his belief that a Michigan Court of Appeals decision, *Ball v Detroit,* 84 Mich App 383, 398; 269 NW2d 607 (1978), authoritatively precluded the filing of an original class action in this Court in this case. Because of Mr. Falk's decision to not so proceed, we are not presented with any issue relating to the applicability of the Court of Appeals *Ball* decision in this action, and we therefore intimate no opinion as to the correctness of the plaintiff's understanding of *Ball.*

and applicable conclusions of law in reaching a judgment resolving the claims presented.

Subsequent to the filing of Mr. Falk's petition, this Court entered an order appointing former Judge Maurice E. Schoenberger to conduct a hearing and make findings of fact on the issues presented in this case. 402 Mich 960 (1978).

On June 5 and 6, 1978, the hearing was held, and both parties presented testimony relating to the various activities and functions of the State Bar. A transcript of the hearing is part of the present record. On September 29, 1978 Judge Schoenberger submitted his report to this Court. The report summarizes the presentations of the State Bar and Mr. Falk, lists the exhibits received into evidence at the hearing, and concludes that there are no controverted factual matters which require resolution.

Thereafter, plaintiff Falk filed a brief, a reply brief, and a supplemental reply brief. The defendant State Bar filed a brief in opposition and a motion to file an answer to plaintiff's supplemental reply brief which contained the answering brief. All of this material has been considered by this Court. Finally, pursuant to our order of April 6, 1979 oral arguments were heard on June 5, 1979. 406 Mich 1117 (1979).

A review of the record establishes certain salient facts relating to plaintiff Falk's claim. One of those uncontroverted facts is that the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, compels all licensed attorneys to associate in and provide financial support for the integrated State Bar. Another uncontroverted fact is that the State Bar engages in various lobbying efforts in the Legislature, and that such efforts are financed, at least in part, by

the compulsorily exacted dues of the bar's members. It is likewise undisputed that compulsory bar dues are used to finance other activities which plaintiff contends are non-regulatory in nature, such as the Prepaid Legal Services programs, Lawyer Referral Service programs, the Lawyer Placement Service, and the Client Security Fund.

B

The integrated State Bar of Michigan was legislatively authorized by 1935 PA 58.[5] Thereafter, this Court, in cognizance of the legislation and pursuant to its own inherent power to regulate the practice of law in this state,[6] entered an order

[5] That act provided, in its entirety:

"AN ACT to create the state bar of Michigan; and to authorize the supreme court to provide for the organization, regulation and rules of government thereof.

"*The People of the State of Michigan enact:*

"Sec. 1. There is hereby created an association to be known as the state bar of Michigan, the membership of which shall consist of all persons in the state now or hereafter regularly licensed to practice law in this state.

"Sec. 2. The supreme court is hereby authorized to provide for the organization and regulation of the state bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein, which dues shall not exceed five dollars per annum, nonpayment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members. Under such regulations and restrictions as the supreme court may prescribe, the power of subpoena may be conferred upon the association or its officers and committees for the purpose of aiding in the cases of discipline, suspension or disbarment; the rules promulgated by the supreme court and the proceedings and records of the state bar association to be published by the judicial council of Michigan and in the Michigan reports and advance sheets thereof."

See also 1947 PA 34; 1948 CL 601.48, 601.61, 691.51, 691.52; 1961 PA 236, §§ 901, 904; MCL 600.901; MSA 27A.901; MCL 600.904; MSA 27A.904.

[6] See Const 1963, art 6, § 5; *In the Matter of Mills, an Attorney,* 1 Mich 392, 393-394 (1850); *In re Hartford,* 282 Mich 124; 275 NW 791 (1937); *In re Schlossberg v State Bar Grievance Board,* 388 Mich 389, 395; 200 NW2d 219 (1972).

organizing, and promulgating rules concerning, the integrated bar.[7]

Section 1 of the first Supreme Court Rules Concerning the State Bar provided:

"The State bar of Michigan is the association of the members of the bar of this State, organized pursuant to powers of the Supreme Court over the bar of the State. The association shall, under these rules, aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this State."[8]

This original declaration of the purposes of the integrated bar has not been materially altered by any restatement in the subsequent 44 years.[9]

At all times since the formation of our integrated State Bar, all actively practicing lawyers in this state have been required to be members of,[10] and pay dues to,[11] that organization.

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[7] 273 Mich xxxv (1935).

[8] *Id.*

[9] See 340 Mich xxxviii (1954) for the text of current State Bar Rule 1.

It is here worthwhile to consider the analysis of the integrated bar's purposes which was expressed by its first president, Roberts P. Hudson, in his "Message from the President" which appeared in 15 Mich State Bar J 7-8 (1936):

"Your organization is designed not only for the benefit and betterment of its members, but primarily for the public at large who require the services of the profession. It must never be subservient to political dictation or intimidation, nor control from outside its membership. It cannot represent the interests of any group or political faith. It must not draw distinctions of color, race or creed. It must not submit to politically minded leadership. It must not stand aloof from its membership. It must purge itself of the unfit. It must not recognize geographic boundaries. It is now and must remain democratic, independent and representative of the best ideals of citizenship."

[10] Supreme Court Rules Concerning the State Bar of Michigan, §§ 2 and 3; now State Bar Rules 2, 3.

[11] Supreme Court Rules Concerning the State Bar of Michigan, § 4; now State Bar Rule 4.

There can be no question that since 1935 the privilege of practicing law in this state has been conditioned upon association with, and financial support of, the integrated State Bar of Michigan compelled by the state.

II. RELEVANT UNITED STATES SUPREME COURT DECISIONS

Our analysis of Mr. Falk's claim under the First Amendment is controlled, of course, by the applicable decisions of the United States Supreme Court. We therefore here undertake the task of presenting our understanding of certain United States Supreme Court decisions which are implicated by Mr. Falk's claims and the State Bar's response.

A. Hanson, Street, and Lathrop

In *Railway Employes' Dep't v Hanson,* 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956), non-union employees of a railroad brought suit in a Nebraska state court against the railroad and various unions representing the railroad's employees seeking to enjoin anticipated enforcement of a union shop[12] agreement entered into between the railroad and the unions. The contract required that all employ-

[12] A union shop agreement requires that all affected employees must actually join the union, maintain their membership, and pay union dues, as a condition of their employment.

An agency shop agreement is one under which affected employees are not required to actually become members of the union, but are required to pay "service fees" bearing a relationship to union dues to help defray the collective bargaining costs of the agent-union which acts as the exclusive bargaining agent of all affected employees, union members and non-members alike. See, generally, 48 Am Jur 2d, Labor and Labor Relations, §§ 12-20, 355-356, 361; pp 86-93, 273-275, 278-279; 48A Am Jur 2d, *id.,* § 1904, p 324. See also *Abood v Detroit Board of Education, supra,* 431 US 217, fn 10.

ees of the railroad become members of the specified union as a condition of their employment.

The union shop agreement was permissively authorized by the Federal Railway Labor Act. That act authorized union shop agreements "notwithstanding the law of 'any State' ". 351 US 228.

The Nebraska state constitution contained a "right to work" provision which outlawed union shop agreements.

The Nebraska trial court enjoined enforcement of the agreement. The Nebraska Supreme Court affirmed, holding that the union shop agreement violated the First Amendment in that it deprived employees of their freedom of association, and violated the Fifth Amendment,[13] in that it required members of the union to pay for activities above and apart from the costs relating to collective bargaining. The Nebraska Supreme Court concluded that the relevant provisions of the Railway Labor Act were unconstitutional under the Federal constitution, and therefore did not supersede the Nebraska state constitution's right to work provision. 160 Neb 669; 71 NW2d 526 (1955).

The United States Supreme Court, in an opinion authored by Justice Douglas, reversed. While the Court's decision in *Hanson* has been accorded varying interpretations in later cases, we believe that *Hanson* narrowly held: (1) that Congress' bare authorization of union shops was within the consti-

[13] US Const, Am V provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

tutional realm of legislative policy making under the Commerce Clause,[14] in pursuit of labor peace; and (2) that the *Hanson* record did not present any concrete, justiciable First Amendment issues relating to the union shop agreement's potential impairment of freedom of expression or forcing of ideological conformity, since the action had been commenced before the effective date of the agreement.[15] 351 US 238.

In *International Ass'n of Machinists v Street,* 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961), a union shop agreement entered into under the Railway Labor Act was challenged by objecting railroad employees.

The employees brought an action in a Georgia state court alleging that substantial portions of their compulsory union dues were being used to finance the campaigns of political candidates, and to advance the propagation of political and economic doctrines to which the plaintiffs were opposed. The agreement in *Street* was in effect at the time the action was brought and a concrete record was therefore presented.

The state trial court entered a judgment for the plaintiffs, enjoining enforcement of the agreement to the extent that it permitted the use of dues for political purposes and the propagation of ideologies which the plaintiffs opposed.

The Georgia Supreme Court affirmed. 215 Ga 27; 108 SE2d 796 (1959).

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[14] US Const, art I, § 8, cl 3.

[15] Of interest in Justice Douglas' *Hanson* opinion is the following statement:

"On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 US 238.

Justice Douglas later disavowed the analogy. *Lathrop v Donohue,* 367 US 820, 879; 81 S Ct 1826; 6 L Ed 2d 1191 (1961). See also *Abood v Detroit Board of Education, supra,* 431 US 246, fn 1 (Powell, J., concurring).

On appeal, the United States Supreme Court, in an opinion by Justice Brennan signed by four Justices, with two additional Justices concurring in the decisional analysis, reversed and remanded for further proceedings.

Justice Brennan's opinion considered the *Hanson* decision at length. The inadequacy of the *Hanson* record with respect to the justiciability of the possible First Amendment issues was emphasized. *Hanson* was read as only reaching the facial constitutionality of the Railway Labor Act's authorization of union shop agreements:

"In their brief in this Court the appellees in *Hanson* argued that First Amendment rights would be infringed by the enforcement of an agreement which would enable compulsorily collected funds to be used for political purposes. But there was nothing concrete in the record to show the extent to which the unions were actually spending money for political purposes and what these purposes were, nothing to show the extent to which union funds collected from members were being used to meet the costs of political activity and the mechanism by which this was done, and nothing to show that the employees there involved opposed the use of their money for any particular political objective. In contrast, the present record contains detailed information on all these points, and specific findings were made in the courts below as to all of them. When it is recalled that the action in *Hanson* was brought before the union-shop agreement became effective and that the appellees never thereafter showed that the unions were actually engaged in furthering political causes with which they disagreed and that their money would be used to support such activities, it becomes obvious that this Court passed merely on the constitutional validity of § 2, Eleventh of the Railway Labor Act on its face, and not as applied to infringe the particularized constitutional rights of any individual. On such a record, the Court could not have done more, consistently with the re-

straints that govern us in the adjudication of constitutional questions and warn against their premature decision. We therefore reserved decision of the constitutional questions which the appellees present in this case. We said: "It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record * * * if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. *We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." Id.* 351 US 238. See, also, 351 US 242 (concurring opinion). *Thus all that was held in Hanson was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents.* We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which 'all employees shall become members of the labor organization representing their craft or class.' *Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees."* (Footnote omitted, emphasis supplied.) 367 US 747-749.

Finding the *Street* record sufficiently concrete to present the issues not decided in *Hanson,* the Court went through an exhaustive analysis of the legislative histories of various Federal railroad labor acts, and then delivered the following construction of the Railway Labor Act's union shop provision:

"We give § 2, Eleventh the construction which achieves both congressional purposes when we hold, as we do, that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.

"We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. We do not understand, in view of the findings of the Georgia courts and the question decided by the Georgia Supreme Court, that there is before us the matter of expenditures for activities in the area between the costs which led directly to the complaint as to 'free riders,' and the expenditures to support union political activities. We are satisfied, however, that § 2, Eleventh is to be interpreted to deny the unions the power claimed in this case. The appellant unions, in insisting that § 2, Eleventh contemplates their use of exacted funds to support political causes objected to by the employee, would have us hold that Congress sanctioned an expansion of historical practices in the political area by the rail unions. This we decline to do. Both by tradition and, from 1934 to 1951, by force of law, the rail unions did not rely upon the compulsion of union security agreements to exact money to support the political activities in which they engage. Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." (Footnotes omitted.) 367 US 768-770.

The *Street* opinion emphasized that the objecting employees' cause of action arose under the Railway Labor Act, and not the First Amendment, because the exactions complained of were not authorized by that statute. 367 US 771.

The foregoing interpretations of *Hanson* and

Street clearly indicate that neither case was decided on First Amendment grounds, although the delimiting language of that provision arguably implicitly compelled the results reached.

In *Lathrop v Donohue,* 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961), a companion case to *Street,* Wisconsin attorney Lathrop brought an action in a state trial court to recover compulsorily exacted dues paid by him to the integrated Wisconsin State Bar, alleging the requirement to pay such dues to be unconstitutional under the First and Fourteenth Amendments[16] of the United States Constitution. The treasurer of the Wisconsin State Bar was named as the defendant.

The defendant demurred to the complaint on three grounds, one of which was that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer on all three grounds, and then entered an order dismissing the complaint without leave to amend, for the reason that no amendment could cure the defects in the merits of the plaintiff's case. See 367 US 868-869 (Black, J., dissenting).

On appeal to the Wisconsin Supreme Court, the judgment of the trial court was affirmed. 10 Wis 2d 230; 102 NW2d 404 (1960). The Court held that the trial court was without subject matter jurisdiction to entertain the plaintiff's complaint, but went on to treat the complaint as if it had been originally filed in the reviewing court.

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[16] Section 1 of the Fourteenth Amendment of the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We read the Wisconsin Supreme Court's opinion as determining that the state had a sufficient interest in the achievement of the stated objectives of the integrated bar to justify the minimal compulsion of individuals effected by the requirement of association in, and payment of dues to, the integrated Wisconsin bar.

The United States Supreme Court, on appeal, divided sharply and entered a plurality judgment affirming the Wisconsin Supreme Court. That affirmance was later explained in *Abood v Detroit Board of Education,* 431 US 209, 233, fn 29; 97 S Ct 1782; 52 L Ed 2d 261 (1977), as follows:

"In *Lathrop v Donohue,* 367 US 820, a companion case to *Street,* a lawyer sued for the refund of dues paid (under protest) to the integrated Wisconsin State Bar. The dues were required as a condition of practicing law in Wisconsin. The plaintiff contended that the requirement violated his constitutionally protected freedom of association because the dues were used by the State Bar to formulate and to support legislative proposals concerning the legal profession to which the plaintiff objected.

"A plurality of four Justices found that the requirement was not on its face unconstitutional, relying on the analogy to *Hanson.* And the plurality ruled, as had the Court in *Hanson,* that the constitutional questions tendered were not ripe, for the Court was nowhere 'clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities.' 367 US at 845-846. The other five Members of the Court disagreed with the plurality and thought that the constitutional questions ought to be reached. Three Justices would have upheld the constitutionality of using compulsory dues to finance the State Bar's legislative activities even where opposed by dissenting members. See *id.,* at 848 (Harlan, J., concurring in

judgment); *id.,* at 865 (Whittaker, J., concurring in result). The other two Justices would have held such activities to be unconstitutional. See *ibid.* (Black, J., dissenting); *id.,* at 877 (Douglas, J., dissenting).

"The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, *Lathrop* does not provide a clear holding to guide us in adjudicating the constitutional questions here presented."

It is clear from the foregoing that the United States Supreme Court did not resolve the merits of the constitutional issues raised by the plaintiff's arguments in *Lathrop.*

Although none of the three decisions discussed above was decided on First Amendment grounds, some analysis of them is necessary in order to fully understand the *Abood* decision, upon which Mr. Falk places considerable reliance.

B. Abood

In *Abood v Detroit Board of Education, supra,* the defendant board entered into a collective bargaining agreement with the Detroit Federation of Teachers, the certified exclusive representative of teachers employed by the board. The agreement implemented an agency shop[17] arrangement whereby all board-employed teachers were required to pay a service fee to the union as a condition of their employment, although they were not required to actually join the union.

Certain objecting teachers filed an action against the board, the union, and others, in circuit court

[17] See fn 12, *supra.*

alleging that the agency shop contract violated their First Amendment rights, in that the plaintiffs were opposed to collective bargaining in the public sector generally; and that the union was using the agency service fees to support ideological and political causes which were unrelated to collective bargaining activities and which were opposed by the plaintiffs.

The circuit court granted the defendants' motion for summary judgment,[18] finding the agency shop arrangement inoffensive to the plaintiffs' constitutional rights.

During the pendency of the plaintiffs' subsequent appeal from the summary judgment, this Court decided *Smigel v Southgate Community School Dist,* 388 Mich 531; 202 NW2d 305 (1972), which held that the Michigan public employment relations act (PERA), as then written, did not authorize or permit agency shop contracts in the public employment sphere.

The *Abood* application for leave to appeal then reached this Court. On the authority of *Smigel* the circuit court's summary judgment was vacated and the case was remanded to that court "for further proceedings consonant herewith", *sub nom Warczak v Detroit Board of Education,* 389 Mich 755 (1972).

The Legislature then amended PERA to expressly authorize agency shop contracts in the public sector. 1973 PA 25; MCL 423.210(1); MSA 17.455(10)(1).

On remand to the circuit court, the defendants filed a new motion for summary judgment based on the premise that the PERA amendment autho-

[18] The motion was brought pursuant to GCR 1963, 117.2(1), on the ground that the opposing party had failed to state a claim upon which relief could be granted.

rizing agency shops should be given retroactive effect (thereby effectively reversing *Smigel).* The circuit court granted the new summary judgment motion.

On appeal to the Michigan Court of Appeals, the trial court was reversed. *Abood v Detroit Board of Education,* 60 Mich App 92; 230 NW2d 322 (1975). The Court of Appeals held that the legislative amendment to PERA concerning agency shop agreements was prospective only. This holding would have been dispositive of the *Abood* case, since *Abood* involved a pre-PERA amendment agency shop agreement.[19]

However, the Court of Appeals went on to frame the following issue at 60 Mich App 98:

"Does the agency shop clause violate plaintiffs' First and Fourteenth Amendment rights securing freedom of speech and freedom of association?"

The Court of Appeals then discussed the United States Supreme Court's decisions in *Hanson* and *Street* and concluded:

"We have before us then, two powerful countervailing public policies. We are asked, on the one hand, to preserve freedom of expression, and, on the other, to promote labor stability. But freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded. This is particularly true where, as here, employees are compelled by the government to support the collective bargaining activities of an organization which they prefer not to join. Justice Douglas expressed this concern well in his concurring opinion in *Street:*

" 'If an association is compelled, the individual should

[19] See the United States Supreme Court's analysis on this point in *Abood v Detroit Board of Education,* 431 US 209, 216, fn 9; 97 S Ct 1782; 52 L Ed 2d 261 (1977).

not be forced to surrender any matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; and he should not be required to finance the promotion of causes with which he disagrees.' 367 US at 776 * * *.

"Therefore, we conclude that the agency shop clause, as prospectively authorized by the amendment to MCL 423.210; MSA 17.455(10), could violate plaintiffs' First and Fourteenth Amendment rights." 60 Mich App 100.

The record presented was, however, found to be inadequate to merit relief:

"To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection." 60 Mich App 102.

This Court subsequently denied leave to appeal from the Court of Appeals decision. 395 Mich 755-756 (1975).

On appeal to the United States Supreme Court, the judgment of the Michigan Court of Appeals was vacated and the case was remanded to the trial court for further proceedings.

The majority opinion framed the following issue:

"The issue before us is whether [the agency shop] arrangement violates the constitutional rights of government employees who object to public-sector unions

as such or to various union activities financed by the compulsory service fees." *Abood v Detroit Board of Education,* 431 US 209, 211.

The majority observed that "[t]o compel employees financially to support their collective-bargaining representative has an impact on their First Amendment interests", 431 US 222, and then considered the applicability of *Hanson* and *Street* to the *Abood* facts:

"The distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model. To take but one example, there has been considerable debate about the desirability of prohibiting public employee unions from striking, a step that the State of Michigan itself has taken [MCL 423.202]. But although Michigan has not adopted the federal model of labor relations in every respect, it has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. As already stated, there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act. The only remaining constitutional inquiry evoked by the appellants' argument, therefore, is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not." (Footnotes omitted.) 431 US 229.

Shortly thereafter the Court said:

"The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights. Even those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned

with its policy implications agree that '[t]he union security issue in the public sector * * * is fundamentally the same issue * * * as in the private sector * * *. No special dimension results from the fact that a union represents public rather than private employees.' Wellington & Winter, The Unions and the Cities (1971), pp 95-96. We conclude that the Michigan Court of Appeals was correct in viewing this Court's decisions in *Hanson* and *Street* as controlling in the present case insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." 431 US 232.

After the Court determined that the *Abood* record did not permit avoidance of the First Amendment issues raised, the following analysis and conclusion were stated:

"Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. *E.g., Elrod v Burns,* 427 US 347, 355-357 [96 S Ct 2673; 49 L Ed 2d 547 (1976)] (plurality opinion); *Cousins v Wigoda,* 419 US 477, 487 [95 S Ct 541; 42 L Ed 2d 595 (1975)]; *Kusper v Pontikes,* 414 US 51, 56-57 [94 S Ct 303; 38 L Ed 2d 260 (1973)]; *NAACP v Alabama ex rel Patterson,* 357 US 449, 460-461 [78 S Ct 1163; 2 L Ed 2d 1488 (1958)]. Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. *E.g., Elrod v Burns, supra,* at 357-360, and cases cited; *Perry v Sindermann,* 408 US 593 [92 S Ct 2694; 33 L Ed 2d 570 (1972)]; *Keyishian v Board of Regents,* 385 US 589 [87 S Ct 675; 17 L Ed 2d 629 (1967)]. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unre-

lated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

"One of the principles underlying the Court's decision in *Buckley v Valeo,* 424 US 1 [96 S Ct 612; 46 L Ed 2d 659 (1976)], was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals,' *id.,* at 22, the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interests,' *id.,* at 23.

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See *Elrod v Burns, supra,* at 356-357; *Stanley v Georgia,* 394 US 557, 565 [89 S Ct 1243; 22 L Ed 2d 541 (1969)]; *Cantwell v Connecticut,* 310 US 296, 303-304 [60 S Ct 900; 84 L Ed 1213; 128 ALR 1352 (1940)]. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd of Ed v Barnette,* 319 US 624, 642 [63 S Ct 1178; 87 L Ed 1628; 147 ALR 674 (1943)].

"These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso v Watkins,* 367 US 488 [81 S Ct 1680; 6 L Ed 2d 982 (1961)], or to associate with a political party, *Elrod v Burns, supra;* see 427 US, 363-364, fn 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may

oppose as a condition of holding a job as a public school teacher." (Footnotes omitted.) 431 US 233-235.

With reference to the issue framed by the United States Supreme Court, p 101, *supra, we* read *Abood* as holding: (1) that, as in *Hanson,* the State of Michigan's authorization of agency shop agreements in the public sector served a sufficiently compelling state interest in the achievement of labor stability to permit impingement on public employees' First Amendment rights to the extent of requiring payment of service fees for purposes germane to the collective bargaining duties of the teachers' union; and (2) that to the extent that agency fees were exacted and used for purposes beyond or apart from those activities related to collective bargaining, the plaintiffs had stated a claim upon which relief could be granted under the First Amendment.[20]

[20] The Court drew no lines between the permissible and the impermissible, 431 US 236, and further clarified the context in which its decision was made:

"All that we decide is that the general allegations in the complaints, if proved, establish a cause of action under the First and Fourteenth Amendments." 431 US 237.

This language suggests that as to the compulsion of service fees for activities relating to collective bargaining, the complaints in *Abood* failed to state a claim upon which relief could be granted under the First and Fourteenth Amendments. As to the compulsion of service fees for other purposes, the plaintiffs' complaint did state a claim, and further proceedings going to the proof of that claim were required before a delineation of what activities were constitutionally permissible could be made. Established First Amendment principles indicate that, once an individual has stated a valid claim under the First Amendment, the burden of proof shifts to the state to show the infringement on individual rights that is claimed is unavoidable in order to accomplish a compelling state interest. See, *e.g., Elrod v Burns,* 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

As previously stated, in the present case, this Court sits, under these unusual circumstances, as the trial court. Indeed, our order appointing a fact-finder for the purpose of conducting a hearing on the factual matters here involved necessarily implicitly recognized that Mr. Falk's pleading stated a claim in First Amendment terms which

With the foregoing understanding of *Abood* and its progenitors in mind, we now proceed to our analysis of the present case.

III. ANALYSIS

A. Controlling Principles

While the decision in *Abood* is of primary significance to the instant case, it does not offer a clear statement of the controlling framework for analysis of First Amendment issues of the kind here presented. We therefore turn to the earlier United States Supreme Court decision in *Elrod v Burns,* 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976), which does.

In *Elrod,* non-civil service employees of the Cook County, Illinois, Sheriff's Department challenged the constitutionality of the longstanding patronage system in that county. Under that system, employees were required to become affiliated with or sponsored by the political party in control of the office of Sheriff, or face the likelihood of being discharged.

Justice Brennan's lead opinion in the plurality decision neatly summarized the controlling First Amendment principles:

"Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. *Keyishian* and *Perry,* however, not only serve to establish a presumptive prohibition on infringement, but also serve to dispose of one suggested by petitioners' reference to this Court's affirmance by an equally di-

required development of an appropriate factual record. See 402 Mich 960 (1978).

vided court in *Bailey v Richardson,* 341 US 918 [71 S Ct 669; 95 L Ed 1352] (1951), *aff'g* 86 US App DC 248; 182 F2d 46 (1950). That is the notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. *Perry,* however, emphasized that '[f]or at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.' 408 US, at 597. *Perry* and *Keyishian* properly recognize one such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. ' "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." ' *Keyishian v Board of Regents,* 385 US, at 605-606. 'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' *Sherbert v Verner,* 374 US 398, 404 [83 S Ct 1790; 10 L Ed 2d 965] (1963). ' "[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." ' *Sugarman v Dougall,* 413 US 634, 644 [93 S Ct 2842; 37 L Ed 2d 853 (1973)] (quoting *Graham v Richardson,* 403 US 365, 374 [91 S Ct 1848; 29 L Ed 2d 534 (1971)]).

"While the right-privilege distinction furnishes no ground on which to justify patronage, petitioners raise several other justifications requiring consideration. Before examining those justifications, however, it is necessary to have in mind the standards according to which their sufficiency is to be measured. It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v Valeo,* 424 US, at 64-65; *NAACP v Alabama [ex rel Patterson],* 357 US [449, 460-461; 78 S Ct 1163; 2 L Ed 2d 1488 (1958)]. 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government ac-

tion, but indirectly as an unintended but inevitable result of the government's conduct. * * *' *Buckley v Valeo, supra,* at 65. Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper v Pontikes,* 414 US, at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Buckley v Valeo, supra,* at 94; *Williams v Rhodes,* 393 US [23, 31-33; 89 S Ct 5; 21 L Ed 2d 24 (1968)]; *NAACP v Button,* 371 US 415, 438, 444 [83 S Ct 328; 9 L Ed 2d 405 (1963)]; *Bates v Little Rock,* 361 US 516, 524 [80 S Ct 412; 4 L Ed 2d 480 (1960)]; *NAACP v Alabama [ex rel Patterson], supra,* 464-466; *Thomas v Collins,* 323 US 516, 530 [65 S Ct 315; 89 L Ed 430 (1945)]. In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. *Sherbert v Verner, supra,* [374 US] at 406. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, see *United Public Workers v Mitchell,* 330 US [75, 96; 67 S Ct 556; 91 L Ed 754 (1947)], and the government must 'emplo[y] means closely drawn to avoid unnecessary abridgment. * * *' *Buckley v Valeo, supra,* at 25. '[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.' *Kusper v Pontikes, supra,* at 59 (citations omitted). See *United States v Robel,* 389 US 258 [88 S Ct 419; 19 L Ed 2d 508 (1967)]; *Shelton v Tucker,* 364 US 479 [81 S Ct 247; 5 L Ed 2d 231 (1960)]. In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss

of constitutionally protected rights." (Footnotes omitted.) *Elrod v Burns,* 427 US 360-363. See, also, *Abood v Detroit Board of Education,* 431 US 259-261 (Powell, J., concurring in judgment).

As the above quoted passage states, First Amendment protections are not absolute. The compelling interests of government may justify restrictions on the First Amendment freedoms of individuals.

It remains to be determined how, if at all, the arguments of the parties before us are to be resolved by application of the above-stated constitutional principles.

B. Arguments

The essence of Mr. Falk's First Amendment argument is that *Abood* mandates a ruling in this case that he cannot be compelled to pay dues which are used for non-regulatory activities of the State Bar, particularly lobbying and other political activities.

The State Bar responds that *Abood* is foremost a labor law case, and is not applicable in the present action. The State Bar is not a labor organization, but is rather a "public body corporate" that operates as a public or state agency. Further, the State Bar argues that the grant of permission to practice law is a privilege and not a right. The state may burden this privilege with conditions. Finally, the State Bar contends that assuming *arguendo* the applicability of *Abood* here, all that case requires is that dues be "imposed for purposes germane to the organization and existence of the State Bar", which includes those purposes stated in State Bar Rule 1.

As shall be hereinafter developed, we find the

plaintiff's arguments and authorities to be the more convincing.

C. Holding

Certainly *Abood* and the case before us can be distinguished. However, neutral analysis reveals that the factual differences in the two cases lead to the conclusion that the First Amendment principles announced and applied to the facts in *Abood* impact with even greater force upon the present case.

In *Abood,* the United States Supreme Court found certain attributes of an agency shop agreement, permissively authorized by state law, potentially violative of the objecting teachers' First Amendment rights. While all teachers must be state-certified in Michigan,[21] they are not required to join any state-controlled organization. Indeed, the teachers in *Abood* could have avoided the violation of their First Amendment rights by seeking employment with an unorganized Michigan school district, or with unorganized private or parochial Michigan schools. While the state had authorized school districts and teacher organizations to voluntarily enter agency shop contracts, the state has never required individual teachers to associate with and pay dues to a teacher's association as a condition of obtaining and maintaining certification as a teacher in Michigan.

On the other hand, we are here concerned with the propriety of state-compelled association in, and financial support of, a "public body corporate" as a condition precedent to the pursuit of one's liveli-

[21] See MCL 380.1531 *et seq.;* MSA 15.41531 *et seq.;* MCL 388.551, 388.553; MSA 15.1921, 15.1923.

hood as an attorney in this state, in any active legal capacity. No alternatives, even unpalatable ones, exist for the objecting individual attorney.

Mr. Falk's petition does not specify which of his First Amendment rights are offended. However, we are satisfied that his pleading raises issues involving his rights to freedom of association[22] and freedom of belief.[23] The State of Michigan's requirement of association with, and financial support of, the integrated State Bar clearly has a significant impact on these rights. See *Abood v Detroit Board of Education,* 431 US 222.

First Amendment guarantees are made applicable to the several states through the Due Process Clause of the Fourteenth Amendment. See *Gitlow v New York,* 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925); *De Jonge v Oregon,* 299 US 353, 364-365; 57 S Ct 255; 81 L Ed 278 (1937). It is well established that state action which infringes on First Amendment rights can only be tolerated where such infringement is unavoidably required in order to further a "compelling",[24] "para-

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[22] See *Abood v Detroit Board of Education,* fn 2 *supra,* 431 US 233; *Cousins v Wigoda,* 419 US 477, 487; 95 S Ct 541; 42 L Ed 2d 595 (1975); *Kusper v Pontikes,* 414 US 51, 56-57; 94 S Ct 303; 38 L Ed 2d 260 (1973).

[23] See *Abood v Detroit Board of Education,* fn 2 *supra,* 431 US 234-235; *Stanley v Georgia,* 394 US 557, 565; 89 S Ct 1243; 22 L Ed 2d 542 (1969); *Cantwell v Connecticut,* 310 US 296, 303-304; 60 S Ct 900; 84 L Ed 1213; 128 ALR 1352 (1940); *Wooley v Maynard,* 430 US 705, 714-715; 97 S Ct 1428; 51 L Ed 2d 752 (1977). See also *Elrod v Burns,* 427 US 347, 355-356; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

[24] See *Bates v Little Rock,* 361 US 516, 524; 80 S Ct 412; 4 L Ed 2d 480 (1960); *NAACP v Button,* 371 US 415, 438-439; 83 S Ct 328; 9 L Ed 2d 405 (1963); *Williams v Rhodes,* 393 US 23, 30-32; 89 S Ct 5; 21 L Ed 2d 24 (1968); *Storer v Brown,* 415 US 724, 729; 94 S Ct 1274; 39 L Ed 2d 714 (1974); *American Party of Texas v White,* 415 US 767, 780; 94 S Ct 1296; 39 L Ed 2d 744 (1974); *Wooley v Maynard,* 430 US 705, 715-716; 97 S Ct 1428; 51 L Ed 2d 752 (1977). See also *Ohralik v Ohio State Bar Ass'n,* 436 US 447, 462; 98 S Ct 1912; 56 L Ed 2d 444 (1978).

mount",[25] or "vital"[26] state interest. Unquestionably, the state has very strong, even compelling, interests in the regulation of, and maintenance of high standards in, the legal profession, "since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts' ". See *Ohralik v Ohio State Bar Ass'n,* 436 US 447, 460; 98 S Ct 1912; 56 L Ed 2d 417 (1978) (citation omitted). Nonetheless, and although the permission to practice law may rightly be regarded as a privilege, the state's intrusion on First Amendment rights of all individuals, including attorneys, must be consciously and scrupulously minimized.

We therefore conclude that, in light of the controlling First Amendment principles as hereinabove discussed, the State of Michigan, through the combined actions of this Court, the Legislature, and the State Bar, may compulsorily exact dues, and require association, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting individual attorneys. See *Abood v Detroit Board of Education, supra; Elrod v Burns, supra,* at 360-363 (Brennan, J., plurality opinion); see also cases cited in fns 24, 25 and 26.

IV. FINDINGS, CONCLUSIONS, AND RELIEF

Having considered the pleadings, the briefs, the oral arguments of the parties, the report of the

[25] See *Elrod v Burns,* 427 US 347, 362; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (Brennan, J., plurality opinion).

[26] *American Party of Texas v White,* fn 24 *supra,* 415 US 780-781. See also *Elrod v Burns,* fn 25 *supra,* 427 US 360-363; *Buckley v Valeo,* 424 US 1, 93-94; 96 S Ct 612; 46 L Ed 2d 659 (1976).

fact-finder, and other relevant material and authorities, we make the following findings of fact and conclusions of law:[27]

1. That the original pleading in this action, entitled "Petition for Special Relief", is in the nature of a complaint for a writ of superintending control, and is within this Court's original jurisdiction pursuant to GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219;

2. That plaintiff Allan Falk is, and has been, like all active attorneys in this state, required as a matter of law to be a member of the State Bar of Michigan and is, and has been, required to pay dues in support of that organization;

3. That Mr. Falk has been excused of the obligation to pay any dues to the State Bar of Michigan during the pendency of this action;

4. That the State Bar of Michigan engages in many activities which the plaintiff's dues have been, and would now be, used to support, and with which the plaintiff must associate by virtue of his compulsory membership in the State Bar;

5. That Mr. Falk's Petition for Special Relief and his briefs in support thereof express his objec-

[27] As previously indicated, fn 4 *supra,* no other member of the State Bar has sought to intervene in this case, although pendency of this action was reported in the Michigan State Bar Journal. See 57 Mich State Bar J 224-225 (March, 1978).

We realize that, to the extent that this decision has retroactive application, restitution of improperly used bar dues would be the appropriate equitable remedy. However, we are equally aware of the pertinence here of the maxim of equity that "equity aids the vigilant, not those who sleep on their rights". See *Zoellner v Zoellner,* 46 Mich 511, 515; 9 NW 831 (1881); *Douglass v Douglass,* 72 Mich 86, 98-99; 40 NW 177 (1888); *Henderson v Connolly's Estate,* 294 Mich 1, 18-20; 292 NW 543 (1940); *Gustin v Alpena Power Co,* 307 Mich 241, 244; 11 NW2d 873 (1943). We find this principle particularly forceful in the present circumstances, since the group of persons affected by this decision is composed of trained and qualified lawyers, presumably well-informed on such matters, and certainly on notice as to the pendency of this action.

tions, on First Amendment grounds and otherwise, to various activities of the State Bar of Michigan, and that such petition states a claim upon which relief can be granted under the First Amendment;

6. That the controlling United States Supreme Court decisions relevant to Mr. Falk's claim mandate that the State of Michigan, through its various branches of government and its agencies, cannot require association with, or payment of dues in support of, the State Bar of Michigan for other than those duties and functions of the State Bar which serve compelling state interests and which cannot be achieved by means less intrusive upon the First Amendment rights of objecting attorneys;

7. That under the controlling United States constitutional principles, once an individual has stated a claim upon which relief can be granted under the First Amendment, the burden is on the state or its agency to show the existence of a compelling interest which cannot be achieved with less intrusion upon the affected individual's First Amendment rights;

8. That the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public are, in the context of the present challenge, purposes in which the State of Michigan has a compelling interest which will justify unavoidable intrusions on the First Amendment rights of objecting attorneys;

9. That the record in this case establishes that the defendant State Bar of Michigan has shown a compelling state interest in the following functions of the State Bar, and that such functions cannot be accomplished by means less intrusive on the First Amendment rights of an objecting attorney:

A. All regulatory activities, including attorney

disciplinary proceedings as provided in GCR 1963, 950 *et seq.,* to the extent that such activities are funded out of compulsorily exacted State Bar dues; all licensing-related activities such as those provided for in State Bar Rule 15;

B. All continuing legal education activities presently engaged in by the State Bar which are directed to the maintenance of high professional standards among Michigan attorneys;

C. The publication of the Michigan Bar Journal insofar as that publication is primarily devoted to informing the members of the State Bar on current matters relating to regulation of the profession and the improvement of professional standards;

D. The Client Security Fund insofar as it represents a discharge of a duty to protect the public from recreant members of the profession. The cost of this fund is properly distributed among all members of the profession regardless of individual predilections toward or opportunity for wrongdoing. Support of the Client Security Fund is but a logical and necessary extension of our admittedly imperfect regulatory and licensing standards and is a duty necessarily imposed on a profession committed to the public interest;

E. Those activities designed to educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally. This should not be read to include those outreach programs designed to educate the public concerning specific legislation or promoting specific viewpoints. Permissible activities in this area include the publication and distribution of such booklets as "You and the Law", and the "Juror's Manual";

F. Activities designed to make legal services

more accessible, including the Lawyer Referral Service and support for those legal aid organizations serving the indigent. These activities represent a part of the service every attorney owes the public and hence compelling support for them cannot be deemed constitutionally obnoxious.

10. That the political and legislative activities of the bar, which constitute a function wholly separable from its other activities, violate petitioner Falk's First Amendment rights of association and expression.

The record clearly discloses the extent of the State Bar's legislative and lobbying activities. These include but are not limited to: rendering technical advice to the Legislature; testifying before the State Officers Compensation Commission; adopting and publishing official positions on proposed legislation; and retaining a professional lobbyist. To the extent these efforts are funded by mandatory dues, the State Bar impermissibly infringes on the First Amendment freedoms of its individual members.

The ultimate objective of these political and legislative activities is to influence public decision-making. Even if specific legislative-political goals can be justified as advancing the public interest or improving the administration of justice, compelled support and association to further these activities is not constitutionally acceptable. The "public interest" and the "advancement of jurisprudence" are not unitary concepts subject to a single interpretation. Disagreements regarding legislative or other policy choices arise not only because they result in differing practical effects on individuals, but more importantly because they reflect differing ideological approaches to the subject matter. Such ideological beliefs, and association to promote or

oppose such beliefs, lie at "the core of those activities protected by the First Amendment". *Elrod v Burns, supra,* 356.

That petitioner Falk is entitled to express his disagreement within the organizational framework does not wholly diminish the fact that he is being forced to associate for purposes contrary to his beliefs. The focus is not upon freedom of expression within the organization, but rather upon whether the state can justify the forced association in the first instance.

We do not believe that for First Amendment purposes a distinction can be drawn between legislation aimed at issues loosely termed procedural, such as court reorganization and rules of evidence in product liability actions and the like, and those termed substantive. In either category of legislation, the choice of one approach over another is necessarily premise-based and thus subject to contrary opinion or belief. Compelling a dissenter to finance the encouragement of such First Amendment related legislation and associate with its advancement, whether or not he or she opposes it, cannot be justified in the absence of an overriding state need and then only by means narrowly drawn.

In light of alternative methods available to the Legislature to obtain expert legal advice as to both "substantive" and "procedural" legislation, we see no compelling interest to justify the State Bar's legislative activities supported by compulsory dues. Specifically, the Legislature possesses subpoena power, MCL 4.101; MSA 2.181, and has access to the Legislative Service Bureau, the Attorney General, and House and Senate counsel, as well as committee counsel. Additionally, there are a number of voluntary and self-supporting sections

within the State Bar from whom the Legislature can seek input on legal questions. Further, while they cannot be compelled to do so, individual members may be given the opportunity and may choose to voluntarily support legislative and lobbying activities undertaken by the State Bar.

11. That similarly the broad category of State Bar activities designed to further the commercial and economic interests of the members cannot survive First Amendment scrutiny. Unlike the union members in *Abood,* attorneys cannot be categorized as a group with homogeneous economic interests. In fact, the economic interests of different attorneys often are in direct conflict. Such conflicts, and the requirement that members contribute to an association which may, therefore, undercut their self-interests, cannot be brushed aside as something that will be ameliorated by the "democratic process" within the bar. Further, and more important, furtherance of the commercial interests of attorneys, just as those of doctors or accountants, can hardly be found to constitute a compelling governmental interest. Since the end itself cannot be justified, the means designed to serve that end, such as the Lawyer Placement Service, must fall in the face of a First Amendment challenge.

12. That as to all other State Bar of Michigan activities, the present record fails to demonstrate a compelling state interest which cannot be served by means less intrusive on the First Amendment rights of an objecting individual attorney.

However, apart from those permissible activities discussed in paragraph 9, the State Bar's legislative and lobbying activities, and those activities solely designed to further the commercial interests of its membership, we acknowledge that determi-

nation of the state interest in the remainder of the challenged State Bar activities and whether that interest, if compelling, is served by narrowly drawn means is made difficult, indeed impossible, by a most inadequate record.

Consequently, we would order:

A. That the State Bar of Michigan be enjoined from disbursing compulsorily exacted dues for any functions or purposes other than those described in paragraphs 9A-9F effective as of October 1, 1981, the end of the State Bar of Michigan's fiscal year and that, in the interim, the bar poll its members to identify those willing to support such other activities on a voluntary basis and permit solicitation of contributions from those members for these purposes.

The bar would be permitted, in the interim, to present further facts to this Court, through a master, only as to those activities for which we have concluded the record is inadequate for the purpose of demonstrating an as yet unrevealed compelling interest unavoidably served by mandatory dues.

B. That the State Bar of Michigan determine the proportion of dues paid by each member which does not relate to the above-declared constitutional purposes and functions, and that the amount of dues as of and after October 1, 1981 be reduced accordingly.

C. That plaintiff Allan Falk be advised of the portion of his excused bar dues which relates to the purposes of the State Bar described in paragraphs 9A-9F, and that he pay to the State Bar that amount within 30 days after he is so notified.

FITZGERALD and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

WILLIAMS, J. The principal issue in this case is whether an "integrated" state bar with mandatory membership of all attorneys in the state can perform specified activities, financed in part by compulsory dues, without violating First Amendment rights of those dues paying member attorneys not in accord with such activities. The complained-of activities specified are the following: (1) lobbying and other political activity, (2) compulsory membership in Young Lawyers Section, (3) promoting prepaid legal services, (4) lawyer referral, (5) lawyer placement, (6) Client Security Fund, (7) public education about legal services, (8) funding of Lawyers Wives of Michigan and Children's Charter of Michigan activities, (9) giving and paying for social functions, including those where the Supreme Court Justices are guests of honor, (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court and other judicial salaries, and (11) sale of use of State Bar mailing roster.

After careful consideration of the authority delegated to the Michigan State Bar and the compelling state interest on the one hand, and the possible infringement of petitioner's First Amendment rights in the 11 specific instances on the other hand, this Court holds that there is no showing of an unconstitutional violation of petitioner's First Amendment rights with respect to the above items, excepting item 11 where we find an invasion of petitioner's right to privacy. We note there was no record reference to political activities, such as support of, or opposition to, partisan candidates and partisan issues, which would be offensive to both the State Bar Rules and the First Amendment.

I. FACTS

Petitioner is required by state law[1] and by court rule[2] to belong to and pay dues to the Michigan State Bar. It is petitioner's basic contention, culled from both his broad "Petition for Special Relief" and his tripartite pleadings (brief, reply brief and supplemental reply brief), that the use of his compulsory dues monies for the aforementioned State Bar sponsored activities occasions an unconstitutional infringement of his First Amendment rights

[1] 1935 PA 58. This act, in pertinent part, provided:

"AN ACT to create the state bar of Michigan; and to authorize the supreme court to provide for the organization, regulation and rules of government thereof.

"*The People of the State of Michigan enact:*

"Sec. 1. There is hereby created an association to be known as the state bar of Michigan, the membership of which shall consist of all persons in the state now or hereafter regularly licensed to practice law in this state.

"Sec. 2. The supreme court is hereby authorized to provide for the organization and regulation of the state bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein, * * * non-payment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members. * * *"

[2] Supreme Court Rules Concerning the State Bar of Michigan provide in pertinent part:

"RULE 2. MEMBERSHIP.

"Those persons who are licensed to practice law in this State on December 2, 1935, and those who shall become licensed thereafter to practice law in this State, shall constitute the membership of the State Bar of Michigan subject to the provisions of these rules."

"RULE 4. MEMBERSHIP DUES.

"(a) An active member's dues for each fiscal year (October 1 through September 30), payable at the State Bar's principal office by October 1 of each year, are:

"(1) $150, for a member admitted to practice 3 years or more (counting the fiscal year in which admission took place as a full year), admitted from another jurisdiction, or admitted under Board of Law Examiners Rule 5(D);

"(2) $90, for a member admitted to practice less than 3 years. For the fiscal year of admission, dues are $90 if admitted between October 1 and March 31, and $45 if admitted between April 1 and September 30."

because those activities are not in furtherance of the "regulation" of the bar.[3] Petitioner would therefore have us rule[4] that the only State Bar activities which constitutionally "regulate" the profession and thus sanction the use of his dues monies therefor, are those which relate to "regulation and discipline of the profession, continuing legal education, and related licensing functions", as well as "associated administrative and other overhead expenses".

II. GENERAL BACKGROUND

Petitioner's complaint is based essentially on the following line of reasoning:

(1) Authority over the integrated state bar derives from 1935 PA 58;

(2) Authority over the integrated state bar is

[3] In addition to his Federal First Amendment arguments (freedom of association, freedom of speech, freedom of religion, and right to privacy), petitioner's brief also discusses possible violations of the Federal Commerce Clause, US Const, art I, § 8, cl 3, and Const 1963, art 4, § 24 (title-body clause); art 4, § 30 (assent of two-thirds of each house of the Legislature required for appropriating public money for private purposes); and art 3, § 2 (separation of powers principle).

[4] This case was commenced as an original proceeding in this Court on November 30, 1977 when the petitioner filed his "Petition for Special Relief", naming the State Bar of Michigan as defendant. Acting on this petition, this Court subsequently appointed former Judge Maurice E. Schoenberger to conduct hearings and make findings of fact on the issues petitioner raised. 402 Mich 960 (1978). These hearings were held on June 5 and 6, 1978. Both parties presented testimony and exhibits relating to the various activities and functions of the State Bar, and Judge Schoenberger concluded that there were no controverted factual matters which required resolution.

We agree with Justice RYAN'S treatment of this petition as a complaint for writ of superintending control over the State Bar, within our original jurisdiction, GCR 1963, 851(6); MCL 600.215, 600.219; MSA 27A.215, 27A.219, and with his interpretation of the petition for special relief as a request that we relieve petitioner of the obligation of paying the pro rata portion of his State Bar dues which relates to the complained-of activities, except insofar as petitioner requests in his brief that the State Bar be required to remove his name from its "commercial solicitation mailing list".

confined to "regulation" of the legal profession; "regulation" is limited to the "regulation and discipline of the profession, continuing legal education, and related licensing functions", as well as "associated administrative and other overhead expenses", which do not include the 11 specified activities to which petitioner objects;

(3) Petitioner's First Amendment rights are infringed when the integrated state bar pursues activities other than "regulation" because the petitioner's dues payments may then help finance activities to which petitioner may be ideologically opposed or from which petitioner derives no direct pecuniary benefit;

(4) *Abood v Detroit Board of Education,* 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), supports petitioner's position.

As a consequence, this Court's inquiry necessarily must consider the following questions among others:

(1) Is the Supreme Court's authority over the integrated state bar derived exclusively from 1935 PA 58, or is it also derived from this Court's inherent power in the administration of justice?

(2) Is authority over the integrated state bar confined to "regulation" of the legal profession in the sense petitioner uses regulation or is the Supreme Court's power broader so as to cover some or all of the 11 specified activities pursued by the State Bar?

(3) What is the legal interplay between petitioner's asserted First Amendment rights and the state's compelling interest in this matter?

(4) What guidance is there for the present matter, where the state's compelling interest is in the improvement of the administration of justice and advancement in jurisprudence, from *Abood* where

the state's compelling interest was in labor peace through collective bargaining?

III. INHERENT POWER OF THE SUPREME COURT AND STATE BAR RULE 1

The keystone of petitioner's argument is his interpretation of the word "regulation" found in 1935 PA 58, the act which, in its own words, "created" the integrated State Bar in Michigan. According to petitioner, it is this "procreative engendering legislation" from which this Court derives its power to impose dues, and which limits the State Bar to "regulatory" purposes in expending dues monies.

In view of petitioner's assertions concerning both what he perceives to be the definitional perimeters of the word "regulation", and this Court's power respecting the legal profession of this state, we feel it would be advantageous, preliminary to our inquiry into petitioner's First Amendment claims, to examine the existent schema of legislative and judicial action regarding the integration of Michigan's Bar. In so doing we hope to shed some light on the proper scope of the State Bar's authority over the attorneys of this state, as well as set the stage for our consideration of the constitutional issues raised by petitioner.

The first action toward integration of the Michigan Bar was taken by the Legislature through enactment of 1935 PA 58. This act, by its terms, "created" an integrated State Bar in Michigan, *i.e.,* a bar organization in which membership and payment of dues is required as a condition of practicing law in the state.[5] This act also authorized this Court

[5] See fn 1, *supra.*

"to provide for the *organization and regulation* of the state bar of Michigan; to provide *rules and regulations concerning the conduct and activities of the association and its members;* the schedule of membership dues therein, * * * non-payment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members."[6] (Emphasis supplied.)

That same year this Court promulgated a set of rules for the organization of the State Bar, stating in § 16 of those rules that it did so "pursuant to the powers of the court over the bar of the State and the members thereof", 273 Mich xlv (1935). Section 1 of those rules outlined in broad terms the purposes of the State Bar.

"The association [State Bar of Michigan] shall, under these rules, aid in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this State." 273 Mich xxxv (1935).[7]

[6] The present version of this section is MCL 600.904; MSA 27A.904. There have been several substantive changes in this section, none of which, however, affect our discussion. The present version reads as follows:

"The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar."

[7] Section 1 of the State Bar Rules has undergone little change since its promulgation in 1935. In its present form it states, in relevant part:

"The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state." State Bar Rule 1, 340 Mich xxxviii (1954).

At this point we must recognize that petitioner has expressly disclaimed any assertion that the challenged activities are in violation of the State Bar's "internal constitution" (which we take to mean § 1 of the Rules Concerning the State Bar of Michigan, hereinafter sometimes called State Bar Rule 1 or Rule 1) and, apparently, would not contest the right of the State Bar to engage in these activities on behalf of voluntary contributors.[8] Petitioner having chosen, instead, to base his challenge to the objected-to activities on the First Amendment, it becomes unnecessary for us to dissect each of those activities in order to interpret precisely what falls within and what without the bounds of Rule 1. We therefore, for purposes of this case, will assume that the State Bar has authority under the lawfully delegated power of Rule 1 to perform the acts herein complained of. Nevertheless, since none of the complained-of State Bar activities were expressly provided for by either the Legislature in 1935 PA 58, or subsequent amendments to that section, or the judiciary in its rules concerning the State Bar, petitioner's constitutional challenge requires us to determine if these activities are constitutionally legitimate activities of the State Bar under the broad purposes enunciated in Rule 1. Of course, before we can undertake our First Amendment scrutiny, we must determine whether State Bar Rule 1 and the interests it advances are valid. It is to this consideration that we now turn.

In order to determine the validity of State Bar Rule 1, we must, to some extent, consider the respective powers of the Legislature and this Court

[8] In passing, we observe that if petitioner in referring to political activities had in mind the support of and opposition to partisan candidates and partisan issues, Rule 1 certainly does not sanction such activity, as the State Bar has properly recognized.

over attorneys of this state. In so doing, however, it would serve no useful purpose toward the resolution of this issue to become enmeshed in an abstract discussion of the precise measure of respective control that the Legislature and this Court could constitutionally exercise in this regard. It is sufficient for the purposes of our present discussion to recognize that courts have traditionally sought to harmonize their legitimate concerns with those of the Legislature. Thus while on the one hand courts are willing to acknowledge that the Legislature has a legitimate interest in the members of the bar because of its concern on behalf of the public interest and welfare, see *e.g., Button v Day,* 204 Va 547, 554; 132 SE2d 292, 297 (1963); *Detroit Bar Ass'n v Union Guardian Trust Co,* 282 Mich 707, 712; 281 NW 432 (1938), quoting from *In re Cannon,* 206 Wis 374, 397; 240 NW 441 (1932), the courts have been emphatic in recognizing their own peculiar and special interest in the conduct of attorneys since, as officers of the court by virtue of the practice of their profession (see GCR 1963, 908; MCL 600.901; MSA 27A.901), attorneys are " 'indispensable to the administration of justice and [are] intimate and peculiar in [their] relation to, and vital to the well-being of, the court' ". *Sams v Olah,* 225 Ga 497, 504; 169 SE2d 790, 798 (1969). See also *Button, supra,* 553-554; *In re Petition for Integration of the Bar of Minnesota,* 216 Minn 195, 199; 12 NW2d 515, 518 (1943). Thus courts have recognized in themselves an inherent power to regulate the practice of law and to supervise those engaged therein to the extent necessary for their proper functioning and generally find legislative regulation unconstitutional only when it tends to interfere with or impair the proper administration of judicial functions. *Guardian Trust Co, supra,* 713; *Olah, supra,* 501-502.

Thus in passing on the present conjunction of legislative and judicial action relating to the integration of the State Bar in Michigan, this Court has tempered its willingness to accord legislative enactments the proper degree of deference due a co-equal branch of government with a persistent insistence on its own inherent powers.[9] In *Ayres v Hadaway,* 303 Mich 589, 597-598; 6 NW2d 905 (1942), this Court stressed its own inherent power over attorneys of this state, while at the same time upholding the constitutionality of 1935 PA 58 against the contention that it violated due process since the court rules concerning the State Bar provided that inactive members of the bar were prohibited from practicing law. After citing several foreign jurisdictions on the subject of the inherent power of a court to regulate attorneys, this Court stated:

"In our opinion there is inherent power in the Supreme Court to regulate the qualifications of persons who may be permitted to practice law in this state. That the legislature has seen fit to adopt legislation [1935 PA 58] to this end does not make the act unconstitutional."

This Court reiterated, in more detail, essentially the same position almost two decades later when it held the State Bar's property in Lansing to be tax exempt public property in *State Bar of Michigan v Lansing,* 361 Mich 185, 194; 105 NW2d 131 (1960):

"The provisions of this act [1935 PA 58] are such as to clearly indicate that it was the intent of the legisla-

[9] In Michigan this inherent power derives in part from article 6, § 5 of our 1963 Constitution which states that:

"The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." See *In re Schlossberg,* 388 Mich 389, 395; 200 NW2d 219 (1972).

ture to provide for the organization of an agency that should function pursuant to rules and regulations prescribed by the Supreme Court for the purpose of performing, and assisting in the performance of *functions that, in the final analysis, pertain to the judiciary.* Clearly if such was not the intention there would have been no attempt to invest this Court with the powers of organization and regulations obviously contemplated by the language of the statute.

* * *

"These are matters [matters pertaining to the discipline, suspension, or disbarment of members of the profession and the fixing of ethical standards to be observed in the practice of law] that relate to the public welfare and protection. *Likewise, they are matters within the scope of the inherent power of the judiciary."* (Emphasis supplied.)

Because there has been legislative action on the subject, there is no necessity for this Court to now assert inherent power to integrate the Bar independent of or contrary to legislative action.[10] See *Button v Day, supra,* 554.

As to whether State Bar Rule 1—with its broad injunction to "aid in promoting improvements in the administration of justice" etc. (as opposed to petitioner's narrowly construed "regulation")—is valid or not, we rule in the affirmative for two reasons. First, we believe that State Bar Rule 1 is consistent with the legislative purpose, expressed in 1935 PA 58, that this Court provide for the "regulation" of the State Bar and adopt "rules and regulations concerning the conduct and activities

[10] State Supreme Courts that have directly confronted the question of their inherent power to integrate their State Bars have, to the best of our knowledge, unanimously held themselves to possess such power. See, *e.g., Wallace v Wallace,* 225 Ga 102, 109-110; 166 SE2d 718, 723 (1969); *In the Matter of Integration of the Bar of Hawaii,* 50 Hawaii 107, 109; 432 P2d 887, 888 (1967); *In re Unification of the New Hampshire Bar,* 109 NH 260, 264; 248 A2d 709, 712 (1968).

of the association and its members". This Court stated as much in *Lansing, supra,* 194:

> "The rules and regulations that have been adopted are consistent with the legislative purposes, as disclosed by the act [1935 PA 58]."

Indeed, we know of no rule of statutory construction which would counsel this Court to interpret "regulation" in the narrow and confining sense petitioner advocates (remembering that we are not at this point addressing any constitutional implications of State Bar Rule 1). To provide the flexibility necessary to help this Court insure that the State Bar can achieve such worthy results as, to quote one state supreme court, " 'restor[ing] public confidence in the bar, enlarg[ing] professional consciousness, energiz[ing] the bar's responsibility to the public, * * * improv[ing] the administration of justice and [being] the only means presented whereby every member of the bar can share in its public and professional responsibility' ", *In re Unification of the New Hampshire Bar,* 109 NH 260, 267; 248 A2d 709, 714 (1968), quoting from *Petition of Florida State Bar Ass'n,* 40 So 2d 902, 909 (Fla, 1949), we believe the Legislature intended "regulation" to be defined expansively. *Cf.* the broad reading given the word "regulate" found in the Commerce Clause of the Federal Constitution, US Const, art I, § 8, cl 3. See *Virginia R Co v System Federation No 40,* 84 F2d 641, 650-651 (CA 4, 1936); *Chicago, M, SP & P R Co v Public Service Comm,* 332 Mich 291, 296; 50 NW2d 884 (1952).

Second, and independent of the above construction of the word "regulation", we do not doubt that this Court possessed the inherent power to include in its rules and regulations for the integra-

tion of the Bar the provisions of State Bar Rule 1. In fact, the provisions of State Bar Rule 1 represent a garden variety statement of the legitimate purposes of an integrated bar which other state supreme courts have either considered when making the decision to judicially integrate a bar, see *In re Unification of the New Hampshire Bar, supra,* 263-264, or which the courts themselves have adopted through the exercise of their inherent powers. See *Button, supra,* 555; *Application of the President of the Montana Bar Ass'n,* 163 Mont 523, 526-527; 518 P2d 32, 34 (1974); *Lathrop v Donohue,* 367 US 820, 828-829; 81 S Ct 1826; 6 L Ed 2d 1191 (1961).

IV. CONSTITUTIONAL CHALLENGES

Having examined the authority and scope of the State Bar Rules, we now turn to petitioner's constitutional challenges. Petitioner maintains that his First Amendment rights are being violated by the State Bar's expenditure of mandatory dues for activities unrelated to the licensing, education and regulation of the legal profession. Although conceding that the state may require attorneys to belong to an integrated bar association, petitioner argues that the State Bar may not constitutionally expend funds on activities which "may [support] positions inconsistent with mine".

In order to analyze the constitutional validity of petitioner's claim, we must determine:

a) whether First Amendment rights are absolute;

b) what type of state interest justifies intrusion on First Amendment rights;

c) what means may the state employ to promote the permissible state interest;

d) does Bar Rule 1 embody a permissible state interest; and

e) are the 11 complained-of State Bar activities permissible means to promote the permissible state interest.

We find that the First Amendment is not absolute but will give way to certain state activities which are germane to a compelling state interest. The state has a compelling interest in promoting improvements in the administration of justice and advancing the science of jurisprudence in order to fulfill its function of protecting the health, safety and welfare of its citizens. The state may employ activities which are germane to this compelling state interest. We find that insofar as State Bar Rule 1 authorizes the Bar to "aid in promoting improvements in the administration of justice and advancements in jurisprudence" it embodies a permissible state interest. After carefully reviewing petitioner's 11 challenges, we also find that all but the last activity, regarding the use of the State Bar mailing list for commercial solicitations, are germane to the state's compelling interest.

A. Are First Amendment Rights Absolute?

The First Amendment states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Supreme Court has long recognized that "[f]reedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment". *De*

Jonge v Oregon, 299 US 353, 364; 57 S Ct 255; 81 L Ed 278 (1937). See *Near v Minnesota ex rel Olson,* 283 US 697, 707; 51 S Ct 625; 75 L Ed 1357 (1931); *Gitlow v New York,* 268 US 652, 666; 45 S Ct 625; 69 L Ed 1138 (1925). In contrast to the rights of freedom of religion, speech, press, and assembly, the right to freedom of association is not expressly listed in the First Amendment. Nevertheless, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment". *NAACP v Alabama ex rel Patterson,* 357 US 449, 460; 78 S Ct 1163; 2 L Ed 2d 1488 (1958). It is thus clear that freedom of speech and of association are both protected under the First and Fourteenth Amendments.

However, the rights to free speech and association are not absolute. In *Konigsberg v State Bar of California,* 366 US 36, 49; 81 S Ct 997; 6 L Ed 2d 105 (1961), the Court "reject[ed] the view that freedom of speech and association * * * are 'absolutes' " and held that the denial of petitioner's application to the California Bar for failure to answer any questions pertaining to his membership in the Communist Party did not violate the First Amendment.[11] The Court reaffirmed this concept 12 years later in *United States Civil Service Comm v National Ass'n of Letter Carriers, AFL-CIO,* 413 US 548, 567; 93 S Ct 2880; 37 L Ed 2d 796 (1973). In upholding the prohibition of federal employees from taking an active part in political

[11] Justice Harlan pointed out: "the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like" cannot be logically reconciled with the absolutist position. *Konigsberg, supra,* 49, fn 10. Even Justice Douglas conceded that the right to associate is not absolute. *Lathrop v Donohue,* 367 US 820, 882; 81 S Ct 1826; 6 L Ed 2d 1191 (1961) (dissent).

management or in political campaigns in accordance with § 9 of the Hatch act, 5 USC 7324(a)(2), Justice White acknowledged: "[n]either the right to associate nor the right to participate in political activities is absolute". That there are limits to the First Amendment's protection was recognized in *Buckley v Valeo,* 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976), where the Court declared that "[e]ven a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest".[12] Thus it is clear that the rights of freedom of speech and association, while fundamental to our Constitution and society, are not absolute.

B. What Type of State Interest Justifies First Amendment Intrusion

Although the First Amendment is not absolute the state must demonstrate a particular type of interest to justify constitutional intrusions. The question which we must resolve is what type of state interest is necessary.

"To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." *United States v O'Brien,* 391 US 367, 376-377; 88 S Ct 1673; 20 L Ed 2d 672 (1968).

For example, in affirming an order that injunctive relief be given to state government employees threatened with being discharged solely because

[12] *Buckley v Valeo,* 424 US 1, 25; 96 S Ct 612; 46 L Ed 2d 659 (1976) (upholding the limitation on, and reporting of, political contributions by the Federal Election Campaign Act of 1971, 2 USC 431 *et seq.,* but finding the limitation of independent and candidate expenditures violative of the First Amendment).

they were not affiliated with or sponsored by the Democratic Party, the Supreme Court held:

"It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v Valeo,* 424 US, at 64-65; *NAACP v Alabama,* 357 US 449, 460-461 (1958). * * * Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper v Pontikes,* [414 US 51, 58; 94 S Ct 303; 38 L Ed 2d 260 (1973)]. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v Burns,* 427 US 347, 362; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality).

Similarly when analyzing whether Illinois' state interest in protecting the effective right to participate in political primaries justified a state court injunction prohibiting a group of party members from acting as convention delegates the Supreme Court held:

"Even though *legitimate,* the ' "subordinating interest of the State must be *compelling*" * * *' to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association. *NAACP v Alabama,* 357 US 449, 463 (1958)." *Cousins v Wigoda,* 419 US 477, 489; 95 S Ct 541; 42 L Ed 2d 595 (1975).

Thus the First Amendment must yield to state intrusion when there is a compelling state interest present.

C. The Means Employed to Promote the Permissible State Interest

Having found that the state must show a compelling interest to justify First Amendment intrusion we must look to the appropriate *means* which the state may employ to achieve its compelling

interest. Where the intrusive limitation on association *directly* affects the First Amendment right of expression (here political expression), as where a statute precludes voting in one party's primary within 23 months after voting in another party's primary, *Kusper v Pontikes,* 414 US 51, 58-59; 94 S Ct 303; 38 L Ed 2d 260 (1973), or where not belonging to a particular political party results in discharge from a government job, *Elrod v Burns,* 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality), the Court has adopted the strict, "least intrusive means" test.[13] In contrast, where the intrusive limitation on association *indirectly* affects the First Amendment right of expression, as where employees, though free to express their own views without limitation, are required to belong, and pay dues, to a union which may hold views different from the employees, *Abood v Detroit Board of Education,* 431 US 209, 225-226; 97 S Ct 1782; 52 L Ed 2d 261 (1977), the Supreme Court has applied the less restrictive "germane" test.[14]

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[13] For example, holding that the Illinois Election Code violated the First Amendment by prohibiting a person from voting in a primary election of a political party if that person had voted in another party's primary within the previous 23 months, Justice Stewart described when and how the least intrusive means test applies:

"[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. * * * For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. * * * If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper, supra,* 58-59.

[14] See also *Lathrop v Donohue,* 367 US 820, 843; 81 S Ct 1826; 6 L Ed 2d 1191 (1961), where the Supreme Court held:

"Both in purport and in practice the bulk of [the Wisconsin] State Bar activities serve the function * * * of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of

The most recent case in which the Supreme Court has taken a constitutional stand on the right of association is *Abood.* The Court upheld against First Amendment attack MCL 423.211; MSA 17.455(11) authorizing the use of agency shop clauses in collective bargaining agreements covering government employees, *Abood, supra,* 222, but overturned the use of mandatory dues for political purposes and for advancing ideological causes unrelated to collective bargaining. *Abood, supra,* 235-236. We note that the Court did not use the strict "least intrusive means" test in analyzing Abood's associational rights in either instance. Rather, the Court used the "germane" test and found that the Michigan Legislature had an "important governmental interest" in avoiding confusion which could arise from conflicting demands of rival teacher's unions; promoting labor peace; and preventing "free riders" from obtaining labor contract benefits without supporting bargaining expenses. *Abood, supra,* 224-225. The Court similarly found that the

Wisconsin, in order to further the State's *legitimate interests* in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, *we are unable to find any impingement upon protected rights of association."* (Emphasis supplied.)

The plurality of four was unwilling to decide whether Lathrop's "rights of free speech are infringed if his dues money is used to support the political activities of the State Bar" because they felt the record was insufficiently developed. *Lathrop, supra,* 844-845. However, three justices would have found that none of the Wisconsin Bar's activities violated any of Lathrop's constitutional rights. *Lathrop, supra,* 848 (opinion of Harlan, J., Frankfurter, J., concurring); 865 (opinion of Whittaker, J., concurring in result). The other two justices who addressed the freedom of speech issue, would have prohibited Wisconsin Bar from using mandatory dues revenue to advocate positions which any of its members opposed, *Lathrop, supra,* 865 (opinion of Black, J.); 877 (opinion of Douglas, J.).

expenditure of *mandatory union dues* "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes *not germane* to its duties as collective bargaining representative" violated the First Amendment right of union members who do not support such views, candidates or ideologies. Thus the Court's test in *Abood* was whether the expenditures were "germane to [the union's] duties as collective-bargaining representative".[15] Therefore we believe that the appropriate test to analyze petitioner's constitutional challenges is whether the state has a compelling interest involved, and if so, whether the Bar's complained-of activities are germane to that interest.[16]

D. Does Rule 1 Embody a Compelling State Interest?

The underlying question we must now address is whether "promoting improvements in the administration of justice and advancements in jurisprudence" is a compelling state interest? We find that it is. The United States Supreme Court implicitly recognized the state's compelling interest in promoting improvements in the administration of justice and advancements in jurisprudence in *Lathrop, supra,* 843, where Justice Brennan wrote:

"We think that the Supreme Court of Wisconsin, in order to further the State's *legitimate interests* in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the law-

[15] *Abood, supra.*

[16] We have, of course, decided upon the rationale of germaneness to a compelling state interest. However, we believe that an integrated state bar would be the least intrusive means to effectuate the compelling state interest. See *Application of the President of the Montana Bar Ass'n,* 163 Mont 523, 526; 518 P2d 32, 33 (1974).

yers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." (Emphasis supplied.)

In *Goldfarb v Virginia State Bar,* 421 US 773, 792-793; 95 S Ct 2004; 44 L Ed 2d 572 (1975), the Court explicitly recognized this legitimate state interest to be compelling:

"We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. * * * *The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'* See *Sperry v Florida ex rel Florida Bar,* 373 US 379, 383 [83 S Ct 1322; 10 L Ed 2d 428] (1963); *Cohen v Hurley,* 366 US 117, 123-124 [81 S Ct 954; 6 L Ed 2d 156] (1961); *Law Students Research Council v Wadmond,* 401 US 154, 157 [91 S Ct 720; 27 L Ed 2d 749] (1971)." (Emphasis supplied.)

The fair and efficient use of the state legal system is paramount to the state's very existence. Without a legal system to make, interpret and enforce laws, without some mechanism to weigh and resolve conflicting claims, there is anarchy.

As officers of the court, lawyers play an indispensable role in the administration of justice. The state must not only protect its legal machinery from abuse through such safeguards as the attor-

ney grievance procedure but must also be mindful of the competence of attorneys, who are in a position to best assist, or most impede, the general public in securing justice. Authorizing the State Bar to aid the state in promoting improvements in the administration of justice is essential for the state's continued existence. Therefore we find that the state has a compelling interest in instructing that "[t]he state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence". We do not separately consider whether the state's interest "in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in the State", State Bar Rule 1, are compelling.

With this determination in mind we now will examine petitioner's individual challenges to determine if the Bar activities are germane to the state's compelling interest.

E. Are the Bar Actions in the 11 Points Germane?

Petitioner attacks the following State Bar activities as violating his constitutional rights: (1) engaging in legislative and judicial lobbying and participating in other political activities (presumably supporting political candidates or state referendums); (2) requiring compulsory membership in the Young Lawyers Section; (3) promoting prepaid legal services; (4) supporting lawyer referral services; (5) aiding in lawyer placement; (6) maintaining a Client Security Fund; (7) promoting legal services and educating the public through pamphlets, magazines, radio and television advertisements of the availability and need of legal services; (8) funding Lawyers Wives of Michigan and Children's Charter of Michigan; (9) giving and paying for social functions, including receptions where the Supreme Court Justices are guests of

honor; (10) appearing before the State Officers Compensation Commission in support of higher Supreme Court, and other judicial, salaries; and (11) selling the use of the State Bar mailing roster to commercial interests. He bases the majority of his claims on the First Amendment right to freedom of association, with an occasional reference to the First Amendment's freedom of speech, religion and privacy;[17] the Commerce Clause;[18] and various

[17] Nowhere in either his complaint or brief does petitioner specifically allege a violation of his right to freedom of speech. However, since petitioner claims that the use of Bar dues for non-"regulation" purposes constitutes "a violation of [petitioner's] First Amendment rights" and places strong reliance on *Abood, supra,* we will analyze petitioner's charges in light of both his right of freedom of association and freedom of speech.

Petitioner argues that certain State Bar expenditures violate the First Amendment's prohibition on the establishment of religion:

"The use of State Bar dues monies to purchase alcoholic beverages, pork and shellfish for consumption at social functions, particularly when not all State Bar members are invited to such functions or offered alternatives of equal value for dues paid, and which are unnecessary to the accomplishment of any goal central to the viability of the State Bar as a regulatory body, violates the rights of petitioner and other State Bar members under the free exercise and establishment of religion clauses of the First Amendment."

Petitioner has failed to show any instance when *only* these objectionable foods and beverages were served. If a person attends a cocktail party, luncheon, or dinner, he or she may select nonobjectionable food and beverage to consume. For example, cocktail parties have nonalcoholic drinks, such as sodas, gingerale, fruit juices, tonic water, etc., in order to serve mixed drinks. Luncheons and dinners rarely serve only pork and shellfish. Even a vegetarian, whether for religious or health purposes, can find sufficient quantities of vegetables, cereals, baked goods and other nonmeat foods to form a nutritious meal. Petitioner, therefore, cannot complain that he is being forced to either consume objectionable victuals or go hungry. Nor may petitioner impose his religious views on proper consumption on others. Simply put, petitioner has the right to attend general Bar functions and choose from a reasonable selection of foods and beverages that which he finds satisfactory to consume. He does not, however, have the right to limit other Bar members to his self-imposed diet. By providing a reasonable selection of foods and beverages to its members the Bar cannot be accused of establishing or promoting any religion.

Petitioner's right to privacy argument is treated in section IV, E(11), *infra.*

[18] US Const, art I, § 8, cl 3. Petitioner argues that "[t]he Due

provisions of the Michigan Constitution.[19]

(1) Lobbying and Other Political Activity

The major complaint of petitioner is that the State Bar annually expends in violation of his First Amendment rights large sums of money for two related programs: (1) "for the purpose of influencing the legislation pending before the Michigan Legislature" and (2) "to fund study projects by its constituent committees which result in recommen-

Process Clause of the Fourteenth Amendment in conjunction with the Commerce Clause requires that fees which affect interstate commerce must not be 'excessive in comparison with the governmental benefits conferred.' *Evansville-Vanderburgh Airport Authority Dist v Delta Airlines, Inc,* 405 US 707, 717; 92 S Ct 1349; 31 L Ed 2d 620 (1972) * * *. Moreover, the imposition of economic burdens on activities in interstate commerce must be 'reasonable and fixed according to some uniform, fair and practical standard'. *Hendrick v Maryland,* 235 US 610; 35 S Ct 140; 59 L Ed 385 (1915)".

We recognize that the practice of law may be subject to the Commerce Clause in certain instances, see *Goldfarb v Virginia State Bar,* 421 US 773, 785; 95 S Ct 2004; 44 L Ed 2d 572 (1975) (minimum fee schedules published by county bar association and enforced by state bar violated § 1 of the Sherman act, 15 USC 1). However, petitioner has failed to show how the expenditure of State Bar mandatory dues for the promotion of the administration of justice is either excessive or a burden on interstate commerce. Therefore we find petitioner's claim to be spurious.

[19] Petitioner claims that 1) "[t]he use of State Bar dues monies for 'public' purposes not germane to its regulatory functions [as narrowly defined by petitioner] violates the title-body clause, Const 1963, art 4, § 24" [Petitioner's Brief, p 8]; 2) that such use "is illegal as * * * not having been authorized pursuant to the procedure required by Const 1963, art 4, § 30" to expend public money for a private purpose; and 3) that "[t]he Supreme Court lacks the power to authorize use of State Bar dues for non-regulatory purposes. * * * [T]o purport to authorize expenditures for additional purposes * * * would run afoul of the separation of powers principle ensconced in Const 1963, art 3, § 2".

Having recognized that this Court has the inherent power to regulate the legal profession in addition to any legislative authorization and having further found promulgation of State Bar Rules to be a valid exercise of that power, we reject petitioner's assertions as to the title-body clause, find that the Bar expenditures are for a public purpose, and rule that there is no violation of the separation of powers clause.

dations of policies to be adopted publicly by officials and agencies of the State of Michigan through executive or legislative or administrative action". Expenditures for the various committees reviewing the Michigan Land Title Standards and Criminal Code and Criminal Procedure Code, for the committee considering this Court's proposed Rules of Evidence, and to support the Bar's prison paralegal project are cited by petitioner as examples of improper use of Bar dues monies. There is nothing on the record to indicate Bar participation in partisan politics. But see fn 8.

Petitioner maintains that the Bar may only disburse its funds for "regulation" purposes. As aforementioned, part I, *supra,* petitioner limits "regulation" to "bar grievance activities, the expenses of the character and conduct committee, and subsidies paid to the Institute for *[sic:* of] Continuing Legal Education (ICLE), plus associated administrative and other overhead expenses". Petitioner argues that any other expenditure of mandatory Bar dues monies violates the First Amendment's right to freedom of association since membership in the Michigan State Bar Association is a prerequisite to the practice of law in this state.

Petitioner supports his position by claiming: "*Abood* controls the instant case and mandates a ruling in petitioner's favor." His argument is: "Conceptually, the State Bar of Michigan is a union shop.[20] This fact was implicitly recognized in *Abood".* He then states: "The specific holding in

20 "Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood, supra,* 217, fn 10. See 43 Words and Phrases, Union Shop, p 494.

Abood is that the employees of an agency shop[21] who object to the use of agency shop fees for political activity are entitled to a pro rata reduction in their fee assessment equal to the proportion *ideological expenditures* bear to the total union budget" (emphasis supplied).

The exact words of the Court in *Abood,* in pertinent part, follow:

"We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward *the advancement of other ideological causes not germane to its duties as collective-bargaining representative.* Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." (Emphasis supplied.) *Abood, supra,* 235-236. (Footnotes omitted.)

The significant language in the quotation from the Court's opinion is in italics, because it indicates the difference between what the Court held and what petitioner asserts. The Court proscribed expenditures of dues money for *"the advancement of other ideological causes not germane to its duties as collective-bargaining representative",* whereas petitioner speaks of *"ideological expenditures"* without any limitation. The difference, of course, is whether the ideological expenditure was or was not "germane" to the state's compelling interest.

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[21] An agency shop is an "arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues". *Abood, supra,* 211. See 2A Words and Phrases (1978-1979 Supp), Agency Shop, pp 73-74.

The significance of this distinction is emphasized by a quotation from the *Abood* Court as follows:

"An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. * * * To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But * * * such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood, supra,* 222.

It is obvious from our analysis thus far that all ideological expenditures are not necessarily in derogation of compulsory membership First Amendment rights and that the Court's critical test is whether the ideological expenditure is or is not "germane" to the state interest. This leaves the ultimate inquiries first, what is the compelling state interest, and second, whether the ideological expenditure is "germane" to that interest.

We have already considered and developed the state's interest in the administration of justice and in the advancement of jurisprudence. As a consequence we have a clear concept of what the state's compelling interest is in this case.

Our next inquiry therefore is whether or not the complained-of action here is "germane" to the administration of justice and the advancement of jurisprudence. "Lawyers, as members of an ancient and honorable profession, have a duty to utilize their training and experience in rendering

service to the public."[22] The state has a valid interest in drawing upon this training and experience in order to promote improvements in the administration of justice and to advance jurisprudence.[23] The better attuned the legal machinery is to the public's needs of health, safety and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems.[24] The State Bar's 44 standing committees and 12 special committees ensure that the collective experience of legal ex-

[22] *In the Matter of the Florida Bar Board of Governors' Action on Adoption of Proposed New State Constitution,* 217 So 2d 323, 324 (Fla, 1969). See Roscoe Pound, The Lawyer from Antiquity to Modern Man (St Paul: West Pub, 1953).

[23] Justice Harlan noted how important input from the legal profession is to the legislative and judicial branches:

" '[T]he composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law' *[Lathrop v Donohue,* 10 Wis 2d 230, 239-240; 102 NW2d 404 (1960)] may well be as helpful and informative to a state legislature as the work of individual legal scholars and of such organizations as the American Law Institute, for example, is to state and federal courts. * * * The function such groups serve is a rationalizing one and their power flows from and is limited to their ability to convince by arguments from generally agreed upon premises. They are exercising the techniques and knowledge which lawyers are trained to possess in the task of solving problems with which the legal profession is most familiar. The numberless judicial citations to their work is proof enough of their own usefulness in the judicial decision-making process.

"Legislatures too have found that they can benefit from a legal 'expert's effort to improve the law in technical and noncontroversial areas.' *Dulles v Johnson,* 273 F2d 362, 367 [CA 2, 1959]. In the words of the Executive Secretary of the New York Law Revision Commission, there are areas in which 'lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups.' [MacDonald, *Foreword to the Symposium,]* 40 Cornell L Q 641, 644 [1955]. See also Cardozo, *A Ministry of Justice,* 35 Harv L Rev 113 [1921]." *Lathrop, supra,* 863 (Harlan, J., concurring).

[24] "The office of attorney is indispensable to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court." 7 CJS, Attorney and Client, § 4, p 802, quoted with approval in *Sams v Olah,* 225 Ga 497, 504; 169 SE2d 790, 798 (1969).

perts in many fields will be voiced in the legislative and judicial process to promote improvements in the administration of justice and the advancement of jurisprudence.[25] In this manner the Legislature and Court can better arrive at a fair, effective and efficient result. Thus the state's need in receiving input and feedback from the Bar on appropriate proposed legislation and court rules is germane to its compelling interest in promoting improvements in the administration of justice and the advancement of jurisprudence.

Without more we hold that the State Bar's use of money, including some of petitioner's, to influence legislation and to fund committee study projects looking to that result is "germane" to the state's legitimate and compelling interest in the administration of justice and the advancement of jurisprudence with the result that such activity survives First Amendment attack and that there is nothing in *Abood* to the contrary.

In passing, however, some comment might be in order on petitioner's misunderstanding of *Abood. Abood,* like its predecessors,[26] involved a labor

[25] For example the Revision of Criminal Procedure Special Committee helps draft and critique "proposed codification of all laws and court rules pertaining to criminal procedure". Bylaws of the State Bar of Michigan, art V, 59 Michigan Bar J 49r, 54r (April, 1980). See also the Special Committees on the Criminal Code Revision and the Standard Criminal Jury Instructions and the Standing Committees on Civil Procedure and Legislation. *Id.,* 52r-54r. By obtaining input from members of both plaintiffs' and defendants' bar this Court has had a strong foundation upon which to build a comprehensive judicial system. However, any expenditures toward objectives other than the administration of justice or the advancement of jurisprudence, such as promotion of sports or arts, would be offensive both to Rule 1 and petitioner's First Amendment rights.

[26] See *Brotherhood of Railway & Steamship Clerks v Allen,* 373 US 113; 83 S Ct 1158; 10 L Ed 2d 235 (1963) (manifestation of opposition to any political expenditure of union shop dues is sufficient to state a cause of action); *International Ass'n of Machinists v Street,* 367 US 740, 768; 81 S Ct 1784; 6 L Ed 2d 1141 (1961) (Railway Labor Act, 45 USC 152[11], held to permit compulsory union dues only for collective

union. The case at bar, like *Lathrop v Donohue,*[27]

bargaining purposes and not for partisan political purposes); *Railway Employes' Dep't v Hanson,* 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956) (Railway Labor Act, *supra,* upheld against First and Fifth Amendment challenges).

[27] 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961) (Wisconsin integrated Bar is not unconstitutional insofar as it merely requires lawyers practicing within the state to become members and pay reasonable annual dues). We reject petitioner's claim that *Abood* essentially overruled *Lathrop.* Justice Stewart, writing for the majority, noted that the Court could not avoid making a ruling in *Abood* on the constitutionality of using mandatory union dues for political and ideological purposes as they had in *Street.* He then footnoted the following observation:

"In *Lathrop v Donohue,* 367 US 820, a companion case to *[International Ass'n of Machinists v] Street* [367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961)], a lawyer sued for the refund of dues paid (under protest) to the integrated Wisconsin State Bar. The dues were required as a condition of practicing law in Wisconsin. The plaintiff contended that the requirement violated his constitutionally protected freedom of association because the dues were used by the State Bar to formulate and to support legislative proposals concerning the legal profession to which the plaintiff objected.

"A plurality of four Justices found that the requirement was not on its face unconstitutional, relying on the analogy to *[Railway Employes' Dep't v] Hanson* [351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956)]. And the plurality ruled, as had the Court in *Hanson,* that the constitutional questions tendered were not ripe, for the Court was nowhere 'clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities.' 367 US, at 845-846. The other five Members of the Court disagreed with the plurality and thought that the constitutional questions ought to be reached. Three Justices would have upheld the constitutionality of using compulsory dues to finance the State Bar's legislative activities even where opposed by dissenting members. See *id.,* at 848 (Harlan, J., concurring in judgment); *id.,* at 865 (Whittaker, J., concurring in result). The other two Justices would have held such activities to be unconstitutional. See *ibid.* (Black, J., dissenting); *id.,* at 877 (Douglas, J., dissenting).

"The only proposition about which a majority of the Court in *Lathrop* agreed was that the constitutional issues should be reached. However, *due to the disparate views of those five Justices on the merits and the failure of the other four Members of the Court to discuss the constitutional questions, Lathrop does not provide a clear holding to guide us in adjudicating the constitutional questions here presented." Abood v Detroit Board of Education,* 431 US 209, 233, fn 29; 97 S Ct 1782; 52 L Ed 2d 261 (1977) (emphasis added).

Thus the Supreme Court did not overrule *Lathrop* but merely noted in passing that the plurality opinion was not based on constitutional

deals with an integrated bar association.

While there are superficial similarities between an integrated state bar and a labor union, that is not the question. The question is whether the compelling state interest justifying intrusion on First Amendment rights is the same in both cases. The answer is an emphatic negative. In *Abood* the compelling state interest is achieving labor peace through collective bargaining. In an integrated bar the compelling state interest is the administration of justice. Obviously what might be germane to collective bargaining could be quite different from what is germane to the administration of justice. A labor union, for example, would at the most have indirect interest in improvement of court rules, whereas an integrated state bar could have intense interest in such rules.

Further, we note that petitioner in his original brief does not maintain that he holds political or ideological views contrary to those of the State Bar. Petitioner broadens his argument somewhat in his Reply Brief, p 40, when he states: "Public interest is not a unitary concept * * *; the State Bar officers have their view and plaintiff has his. Plaintiff cannot be required to underwrite the expense of the former in promulgating their views". However, petitioner failed to specify even one conflicting view but noted instead: "plaintiff does not seek to prohibit the State Bar from lobbying, [but] merely from spending plaintiff's money to do so". Therefore petitioner's challenges appear to be monetary rather than ideological.

However, even assuming petitioner has strong ideological objections to certain State Bar positions, he "is still free to voice his own views on

grounds and therefore, like *Street,* could be of no precedential guidance.

any subject in any manner he wishes". *In re Unification of the New Hampshire Bar,* 109 NH 260, 266; 248 A2d 709, 713 (1968); accord, *Lathrop, supra,* 861 (Harlan, J., concurring in result).[28] He is not being forced to proclaim any ideological or political view. As Justice Harlan noted in his concurrence in *Lathrop, supra,* 859, "Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual.' *[In re Integration of the Bar,* 5 Wis 2d 618, 623; 93 NW2d 601, 603 (1958)]." More importantly, petitioner has many avenues open to him to express his ideas either through the Bar or outside of it. Petitioner may or may not wish to run for election to the Board of Commissioners or the Representative Assembly (see State Bar Rules 5 and 6), but in any event he may attend their meetings, since unless specifically voted to be closed all meetings are open to Bar members. In this way he can have direct input on the two governing bodies of the Bar. Similarly if petitioner has an interest in the Michigan Rules of Evidence, Criminal Code, Land Title Standards or other legislation and rules which the Bar reviews, he may attend the committee meetings and make known his feelings. Petitioner is also free to write letters to the editor of the Michigan Bar Journal

[28] In addressing the two dissenting opinions in *Lathrop,* Justice Harlan noted:

"I do not understand why it should become unconstitutional for the State Bar to use appellant's dues to fulfill some of the very purposes for which it was established. I am wholly unable to follow the force of reasoning which, on the one hand, denies that compulsory dues-paying membership in an Integrated Bar infringes 'freedom of association,' and, on the other, in effect affirms that such membership, to the extent it entails the use of a dissident member's dues for legitimate Bar purposes, infringes 'freedom of speech.' " *Lathrop, supra,* 850.

expressing his views and seeking support. If he chooses not to take part in the channels of communication within the Bar and is dissatisfied with the majority position petitioner may express and promote his views through external means such as the communications media.

In sum we find that the State Bar expenditures of dues revenues to fund committees for the purpose of examining proposed legislation and court rules is germane to the state's compelling interest in promoting the administration of justice and advancement in the science of jurisprudence. When taking a position on a proposed bill, rule, or order, the State Bar, however, must confine itself to those subjects directly affecting the administration of justice or the advancement of jurisprudence.[29] Since petitioner has failed to show and we cannot find in the record any specific expenditure of Bar funds to critique or lobby for any legislative or judicial action unrelated to the administration of justice we find that petitioner's rights are not unconstitutionally infringed.

(2) The Young Lawyers Section and the Right of Association

Petitioner also challenges the constitutionality of the automatic membership of newly admitted attorneys in the Young Lawyers Section (YLS). He contends that such "compulsory" membership violates his First Amendment right to freedom of association since he is being forced to join an organization without his consent and since a part

[29] Thus endorsing a particular candidate for office or lobbying for a bill which is unrelated to the improvement of the administration of justice is outside the scope of State Bar Rule 1 and also violates the First Amendment rights of free speech and association. See fn 8, *supra*.

of his mandatory Bar dues supports the YLS. The State Bar argues that "[n]obody is forcing petitioner to participate in the Young Lawyers Section nor to associate with other young lawyers". The Bar relies on *Lathrop, supra,* 827-828, where the majority of the Justices of the Supreme Court agreed that the Wisconsin State Bar did not, on its face, violate the right to freedom of association, noting: " '[H]is compulsory enrollment imposes only the duty to pay dues' " (367 US 827-828, quoting 10 Wis 2d 237 with approval).

We agree with the State Bar that "there is a definite professional/justice system interest in the integrating of young and new lawyers into the practice of law, and in dealing with the very special problems of these new professionals. Such a structure benefits not only the new attorney, but safeguards the public interest in the maintenance of the highest standards in the practice of law". Petitioner argues that newly admitted lawyers know more general, substantive law and are better "attuned to the most modern currents of thought in the law" than experienced practitioners. It is obvious, however, that most new attorneys necessarily have a substantial gap of practical knowledge and experience. Despite the trend to expose law students to various clinical experiences, law schools still emphasize traditional textbook courses, reasoning that the student will acquire the necessary practical and procedural knowledge after being admitted to the Bar. We take judicial notice that a person is not automatically transformed from a struggling student to a skilled legal practitioner upon completion of the Bar admissions ceremony. The Young Lawyers Section can help the new attorney bridge the gap between law school and the practice of law.

Helping young attorneys find their way through

the maze of rules, regulations and laws in turn helps the legal system run effectively and provides for a better distribution of legal services to the public. If petitioner feels that he does not require this valuable aid he is free to disassociate himself from the section: automatic membership does not mean that it is compulsory.[30] Petitioner, therefore, cannot constitutionally complain that the State Bar uses a portion of its general fund to support a section which is composed of young lawyers who voluntarily give their time and energy to sponsor seminars and programs to train the new attorney. Thus we find that ensuring that the legal system runs smoothly and efficiently is germane to the state's compelling interest of promoting improvements in the administration of justice.

(3) Prepaid Legal Services (4) Lawyer Referral

(5) Lawyer Placement (6) Client Security

The use of mandatory dues revenues for sponsoring Lawyer Referral, Prepaid Legal Services, Lawyer Placement and the Client Security Fund is also challenged by petitioner. His primary argument against such expenditures is that they do not constitute a public purpose and have not been authorized in accordance with the provisions of Const 1963, art 4, § 30.[31] Petitioner insists that

[30] Indeed, a Bar applicant could notify the YLS prior to the admissions ceremony of his wish not to become a section member, thereby never being "forced" to join the section. Or a newly admitted attorney can become a member for a trial period and, if dissatisfied, terminate membership.

[31] The State Constitution provides:

"The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes." Const 1963, art 4, § 30.

Since we have based the Bar's authority to promote the improve-

"[t]he use of State Bar dues monies to enhance the income producing opportunities, employability, and to guarantee trustworthiness of practitioners (via Client Security Fund), is thus invalid as not for a public purpose".[32] A secondary argument raised by petitioner is the all-inclusive charge that the First Amendment right of association prohibits any use of mandatory Bar dues revenue for non-"regulation" purposes.

As to the first argument that the expenditure of Bar funds for the challenged activities is not for a public purpose we note that petitioner's analysis of the purpose of the Bar program is inadequate. Except perhaps for the Lawyer Placement Service, none of the programs were instituted nor are presently conducted primarily for the benefit of attorneys even though, admittedly, some attorneys may benefit incidentally. Lawyer Referral and Prepaid Legal Services[33] were created in order to

ment in the administration of justice and advancement in jurisprudence upon State Bar Rule 1 we will not address plaintiff's attack on the constitutionality of MCL 600.901 *et seq.;* MSA 27A.901 *et seq.* See fn 19, *supra.*

[32] When asked to explain his objections to the Lawyer Referral Service, however, petitioner stated:

"I don't understand why I should be required to subsidize the income-producing opportunities of the attorneys in private practice when I have no interest in enhancing my own income-producing opportunities.

"*Q:* So it is your own economic interest that is the touchstone of this objection, is that correct?

"*A:* Yes, and the fact that an agency of the state for which I work precludes me from taking advantage of the service that I am required to subsidize."

[33] Lawyer Referral Service provides members of the public with the opportunity to consult with an attorney for a half an hour for a $15 fee to determine whether a legal problem exists, whether the problem merits further action by an attorney or whether it may be satisfactorily settled by the client. Thus a person seeking a divorce may be referred to an attorney, randomly selected from a list of lawyers competent in that area who agree not to charge over a set amount, while someone wanting to change his or her name would likely be instructed to go to probate court.

Prepaid Legal Services is analogous to Blue Cross insurance in that

make legal services more accessible to "that segment of the population, which studies have shown runs roughly around 70 percent, who do not consult lawyers for one reason or another, partly out of fear of the unknown and of how much lawyers would charge" (testimony of Michael Franck, Executive Director of the Michigan State Bar). See *Bates v State Bar of Arizona,* 433 US 350, 370, fn 22; 97 S Ct 2691; 53 L Ed 2d 810 (1977). Similarly the purpose of the Client Security Fund is not to insure attorneys for malpractice but to protect the public by reimbursing victims of a defalcation either by clients of lawyers or by a lawyer acting in a fiduciary capacity.[34] Therefore Lawyer Referral, Prepaid Legal Services and the Client Security Fund clearly constitute a permissible public service, rather than a private or local service, within the meaning of Const 1963, art 4, § 30.

As to petitioner's First Amendment argument

an annual premium is usually paid by an employer and/or employee ensuring that up to a fixed amount of legal services would be available should the need arise. The purpose of Prepaid Legal Services is essentially the same as of Lawyer Referral in that both programs help deliver legal services to members of the public who otherwise might lack legal advice except that Prepaid Legal Services is more extensive in its scope of coverage.

[34] Petitioner admits that the Client Security Fund benefits the public but complains that it does not aid the general welfare of lawyers, "many of whom, like petitioner herein, either do not engage in professional activity related to the protective function of the Client Security Fund, or are precluded from doing so by the State as employer".

Petitioner would have this Court create a mandatory Bar Rule requiring private practitioners obtain insurance to replace the Client Security Fund.

There is a problem that the present malpractice insurance coverage, and indeed the whole concept of insurance, does not include protection for an intentional wrong. As Mr. Franck noted:

"[M]alpractice insurance, by the terms of all the policies, specifically excludes intentional misconduct and only covers errors and omissions to use a general term, so that claims that are eligible for payment by the Client Security Fund would, by definition, not be eligible for coverage under professional liability insurance."

relative to these services, since they either provide legal assistance to those who would otherwise be without it or protect those who do employ lawyers, the relationship to the administration of justice is clear and hence germane to a compelling state interest.

The Lawyer Placement Service presents a closer issue. For a fee of $5 any attorney, newly admitted or an experienced practitioner, may register with the Placement Service for up to 12 months, or until employment is secured. Employers searching for attorneys with certain qualifications are charged a $10 registration fee. The Placement Service acts as an information clearinghouse, gathering application forms and job descriptions and passing the collected information on to the registrants.

Petitioner objects to the State Bar subsidizing the postage, printing, staff and building space of the Placement Service. He perceives this service as being a private purpose within the meaning of Const 1963, art 4, § 30 since at any one time it only benefits a relatively few attorneys. Petitioner claims that Lawyer Placement is just another unnecessary service of the Bar which he is being unconstitutionally compelled to support in violation of his First Amendment right of freedom of association.

Lawyer Placement provides a necessary and useful service for the legal profession and the general public. By providing a focal point for the gathering and dispersal of employment information, the Bar program aids attorneys and society in efficiently utilizing legal skills and services. Placing attorneys where legal services are required aids in the administration of justice. As a consequence, Lawyer Placement, which facilitates

locating attorneys where needed, is germane to the administration of justice.

(7) Informing the Public of their Legal Rights and Responsibilities

(8) Lawyers Wives and Children's Charter

Petitioner also objects to the use of Bar funds to promote legal services and to inform the public of the availability and need of legal services. He similarly objects to the use of Bar revenues to fund Lawyers Wives[35] and Children's Charter.[36] Petitioner claims that the use of mandatory Bar dues monies to promote the above activities violates his First Amendment right of association. For example, petitioner, as an unmarried attorney, has no interest in Lawyers Wives whatsoever. Being an attorney, petitioner would also have no need to be informed of the availability of legal services. Nevertheless we hold that the services performed by Lawyers Wives, Children's Charter

[35] Lawyers Wives of Michigan, composed of spouses of both male and female attorneys,

"is an organization which provides a home * * * for spouses of those in our profession. Its particular interest and activity has been in the area of law related education."

Lawyers Wives distributes the booklet "You and the Law" to junior high school students throughout the state; conducts an annual Law Day essay contest for junior high school students; and provides volunteer services in probate and juvenile courts.

[36] Children's Charter of Michigan

"is a Michigan non-profit corporation which is essentially a consortium of juvenile judges, social workers and officers assigned to juvenile work in the various police departments throughout the state, including the Michigan State Police. They deal with collective problems of juvenile delinquency and other juvenile problems that require the interjection of third parties in the process, including non-status offenders. They meet regularly during the summer months at regional conferences to hear papers, to discuss issues and to educate one another on the subject. * * * The contribution has been fixed at $1,000, as Mr. Franck has testified, for some years, in order to underwrite the cost of these conferences which consist of travel for the speakers and renting of the hall."

and the Bar public education communications are germane to the state's interest in improving the administration of justice.

A legal system, no matter how fair or just, is of little value if no one knows of its existence or how to effectively use it. By providing the public with pamphlets explaining various areas of the law in easily understandable language the State Bar is helping Michigan citizens gain effective access to the legal system. Similarly when Lawyers Wives volunteer their time and effort to distribute brochures to school children, conduct Law Day essay contests and serve probate and juvenile courts they are aiding the state legal system. We therefore find that the expenditure of State Bar dues revenue on public communication, Lawyers Wives and Children's Charter is germane to the state's compelling interest in promoting improvements in the administration of justice and advancements in the science of jurisprudence.

(9) State Bar Social Functions and Judicial Attendance

Petitioner claims the State Bar violates his First Amendment rights of association by expending some of his mandatory dues on offering food and beverages on particular occasions such as the State of the Judiciary Address and Law Day. He also complains that justices and other judges improperly are present at some of these occasions.

To begin with, there is no original jurisdiction in this Court to consider the alleged judicial improprieties, and petitioner is advised to seek the proper forum.

The problem of juxtaposing the majesty of the First Amendment with a minor complaint such as

petitioner's about the offering of food and beverages is that there is a danger of focusing on whether the minor activity rises to the dignity of being a compelling state interest, which, of course, it is not. The pertinent question, however, is whether the minor activity is germane to a more significant activity which fulfills a compelling state interest.

Obviously one can easily imagine dining occasions which have no relationship to the administration of justice or the advancement of jurisprudence whatsoever. Expenditure of funds for these would be offensive not only to the First Amendment but Rule 1. On the other hand, there are other dining occasions that support activities germane to the State Bar's performance of its duties in the improvement of the administration of justice and the advancement of jurisprudence. With that in mind let us focus, for example, on one of petitioner's objections, dining functions in connection with Law Day.

We can take judicial notice that in connection with Law Day there is an essay contest about law-related subjects for young students. The statewide winners, their parents and teachers are brought to Lansing to a Bar-sponsored luncheon attended by prominent attorneys and judges. The highlight of the occasion, of course, is the presentation of awards to the young winners.

Is the use of mandatory bar dues monies for such an occasion germane to the administration of justice? We have already determined that educational programs acquainting the public with the operation and availability of the justice system is germane to the administration of justice. A luncheon of the kind just described is certainly a legitimate expense in the fulfillment of such an

objective and therefore germane to the administration of justice.

We therefore hold that expenditure of mandatory bar dues for the holding of social functions by the State Bar is not per se an invasion of petitioner's First Amendment rights. Such expenditures may be constitutionally permissible if in support of a social function which is a legitimate part of a Bar activity germane to the administration of justice or the advancement of jurisprudence. For example, those in connection with the State of the Judiciary Address and Law Day, if otherwise proper, do not offend petitioner's First Amendment rights.

(10) Support of Judicial Salaries Before SOCC

Petitioner argues that the appearance by State Bar representatives before the State Officers Compensation Commission (SOCC) to support higher judicial salaries, including salaries of members of this Court, is unlawful and improper. Petitioner claims that the expenditure of Bar resources to send a person to the SOCC is unnecessary to the Bar's "regulatory" function and therefore violates his First Amendment rights of association and speech. He also argues that permitting the State Bar to lobby for higher wages for judges is improper since it violates Canon 2(A) of the Michigan Code of Judicial Conduct[37] as constituting an appearance of impropriety. As to this last objection, we have already indicated that the Supreme Court

[37] Canon 2(A) states:

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

is an inappropriate forum in which to initiate such a complaint.

Employment of competent jurists is essential for the effective administration of justice. We take judicial notice that several years ago this country was concerned with the number of eminent federal judges who were resigning due to inadequate salaries. Congress has repeatedly found it necessary to raise the salary of federal judges in order to not only attract, but retain, the top minds of the legal profession who would otherwise engage in private practice. The Michigan Legislature established the SOCC to ensure that top positions in the public sector, such as judges, would be able to compete with the private sector for well qualified and dedicated men and women. By paying competitive salaries the SOCC ensures that the state is not handicapped in drawing and maintaining able jurists. We see nothing improper in the State Bar aiding the state in determining what salaries are necessary to have an effective judiciary, "for the labourer is worthy of his hire". Luke 10:7.

Permitting the State Bar to express its position concerning increases in judicial salaries, whether in favor or opposed, is germane to the state's compelling interest in the administration of justice.

(11) Use of State Bar's Mailing List for Commercial Purposes

Finally, petitioner contests the use by the State Bar of its mailing list for commercial purposes. He maintains that he is an unwilling recipient of "junk mail" resulting from State Bar commercial mailings in violation of his right to privacy. The Bar admits that it mails insurance and travel company solicitations to Bar members but claims

that it carefully screens the use of the list and takes various safeguards, such as never allowing the list to leave its possession, to ensure that only commercial offers of interest to the general membership will be mailed. Respondent also insists that "both the individual attorney and the State Bar receive a benefit from the programs" since the Bar is totally reimbursed for its mailing service while "individual attorneys receive the benefit of group rates which would otherwise be unavailable". Finally the Bar maintains that there is no right not to receive mail, claiming that the right to privacy does not apply here in any event: "[A]ny intrusion is minimal inasmuch as anyone not wishing to receive such mail may certainly discard it without opening it, since the nature of the communication is clearly indicated on the outside of the envelope".

We disagree. *Rowan v United States Post Office Dep't,* 397 US 728; 90 S Ct 1484; 25 L Ed 2d 736 (1970), which upheld Title III of the Postal Revenue and Federal Salary Act of 1967, 39 USC 4009, now recodified as 39 USC 3008,[38] against constitutional attack, provides guidance on this issue. Although the challenged statute was enacted in order to give recipients of obscene mail the power

[38] The recodified statute, virtually unchanged from its predecessor, states:

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees." 39 USC 3008, subds (a) and (b).

to remove their names from such mailing lists, *Rowan, supra,* 731-734, the Supreme Court took a broader approach. Chief Justice Burger, writing the opinion for the unanimous Court, noted:

"Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.

"In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

* * *

"[T]he mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.

"To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communi-

cation, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. See *Camara v Municipal Court,* 387 US 523 [87 S Ct 1727; 18 L Ed 2d 930] (1967)." *Rowan, supra,* 736-737.

Petitioner's right to privacy, "to be let alone", inherently includes the power to have some discretion in what enters his home through the mail. Congress recognized this in passing 39 USC 3008, thereby giving the addressee the authority to stop mailings to his home which he, "in his sole discretion believes to be erotically arousing or sexually provocative". The Supreme Court expanded this power, if only by dicta, to allow the addressee to strike his name from any mailing list. To require the Bar to honor petitioner's request to remove his name from the commercial mailing list would require the burden and added expense of keeping two mailing lists. Depending on how many attorneys opt for removal of their names the Bar may, or may not, be able to maintain the group rates it now provides for its members. Even though petitioner can easily identify the soliciting mailing by its clearly marked envelopes, thereby lessening the intrusion into his privacy, he has the right to demand that his name be excluded from mass merchandising mailing lists since the state cannot be said to be promoting the administration of justice or advancing the science of jurisprudence through this type of mailing.[39]

[39] We restrict our ruling to commercial mailings unrelated to the Bar's authorization to aid in the improvement of the administration of justice and to promote the advancement of jurisprudence. Thus insurance and travel advertisements may be restricted while mailings

V. CONCLUSION

Petitioner has failed to prove a case for relief in any of the specific categories set forth in his complaint and briefs except for item 11 relating to the sale of the use of the State Bar mailing roster. (But see fn 8.)

Therefore the State Bar shall, on petitioner's request, remove his name from the roster sold for commercial use. With respect to all other challenges petitioner's request for relief is denied.

No costs, a public question being involved.

COLEMAN, C.J., concurred with WILLIAMS, J.

LEVIN, J. The issues, facts and history of this proceeding are set forth in Justice RYAN'S and Justice WILLIAMS' opinions.

We have concluded that while the record is sufficiently developed to resolve some of the issues, it is insufficiently developed to resolve others, and therefore the cause should be remanded for a further hearing.

I

The record in this case is sufficiently developed to resolve the challenges to all bar activities save the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar and the public about the law and the legal system, the Lawyer Placement Service, the commercial sale of the bar's mailing list, and activities addressed to influencing legislation. Activities addressed to influencing legislation include not only lobbying activities but also the

announcing continuing legal education programs, which plaintiff concedes are within the Bar's proper function, may not be so limited.

adoption of formal bar positions on proposed legislation and social functions in furtherance of legislative activities.

In ordinary litigation, a party's failure to develop an adequate record would, according to the appropriate allocation of the burden of proof, control the disposition of the case. This case is not, however, an ordinary litigation in which a party is limited to the relief to which he has proven himself entitled. Falk's petition calls for the discretionary exercise of this Court's extraordinary superintending control. We must consider, therefore, not merely the relative rights of the parties before us but, rather, the proper organization and actions of the bar in light of the rights of all its members and the interests of the state.

When this Court exercises its power of superintending control, the Court has the responsibility of ensuring that it is fully informed. To allow inadequacies in the record to shape the order affecting the rights of persons other than the parties would be to cede a measure of our discretion to the parties.[1] We conclude that a more complete factual record is needed to determine the appropriate

[1] Falk commenced this action as an original proceeding in this Court denominating it "Petition for Special Relief". No statute or court rule expressly authorizes such a petition. If the petition were an ordinary lawsuit claiming violations of Falk's constitutional rights, it should have been filed in a circuit court. If regarded as an action for a writ of mandamus against a state officer, it should have been commenced in the Court of Appeals, or the circuit court for Ingham County or other county in which venue was proper. MCL 600.4401; MSA 27A.4401. This Court has elected to treat Falk's petition as a request to exercise the Court's statutory power to regulate the conduct and activities of the bar. MCL 600.904; MSA 27A.904.

As such, this proceeding is more in the nature of a rule-making proceeding than a lawsuit; what character it has as a lawsuit is the result of this Court's action in appointing a judge to conduct a hearing and make findings of fact.

Since this is not a lawsuit, or even an action whose procedure is delineated by statute, court rule or precedent, it is inappropriate to limit our consideration of the issues presented in this proceeding according to the rules circumscribing lawsuits. To determine the

order as to the bar's legislative activities, the activities of the Young Lawyers Section and of the Lawyers Wives beyond those directly educating members of the bar about the law and the legal system, the Lawyer Placement Service, and the commercial sale of the bar's mailing list, and therefore remand for the purpose of developing such record.

II

The controlling decisions of the United States Supreme Court on the First Amendment issues in this case, *Hanson,*[2] *Street,*[3] *Lathrop,*[4] and particularly *Abood,*[5] are fully discussed in Justice RYAN's opinion.

Some may read *Abood* as concluding that any compelled association and support, whether for collective bargaining purposes or otherwise, so intrudes upon the First Amendment rights of individual members as to be permissible only for purposes germane to those activities of the unified organization which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting members.[6]

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scope or content of an order regulating the bar according to burdens of proof or inadequate showings in the record we ordered would be to treat this proceeding as the lawsuit it clearly is not.

[2] *Railway Employes' Dep't v Hanson,* 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956).

[3] *International Ass'n of Machinists v Street,* 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961).

[4] *Lathrop v Donohue,* 367 US 820; 81 S Ct 1826; 6 L Ed 2d 1191 (1961).

[5] *Abood v Detroit Board of Education,* 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977).

[6] The Court in *Abood* observed, as to the collection of dues to support collective-bargaining activities:

"To compel employees financially to support their collective-bar-

gaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood, supra,* p 222.

The Court further observed, as to dues collected for purposes other than collective bargaining:

"Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. * * * Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. * * * The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

"One of the principles underlying the Court's decision in *Buckley v Valeo,* 424 US 1 [96 S Ct 612; 46 L Ed 2d 659 (1976)], was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals,' *id.,* at 22, the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interests,' *id.,* at 23.

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. * * * And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is

Others may read *Abood* as providing that while the state interest served by required association and financial support must be a compelling interest, any activity germane to that interest, rather than only those least intrusive upon members' First Amendment rights, is permissible.[7]

that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd of Ed v Barnette,* 319 US 624, 642 [63 S Ct 1178; 87 L Ed 1628 (1943)].

"These principles prohibit a State from compelling any individual to affirm his belief in God, * * * or to associate with a political party * * * as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Abood, supra,* pp 233-235.

[7] The Court in *Abood* stated:

"We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward *the advancement of other ideological causes not germane to its duties as collective-bargaining representative.* Rather, the Constitution requires only that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Abood, supra,* 235-236. (Emphasis supplied.)

Where the intrusive limitation on association *directly* affects the First Amendment right of expression (here political expression), as where a statute precludes voting in one party's primary within 23 months after voting in another party's primary, *Kusper v Pontikes,* 414 US 51, 58-59; 94 S Ct 303; 38 L Ed 2d 260 (1973), or where not belonging to a particular political party results in discharge from a government job, *Elrod v Burns,* 427 US 347, 363; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality), the Court has adopted the strict, "least intrusive means" test. For example, in concluding that the Illinois Election Code violated the First Amendment by prohibiting a person from voting in a primary election of a political party if that person had voted in another party's primary within the previous 23 months, Justice Stewart described when and how the least intrusive means test applies:

"[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. * * * For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. * * * If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper, supra,* pp 58-59.

Alternatively, still others may read *Abood* as applying different standards of judicial scrutiny according to the nature of the activity: dues collected to support collective-bargaining activities may be considered as assessments imposing the cost of obtaining an economic benefit on the beneficiaries, subject to the lower standard of scrutiny outlined in *Hanson* and *Street,*[8] while mandatory

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In contrast, where the intrusive limitation on association *indirectly* affects the First Amendment right of expression, as where employees, though free to express their own views without limitation, are required to pay dues to a union which may hold views different from the employees, *Abood, supra,* pp 225-226, the Supreme Court may have adopted the less restrictive "germane" test.

[8] While the Court in *Abood* recognized that compulsory support of collective bargaining activities had an "impact" on First Amendment "interests", and that such support "might well be thought * * * to interfere in some way with an employee's freedom to associate", *Abood, supra,* p 222, the opinion may be read by some as concluding that strict scrutiny was not appropriate to assess that interference. The Court relied on the analysis in *Hanson* and *Street,* saying "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress". *Id.*

Both *Hanson* and *Street* dealt summarily with the First Amendment issues posed by mandatory dues, initiation fees and assessments for collective bargaining activities. Finding that the congressional provision for union shops was a permissible exercise of the power to regulate interstate commerce, the Court in both cases found that requiring " 'support of the collective-bargaining agency by all who receive the benefits of its work * * * does not violate either the First or the Fifth Amendments' ". As expressed by Justice Douglas, the author of *Hanson,* concurring in *Street:*

"We * * * concluded in * * * *Hanson* * * * that it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost. That is the narrow and precise holding of the *Hanson* case * * *."

Collective bargaining is an effort primarily aimed at furthering the economic or commercial interests of a union's membership. The commercial nature of conduct claimed to be constitutionally protected has sometime led the Court to adopt a lower standard of protection than is accorded non-commercial activities. Similarly, compelled association and support in furtherance of commercial activities, as distinguished from ideological activities, might be considered by the United States Supreme Court to be less intrusive on First Amendment rights. See, *e.g., In re Primus,* 436 US 412, 437-438, and fn 32; 98 S Ct 1893; 56 L Ed 2d 417 (1978), distinguishing *Ohralik v Ohio State Bar Ass'n,*

dues collected for purposes other than promoting the economic self-interests of members are subject to the higher standard applied in *Abood* to activities not germane to the collective-bargaining process.

Application of the principles announced in *Abood* to the instant case is further hampered by the indefiniteness, on this record, of the purposes and state interests served by the bar. Section 1 of the State Bar Rules, promulgated by this Court pursuant to the Court's powers over the bar and its members, states:

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436 US 447; 98 S Ct 1912; 56 L Ed 2d 444 (1978), and the solicitation of clients for expressive as opposed to commercial purposes:

"Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is 'an associational aspect of "expression"' * * * and other activity subject to plenary regulation by government. * * * As shown above, appellant's speech—as part of associational activity—was expression intended to advance 'beliefs and ideas.' In *Ohralik* * * *, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw * * *, but that is no reason for avoiding the undertaking."

It should be noted, however, that the Court in *Abood* said that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry". *Abood, supra,* p 232.

Assuming that the State Bar may, without contravening First Amendment rights, engage in activity designed to promote the economic interests of its members, it should be noted that any group similar in size and variety of membership to that of the bar may be expected to face difficult questions when allocating resources. Activities enhancing the economic opportunities of litigators may not similarly benefit corporate lawyers, for example. Indeed, activities such as lobbying for defeat of motor vehicle no-fault insurance legislation might work to further the interests of personal injury litigators at the expense of other types of litigators by committing limited judicial resources to motor vehicle tort actions, thereby increasing delays and other disincentives to the bringing of other types of actions. Such conflicts, and the requirement that members contribute to an association which may, therefore, undercut their self-interests, may not be adequately ameliorated by the democratic process within the bar.

"The state bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State."[9]

This broad statement of purpose is susceptible to both expansive and restrictive interpretations. On the one hand, the bar represents the collective experience of legal experts in many fields, and its views on legislation as substantive as revisions of the criminal code, changes to the divorce laws, and no-fault insurance may serve compelling state interests. On the other hand, the threatened and actual intrusions upon individual members' First Amendment rights occasioned by compelled support of substantive issues to which they are opposed may make it proper or even constitutionally necessary to limit this broad statement of purpose to the promotion of issues which are directly related to the practice of law and administration of justice as defined in their narrowest senses, such as court reform, lawyers' education, and requirements for the practice of law, or to eliminate entirely bar legislative activities funded by compulsory dues.

The question is made more complex by the unique relationship between lawyers and the law. Laws are the tools of the lawyer's trade; to improve those tools generally requires legislative activity. Laws are the substance of the lawyer's business; changes in the law will often affect the economic interests of the profession. Further, both by training and daily experience, lawyers possess an expertise in the practical functioning of laws

[9] 340 Mich xxxviii (1954).

and the justice system which may make their views on legislation of unique value.

Yet it is clear that a line must be drawn. The lawyer's relation to the law could rationally support the bar's taking a stand on even the most basic of public policy issues.[10] At some point, the

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[10] Selections from the record illustrate the bar's tendency to blur the interests of attorneys *qua* attorneys with the general public interest. Unless noted, all questions were posed by counsel for the bar; all answers are those of the Executive Director of the bar.

As to the lobbying activity of the bar:

"*Q.* Mr. Franck, is it not fair to say that given the complexities of society today, given the increasing participation of governmental agencies in the life of our society, that for any group, let alone a formally organized group of lawyers, to function, that there must be constant contact with government at every level by that organization?

"*A.* Yes. And then of course it's particularly true, in my judgment, of the legal profession since its function and contribution to society is to deal with the law and the law, obviously, is the function of the three branches of government. So it is almost by definition that the profession can carry out those functions assigned to it by society only by involving itself in the governmental process which creates the law with which the profession deals.

"*Q.* Ergo the bar must lobby?

"*A.* Yes, sir."

As to the distinction between bar lobbyists and other lobbyists:

"*Q. (Mr. Falk):* The question was: Doesn't a lobbyist for the UAW have an interest in labor. * * *

* * *

"*[A].* I'm sure he does, but he is paid to produce a certain result and therein lies a tremendous distinction between any activity the State Bar has with members of the Legislature.

"*Q. (Mr. Falk):* Doesn't the State Bar attempt to get legislation favorable to the legal profession as it views it?

"*A.* To the legal profession, but—and the judiciary, but more important to the public because our profession, as we all recognize, the bottom line is to better serve the public. That's what it's all about.

"*Q. [Mr. Falk]:* Is what constitutes service to the public judgmental or objective?

"*A.* Well, I suppose that what you think is service to the public may be different than what I think, but it is the collective judgment of the State Bar."

As to the political activities, in general, of the bar:

"*Q.* Why are those activities related to the life of the organized bar?

"*A.* Because the life of the profession is to work through law, whether that law is specific statute, court rule, municipal regulation,

and that is where the profession works; that is where its expertise and where its ability to contribute to the public's understanding and development and welfare lies. So those are the areas in which the profession works and the organization of the profession works in those areas as an organization."

As to the types of legislation of interest to the bar:

"*A.* [W]e are now increasingly both choosing to involve ourselves with non-lawyer organizations in the consideration of issues involving substantial elements of public policy and by contrast from the other side major representatives of non-lawyer organizations, consumer organizations, union organizations and organizations of that kind are seeking out the State Bar in the consideration of problems of major public concern and seeking development of appropriate solutions to those problems.

* * *

"*Q.* Are these issues germane to the life of the State Bar?

"*A.* Yes, sir. They involve facets of the administration of justice.

"*Q.* In your opinion, Mr. Franck, are they germane to the life of the profession of law in this state?

"*A.* Yes, sir.

"*Q.* Why?

"*A.* Because they all affect the contribution of the profession to the evolution and existence of the society in which we live and those unique aspects of societal problems that the law and profession of the law concern themselves with."

"*A.* * * * The entire public skepticism about institutions, about laws, about the obligations of government, has, as we all know, increased dramatically. That has had tremendous ramifications in terms of proposed legislation, areas that are now fair game for legislative intervention so that that has to be considered, for the courts' rule-making powers have increased tremendously and the bar is almost a unique institution, for example, in terms of legislative process, whereas almost every other organization which has a membership component is interested in a very limited number of bills each session. For example, namely only those that affect membership. Most legislation does not directly affect lawyers as members of the State Bar of Michigan, but it does affect lawyers and their clients and their lives, and therefore, compared to other organizations we have an interest in almost every bill that is introduced over in the Legislature.

"*Q.* Now, is that interest in behalf of the profession or is that interest on behalf of the public, in fulfillment of the profession's judiciary responsibilities or a combination of both?

"*A.* It is—

"*Q.* Characterize it.

"*A.* It is really a combination of both. The viewpoint of the lawyers on public questions is very much shaped, obviously, by whom they represent, but in that reflection is the views and the concerns and indeed the experience of their clientele and those persons in the public that they represent. And of course another thing that is unique

interests of the bar and the state in collective legislative activity by the bar must yield to the constitutional freedoms of the individual lawyer.

III

It is unnecessary at this time to determine the appropriate standard of judicial scrutiny or to definitively articulate the bar's purpose, since such of Falk's challenges to bar activities as can be resolved on this record are clearly permissible even under the strictest standard of review and the narrowest construction of the bar's purpose.

A

Few would argue, and Falk himself is not one of them, that maintaining high standards of competence and honesty in the legal profession does not serve a compelling state interest. The bar's regulatory and licensing activities narrowly drawn to that end can be justified even if they impinge on members' First Amendment rights. Included among these activities are: continuing legal education, the Michigan Bar Journal to the extent it serves an informational function, advisory opinions on ethical questions, and disciplinary proceedings.

Whatever may be the proper use by the Court of members of the bar to improve the administration of justice, it includes, at the very least, activities primarily to educate the public about the law and legal services, to provide legal services to the indigent, to help the public to select legal counsel

about the profession is that there are lawyers on every issue who reflect every shade of opinion, every portion of the public that would be affected by proposed legislation, indeed has an interest or viewpoint on proposed legislation."

through the Lawyer Referral Service, and to provide forums for discussion of problems facing the courts and the legal profession.

That the state has a compelling interest in improving the administration of justice through activities such as these needs no explication. Compulsory dues are a necessary means both to provide adequate funds and to equitably share the burden among those subject to the duty. Limiting the compulsory element to a reasonable level of dues is the least intrusive means available. No actual participation by Falk is required beyond the financial obligation. This Court and the majority of the profession may rely on the volunteering of time and energy by members of the bar and other groups; without, at a minimum, the financial support to meet the expenses of these activities, they might end or be severely restricted.

Some of the non-legislative bar activities challenged by Falk fall comfortably within the permissible range of this category of activities. Without attempting to be exhaustive, activities such as the preparation and distribution by the Young Lawyers of the Juror's Manual, the distribution to junior high school students of the "You and the Law" booklet by the Lawyers Wives of Michigan, and funding of the Children's Charter, which provides a forum for discussing problems of juvenile delinquency requiring participation of third parties, are examples of clearly permissible activities.

B

Other activities of the bar challenged by Falk, including activities of the Young Lawyers Section and Lawyers Wives other than those described above, the Lawyer Placement Service, the commer-

cial sale of the bar's mailing list, and particularly bar activities addressed to influencing legislation, require development of a fuller and more particularized record before their permissibility can be determined.

On remand, the burden will be on Falk to show specific activities which allegedly infringe upon his First Amendment rights. The burden will be on the State Bar to establish the requisite state interest, the appropriate connection between particular activities and the state interest (or, if a valid criterion for First Amendment purposes, the economic self-interest of the bar's members), and the unavailability or impracticability of alternative means of realizing the asserted state interest. Particular attention should be given to specific evidence of what the bar is doing; how it came to be doing it; how and under what standards it chooses issues on which to take an official stand and which stand to take; whether any ground rules exist for declining to take an official position, with details of instances when the bar has so declined; whether any procedure exists for encouraging, receiving and presenting dissenting opinions; what alternatives are possible to accommodate the First Amendment rights of dissenting members; what impact alternatives will have on the effectiveness of the bar's assistance to its members, the public and this Court; and the proposed times and procedures for implementing alternatives.

We emphasize that the Court is not now deciding, nor intimating an opinion on, either the appropriate standard of judicial scrutiny or a definition of the state interests served by the bar. These issues have been discussed to indicate the kind of record which should be developed on remand and

to provide focus for briefing and argument after remand.

After remand, the Court will also consider, and the parties should address, whether a fair analysis of the purposes served by those bar activities presenting close questions of constitutional conflict and of alternatives thereto indicate that a better course would be to exercise the superintending authority of this Court by court rule to limit the activities of the bar to a greater degree than is absolutely compelled by the Constitution, and thereby eliminate the potential for constitutional conflict. Such an approach may not only serve the important goal of avoiding unnecessary decision of constitutional questions, but may also provide a desirable measure of flexibility in an area that will almost certainly change with time. Further, a proper respect for the "breathing room" necessary for full enjoyment of First Amendment rights suggests that this Court should be reluctant to allow bar activities to press upon the border of constitutional prohibition, absent a clearly demonstrated need therefor.

An appropriate order will enter. No costs, a public question.

KAVANAGH, J., concurred with LEVIN, J.

PEOPLE v CASEY

Docket No. 66445. Decided May 4, 1981. On application by the people for leave to appeal the Supreme Court, in lieu of granting leave to appeal, affirmed the judgment of the Court of Appeals.

Edal L. Casey was convicted by a jury in Recorder's Court of Detroit, David E. Wilson, J., of armed robbery and possession of a firearm during the commission of a felony. The Court of Appeals, R. M. Maher, P.J., and Bronson and Quinn, JJ., reversed the convictions on the grounds that the defendant had been illegally arrested and that two inculpatory statements made by him must be suppressed because they were tainted by the illegal arrest (Docket No. 51723). The people apply for leave to appeal, arguing that an informal proceeding in Recorder's Court of Detroit, known as a reverse writ, provided police officers with judicial approval of the continued detention of Casey even though no arrest warrant had been issued, and that the proceeding was an intervening circumstance which made the defendant's statements admissible. In a unanimous per curiam opinion, the Supreme Court *held:*

The reverse writ proceeding is a nullity without constitutional or statutory basis. The writ of habeas corpus has been called the great writ. It is the safeguard of personal liberty and cannot be used as an instrument for the detention of a citizen rather than his release. Whether a citizen is being legally or illegally held must be determined by reference to principles in constitutional, statutory, and judicial sources. A detention which is otherwise illegal is not cleansed of its illegality by the issuance of a reverse writ or by the pendency of such proceedings.

The judgment of the Court of Appeals is affirmed.

102 Mich App 595; 302 NW2d 248 (1980) affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people.

Carl Ziemba for defendant.

PER CURIAM. In this case we encounter a so-called "reverse writ" proceeding. Apparently, the procedure is usually a brief hearing at which the police or the prosecutor seek judicial approval for the continued detention of a citizen when, for want of probable cause, no warrant has been issued.[1] For the reasons herein stated, we hold that reverse writ proceedings are without legal effect and may not be employed to justify the detention of a citizen.

I

Defendant was convicted by a jury in Recorder's Court of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). After the Court of Appeals granted a motion to affirm, we returned the case to that Court for plenary consideration. *People v Casey,* 408 Mich 935 (1980). The Court of Appeals then reversed the convictions, ruling that the defendant had been illegally arrested and that a pair of inculpatory statements made by the defendant must be suppressed. *People v Casey,* 102 Mich App

[1] The Court of Appeals described the reverse writ procedure as one in which "the local police seek judicial approval for extended detention of a suspect without the issuance of a warrant". In *People v Antonio Johnson,* 85 Mich App 247, 250, fn 5; 271 NW2d 177 (1978), the Court of Appeals quoted a trial court opinion which had stated that a "reverse writ proceeding is informal and without any documentation. It is the local police method of seeking judicial approval for extended detention of an arrestee without benefit of a warrant". An examination of the record in this case and of a form order for a reverse writ suggests that the precise means by which a citizen is held is the adjournment of reverse writ proceedings, rather than the issuance of any such writ.

595; 302 NW2d 248 (1980).[2] The Court of Appeals wrote that "the record clearly shows a causal connection between the tainted arrest and the confession" and that "[n]o intervening circumstances existed which would make either * * * [statement] admissible".

II

In plaintiff's application to this Court, it is urged that "an intervening event of significance did, in fact, occur; namely, the issuance of a 'reverse writ' * * * which is an independent determination by a judicial officer [t]o permit continued detention". Thus, in the plaintiff's view, defendant's statements should be admissible upon retrial.

We disagree that the reverse writ proceeding which occurred in this case is "an intervening event of significance". It is a nullity. Its constitutional and statutory bases cannot be examined for it has none.

The United States Supreme Court has properly labelled the writ of habeas corpus "the Great Writ". *Darr v Burford,* 339 US 200, 203; 70 S Ct 587; 94 L Ed 761 (1950). That Court has written,

> "It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v Johnston,* 306 US 19, 26; 59 S Ct 442; 83 L Ed 455 (1939).

We will not allow the writ to be utilized as an instrument for a citizen's detention rather than his release.[3]

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[2] The facts of defendant's arrest and detention are set out at length in that opinion.

[3] In his concurring opinion in *Antonio Johnson,* Judge N. J. KAUF-

The principles governing the detention of a citizen may be located in a host of constitutional, statutory, and judicial sources; whether a citizen is being legally or illegally held is a determination which must be made by reference to those principles. We today neither add to nor subtract from that body of law. A detention which is otherwise illegal is not cleansed of its illegality by the issuance of a reverse writ or by the pendency of such proceedings.

Accordingly, in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals. GCR 1963, 853.2(4).

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

MAN condemned the use of a reverse writ to accomplish "exactly what the constitutional provision protects against". In the instant case, the Court of Appeals characterized the reverse writ as being designed "to get judicial approval of an illegal confinement, precisely what Const 1963, art 1, § 12 sought to protect against".

OAKLAND COUNTY PROSECUTING ATTORNEY v DEPARTMENT OF CORRECTIONS

Docket No. 67134. Argued May 6, 1981 (Calendar No. 12).—Decided May 14, 1981.

The Oakland County Prosecuting Attorney brought an action against the Department of Corrections and the Director of the Department of Corrections for a declaratory judgment that the Prison Overcrowding Emergency Powers Act, 1980 PA 519, is unconstitutional. The Oakland Circuit Court, Robert L. Templin, J., dismissed the complaint. The Court of Appeals, V. J. Brennan, P.J., and R. M. Maher and D. C. Riley, JJ., peremptorily reversed, on the ground that the statute impermissibly grants to the Department of Corrections the power to reduce minimum sentences because the power to commute sentences is lodged by the constitution exclusively in the Governor, and enjoined the defendants from implementing the statute (Docket No. 57297). Defendants appeal. In a per curiam opinion signed by all except Justice Williams, the Supreme Court *held:*

The statute is constitutional. The constitution authorizes the Legislature to provide for indeterminate sentences and to provide for the release of persons imprisoned or detained under indeterminate sentences. Whether this statute is viewed as providing for indeterminate sentences in a manner which retroactively amends an earlier provision for indeterminate sentences or as providing for the release of persons imprisoned or detained under indeterminate sentences, the legislation is within the terms of the constitutional grant of authority. The legislative history demonstrates that a commutation in derogation of the Governor's power was not intended; instead the legislation was part of a broad-based effort at correctional reform. Although the retroactive reduction of minimum sentences because of prison overcrowding has consequences similar to commutation, it derives from a wholly separate constitutional grant of power. It is within the constitutional grant of

REFERENCES FOR POINTS IN HEADNOTES

[1-4] 16 Am Jur 2d (Rev), Constitutional Law § 334.
21 Am Jur 2d, Criminal Law §§ 14, 17, 540, 577, 581, 592, 614.
[3, 4] 16A Am Jur 2d (Rev), Constitutional Law § 644.

authority to the Legislature to provide for the release of persons imprisoned or detained under indeterminate sentences. Further, the Governor remains free to pardon or commute the sentences of individual prisoners as he, in his discretion, feels the circumstances warrant.

Reversed.

Justice Williams dissented in part:

1. Under the constitution the Legislature could prospectively provide for an indeterminate sentence based upon the conditions of release specified in the Prison Overcrowding Emergency Powers Act. A sentencing judge would know that any sentence imposed was liable to future 90-day reductions under the statute, much as the judge can anticipate reductions by the Department of Corrections for "good time" or "special good time". There is no constitutional infirmity in a prospective application of the statute because it does not interfere with the Governor's power to commute after judicial sentencing.

2. The issue in this case is whether the Legislature has the power to mandate the reduction of minimum sentences already judicially imposed. It does not for two reasons. First, the constitution uses the phrase "detention and release", and the two powers must be read together; the Legislature cannot constitutionally provide for the release of persons imprisoned under indeterminate sentences where it could not also provide for their detention. Since it is obvious that the Legislature was not authorized by the constitution to increase the time of detention of persons after judicial sentencing, it also could not shorten the actual term of sentence. It must be assumed that the constitutional provision was intended to be construed prospectively, because a retrospective construction runs contrary to other constitutional provisions. Second, the Prison Overcrowding Emergency Powers Act would usurp the Governor's exclusive power of commutation if it is construed as mandating that the Governor act to reduce sentences which were imposed before the statute was enacted. Therefore, the statute should be construed, to maintain its constitutionality, so that as to sentences imposed before the enactment of the statute the action by the Governor to reduce the sentences is discretionary rather than mandatory. The retroactive application of the Prison Overcrowding Emergency Powers Act is to be viewed as a procedural device for bringing to the Governor's attention problems of prison overcrowding which may be relieved through the discretionary exercise of the commutation power. The Prison Overcrowding Emergency Powers Act is constitutional with respect to sentences imposed after January 26,

1981, but with respect to sentences imposed before that date only insofar as the Governor's actions which trigger the reductions in sentence are discretionary rather than mandatory.

OPINION OF THE COURT

1. CONSTITUTIONAL LAW — PRISONS AND PRISONERS — INDETERMINATE SENTENCES.

The constitutional amendment which gave the Legislature the power to provide for indeterminate sentences and for the detention and release of persons imprisoned under such sentences was intended to give to the Legislature a power which previously was vested exclusively in the judiciary and executive, and whatever infringement or sharing of the Governor's commutation power exists in a statute which falls within its authorization is constitutionally authorized (Const 1963, art 4, § 45; art 5, § 14).

2. CONSTITUTIONAL LAW — PRISONS AND PRISONERS — INDETERMINATE SENTENCES — PRISON OVERCROWDING EMERGENCY POWERS ACT.

The Prison Overcrowding Emergency Powers Act, which authorizes the reduction of established minimum terms of prisoners upon a declaration by the Governor of a state of emergency in excess prison population, is within the power granted in the constitution to the Legislature to provide for indeterminate sentences and for the detention and release of persons imprisoned under such sentences, and thus is constitutional regardless of whether the release of prisoners under the statute is characterized as a commutation (Const 1963, art 4, § 45; MCL 800.71 *et seq.;* MSA 28.1437[1] *et seq.).*

OPINION BY WILLIAMS, J.

3. CONSTITUTIONAL LAW — PRISONS AND PRISONERS — SENTENCE REDUCTION — PRISON OVERCROWDING EMERGENCY POWERS ACT.

The Prison Overcrowding Emergency Powers Act is constitutional and does not contravene the Governor's exclusive power of commutation with respect to sentences imposed after January 26, 1981, and with respect to sentences imposed before that date only insofar as the Governor's actions which trigger the reductions in sentence are discretionary rather than mandatory (Const 1963, art 4, § 45; art 5, § 14; MCL 800.71 et seq.; MSA 28.1437[1] et seq.).

4. CONSTITUTIONAL LAW — PRISONS AND PRISONERS — SENTENCE REDUCTION — STATUTES.

The Legislature is not authorized by the constitution to mandate

the reduction of minimum prison sentences already judicially imposed; the powers of detention and release must be read together, and the Legislature cannot provide for the release of a person imprisoned under an indeterminate sentence where it could not provide for detention (Const 1963, art 4, § 45).

L. Brooks Patterson, Prosecuting Attorney, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Keith D. Roberts,* Assistant Attorney General, for defendants.

PER CURIAM. The Court of Appeals has held that the Prison Overcrowding Emergency Powers Act, 1980 PA 519,[1] unconstitutionally contravenes the Governor's exclusive commutation power under Const 1963, art 5, § 14. We conclude that the Court of Appeals erred in so holding, and we reverse.

I

1980 PA 519 had its genesis in the Joint Legislative/Executive Task Force on Prison Overcrowding. This task force was convened by the Governor, the Speaker of the House, and the Senate Majority Leader on January 29, 1980, in recognition of the fact that "Michigan is in the midst of a crisis in its prison system"; what was sought was "the most effective but cost-efficient response to this crisis".[2] The task force responded on June 24, 1980, with 14 recommendations, the last of which recommended a statute such as 1980 PA 519:

"To protect the interests of the State and to prevent

[1] MCL 800.71 *et seq.;* MSA 28.1437(1) *et seq.*

[2] Report of the Joint Legislative/Executive Task Force on Prison Overcrowding (June 24, 1980), p i.

major disruptions or federal court intervention in our prison system, the Task Force recommends the enactment of a series of 'last-resort' statutory mechanisms that would reduce the prison population to its rate capacity upon a gubernatorial declaration of a State of Emergency in the prisons."[3]

The task force explained its recommendations in these terms:

"Since 1975, Michigan's prisons have been continuously overcrowded by as many as 2,000 prisoners over the system's rated capacity. As a result of this population pressure, the Department has been forced to house prisoners in areas not designed for housing, *e.g.,* recreation and treatment areas and garages. This restricts the availability of rehabilitative and diversionary activities and only serves to aggravate the normally high tension levels found in an institutional environment.

"These living conditions create a situation that invites judicial intervention—a situation occurring on a large scale across the country. In fact, as of April 1, 1980, 19 states were operating their prison systems wholly or partially under court order, and 13 others were facing litigation on the conditions of confinement. Virtually all of this judicial action has occurred since 1974. And, if the anticipated Congressional authorization for the U.S. Justice Department to initiate or become involved in litigation on behalf of state inmates occurs, the instances of judicial intervention are likely to increase at a more rapid pace. A federal court order generally establishes the acceptable conditions that must be met by the state within a specified period of time, regardless of the costs involved or the ability of the state to meet those costs.

"A second implication of an overcrowded prison system, perhaps the most dangerous and costly, is that of prison riot and disruptions. Since January 1, 1980, there has been a major prison riot and a series of minor prison disruptions across the nation. Although, with the

[3] *Ibid.,* p iii.

exception of the New Mexico riot, they have not been serious, they do indicate the prevailing mood of the prison population in this country: unrest. It is the result of this unrest, in terms of human suffering as well as dollars and cents, that a humane society must take every possible step to avoid.

"The Task Force has recommended a realistic course of action for the State to follow in seeking to address these possibilities. However, even the most timely action on these recommendations will not guarantee that one or both of these possibilities will not come to fruition. Therefore, the Task Force is recommending the immediate passage of a mechanism designed to provide a progressively radical course of action to reduce Michigan's prison population. A decision to invoke the provisions of this legislation would be a last ditch effort called into play only if other legislative and executive efforts to reduce prison population do not result in the elimination of overcrowding."[4]

The called-for legislation was introduced as HB 6049 on September 17, 1980, and approved by both Houses. The Governor signed the enactment on January 26, 1981.

In the sections relevant to this litigation, 1980 PA 519 calls for the corrections commission to request the Governor to declare a state of emergency whenever prison population exceeds available bed space for 30 consecutive days;[5] for the Governor to declare the emergency within 15 days thereafter, unless he finds the commission erred; and on this declaration, for the Director of the

[4] *Ibid.*, p 22.

[5] "The commission shall request the governor to declare a state of emergency in the state's prisons whenever the population of the prison system exceeds the rated design capacity for 30 consecutive days. In making the request, the commission shall certify the rated design capacity and current population of the prison system and that all administrative actions consistent with applicable state laws and the rules promulgated under those laws have been exhausted in an attempt to reduce the prison population to the rated design capacity." MCL 800.73; MSA 28.1437(3).

Department of Corrections to reduce the minimum terms of those prisoners who have established minimum terms by 90 days.[6] Further reductions occur until population is reduced to 95% of capacity.[7]

II

On March 30, 1981, the corrections commission notified the Governor that the prison population had exceeded its capacity for 30 consecutive days and requested a declaration of emergency. The declaration has not been made. On April 8, 1981, the Oakland County Prosecutor filed a complaint for declaratory judgment in Oakland Circuit Court which sought a judgment declaring 1980 PA 519 unconstitutional. An order was entered in the circuit court which restrained the Department of Corrections and its director from reducing the minimum terms of sentences under 1980 PA 519. The circuit court then entered an order vacating its temporary restraining order and dismissing the prosecutor's complaint. The prosecutor prevailed, however, on appeal to the Court of Appeals. That Court enjoined the Department of Corrections and its director from implementing 1980 PA 519; it said:

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[6] "Unless the governor finds within 15 calendar days of the commission's request under section 3 that the commission acted in error, the governor shall declare a prison overcrowding state of emergency within that 15 days and the minimum sentences of all prisoners who have established minimum prison terms shall be reduced by 90 days by the director of the department of corrections." MCL 800.74; MSA 28.1437(4).

[7] "If the actions under section 4 do not reduce the population of the prison system to 95% of the rated design capacity within 90 days of the date of the declaration of the prison overcrowding state of emergency, the minimum sentences of all prisoners incarcerated in state prisons on that date who have established minimum prison terms shall be reduced by 90 days by the director of the department of corrections." MCL 800.75; MSA 28.1437(5).

"1980 PA 519 is unconstitutional. The statute impermissibly grants to the Department of Corrections the power to reduce minimum sentences, in contravention of the Governor's exclusive power to commute sentences under Const 1963, art 5, § 14. Once a valid minimum sentence is imposed by the sentencing court pursuant to the Indeterminate Sentence Act, MCL 769.8; MSA 28.1080, not even that court can change the sentence because the power to commute is lodged in the executive branch of government. See, for example, *Moore v Parole Board,* 379 Mich 624, 642; 154 NW2d 437 (1967) (opinion by ADAMS, J.)."

We granted leave to appeal from this order.

III

Const 1963, art 5, § 14 provides:

"The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefor."

The Convention Comment discloses that the only change from the predecessor in the 1908 Constitution was deletion of treason as an offense for which the Governor did not have the authority to reprieve, commute, or pardon. There was, however, some rephrasing. Instead of the current provisions "the governor shall have power", Const 1908, art 6, § 9 provided that "he may grant".

"He may grant reprieves, commutations and pardons after convictions for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think

proper, subject to regulations provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence or grant a further reprieve. He shall communicate to the legislature at each session information of each case of reprieve, commutation or pardon granted and the reasons therefor."

We have jealously guarded the Governor's prerogative under this constitutional provision. For example, in *People v Freleigh,* 334 Mich 306; 54 NW2d 599 (1952), we reviewed a statute through which the Legislature had granted to a sentencing judge the power to vacate a prior sentence and impose a lesser sentence in light of an enactment giving a sentencing judge discretionary sentencing power in place of previous mandatory sentencing restrictions. We said that this statute violated art 6, § 9:

"The constitution by implication forbids the judiciary to commute a sentence. It does not enable the legislature to pass a law that will infringe upon the exclusive power of the governor to commute a sentence." 334 Mich 310.

In *People v Fox,* 312 Mich 577; 20 NW2d 732 (1945), the question was whether the sentencing judge had the power to subsequently amend his sentence. We said no:

"To hold with defendant under the circumstances of this case that the court has power to amend a sentence after the prisoner has served a part of it would infringe upon the exclusive power of the governor under the Constitution to commute sentence." 312 Mich 581-582.

In re Casella, 313 Mich 393; 21 NW2d 175 (1946), involved an alleged parole violator who sought a judicial determination on the question of whether he had violated parole. We said that courts may not interfere with the performance of the administrative parole function. In *People v Cook,* 147 Mich 127; 110 NW 514 (1907), we also emphasized that parole was not a judicial matter. In *Freleigh,* we summarized our holdings in *Cook* and *Casella* as follows:

"We only held that such release by parole was not a commutation of the sentence as such parolees remained under the surveillance of the prison authorities and upon violation of the parole would be returned to the prison to serve the balance of the sentences without any deduction of the time during which they had been released on parole." 334 Mich 309.

In *Cook* we said that a parole does not involve an executive act:

"The design of the indeterminate sentence law is to reform criminals and to convert bad citizens into good citizens, and thus protect society. In order to accomplish this result, the theory is that, when the prisoner has shown by his conduct that he may turn from his criminal career, he should have an opportunity, under favorable circumstances, to make the test. He is in prison for a definite time. Any release therefrom is a favor to him. Such release does not necessarily involve a judicial or an executive act. The release of a prisoner under the old law before the expiration of his term of imprisonment for good behavior has never been held an interference with judicial or executive power.

"The paroled prisoner is regarded as still under the control of the prison authorities. When the prisoner applies for his parole, he applies under the provisions of the law, agrees to its terms, and fully understands that for the misconduct provided in the statute he may be taken back to serve out his term of sentence. This

power of recall is lodged in the warden, subject to review by the board of pardons. The prisoner applies for and obtains his release upon those terms, and no other. They are of the very essence of the indeterminate sentence law." 147 Mich 132.

We remain steadfast in our support of the Governor's exclusive power under art 5, § 14. We do not, however, believe that art 5, § 14 compels the result reached by the Court of Appeals. The Legislature too has a role in establishing the length of sentence, and it has not intruded on the Governor's power with 1980 PA 519.

In *People v Cummings,* 88 Mich 249; 50 NW 310 (1891), we had held that a statute which provided for indeterminate sentences and the release of prisoners under such sentences was unconstitutional because it gave the prison board authority to exercise either the judicial power to determine the term of imprisonment of a defendant or the pardoning power exclusively vested in the Governor. In response to the *Cummings* decision,[8] the 1901 Legislature proposed and, in the November 1902 election, the people ratified an amendment to the constitution giving the Legislature the power to provide for indeterminate sentences and for the detention and release of persons imprisoned under such sentences:

"The legislature may, by law, provide for the indeterminate sentences, so called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."[9]

[8] *Freleigh, supra,* p 308; *Cook, supra,* p 131.

[9] Const 1850, art 4, § 47 as amended in 1902, currently Const 1963, art 4, § 45:

"The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."

In considering the instant claim—that a law providing for the release of persons imprisoned under indeterminate sentences impermissibly infringes the Governor's commutation power—we must bear in mind that the circumstances which prompted the adoption of what is currently Const 1963, art 4, § 45 indicate that it was intended to give the Legislature a power which we had previously held was constitutionally and exclusively vested in the judiciary and the executive. As the Court said of § 45's predecessor just five years after it was adopted:

"If that amendment to the Constitution took away any of the power which had theretofore been lodged in the judiciary or the executive, the people exercised a right inherent in them to adopt a constitutional amendment taking away from, or adding to, the powers of either of the departments of government." *Cook, supra,* 132.

If 1980 PA 519 falls within the authorization of § 45, the question of its infringement on the Governor's commutation power is obviated since such infringement or sharing of the commutation power as exists has been constitutionally authorized. Similarly, while it may be possible to distinguish release on parole, when the parolee remains subject to the supervision of and possible recall by the parole board, from release on unconditional pardon or commutation of sentence, and thereby conclude that the executive power has not been infringed,[10] it is unnecessary to do so if the statute is a proper exercise of the power granted by § 45.[11]

[10] See *People v Cook, supra; In re Casella, supra;* but see *People v Cummings, supra,* p 256:

"In any event, this parole system is as obnoxious to the Constitution as an unconditional release by the board would be; and, if they have the power to release on conditions, those conditions may be made so trifling as in fact to be no conditions at all."

[11] 1980 PA 519 is similar in effect to, and identical in terms of the

We are of the opinion that 1980 PA 519 is within the authority granted the Legislature by Const 1963, art 4, § 45, and thus that the statute is constitutional regardless of whether the release of prisoners under the statute is properly characterized as a commutation. Whether it is sound policy to vest the functional equivalent of the commutation power in the Legislature, acting through the parole board, or whether it is sound policy to remedy prison overcrowding by releasing prisoners are questions which can be resolved only in the political forum. 1980 PA 519 embodies the judgment of the Legislature and the Governor; this Court has no authority to review that judgment beyond assessing its constitutionality.

Section 45 authorizes the Legislature to "provide for indeterminate sentences" and to provide for the "release of persons imprisoned or detained under [indeterminate] sentences". Whether 1980 PA 519 is viewed as "provid[ing] for indeterminate sentences" in a manner which retroactively amends an earlier provision for indeterminate sentences or as "provid[ing] for the release of persons imprisoned or detained under [indeterminate] sentences"; the legislation is within the terms of the constitutional grant of authority.

Our decision in *Freleigh,* on which the plaintiff relies, is distinguishable in a manner which clarifies why 1980 PA 519 is within the authority granted in Const 1963, art 4, § 45. In *Freleigh,* the

power exercised by, the Legislature's enactment of a "good time" statute, 1857 PA 99, as first enacted, and later a "special good time" law, 1933 PA 252 (the Legislature gave this statute retroactive effect). These operate effectively to reduce the prisoner's minimum term, as 1980 PA 519 does, by making him or her eligible for parole at an earlier date. What difference exists between the "good time" statutes and 1980 PA 519 is essentially in the factors justifying reduction of the prisoners' minimum terms: in the one case good behavior, in the other prison overcrowding. Yet, as the Court said in *Cook, supra,* and *Casella, supra,* release by parole is not a commutation.

Court reviewed a statute which authorized a sentencing judge to review a prior sentence and to vacate that sentence and impose a lesser sentence if, in the court's judgment, such lesser sentence might have been imposed had a statute giving the sentencing judge discretionary sentencing power instead of the previously effective mandatory sentencing restrictions been in effect at the time of original sentencing. The Court concluded that the statute was an unconstitutional infringement upon the governor's commutation power.

The statute considered in *Freleigh,* unlike 1980 PA 519, did not "provide for * * * release of persons imprisoned or detained under *indeterminate* sentences" (emphasis supplied) since, as the Court there observed, the statute had "retroactive effect upon sentences which were *mandatory*".[12] 1980 PA 519 not only has effect only on indeterminate sentences but also has only the limited effect of changing the period of indeterminacy—the period during which the parole board has authority to act. The statute reviewed in *Freleigh,* on the other hand, authorized the court to vacate the prior sentence entirely and to impose a new sentence. Finally, the Court notes that while Const 1963, art 4, § 45, then Const 1908, art 5, § 28, does not contain language so limiting its effect, it appears from the antecedents prompting the section's adoption that the people contemplated that effect would be given to the section through a parole board or similar agency, as 1980 PA 519 does, rather than through the judiciary, as the statute in *Freleigh* did.

The legislative history available to us demonstrates that a commutation in derogation of the Governor's power was not intended; instead this legislation was part of a broad-based effort at

[12] *Freleigh, supra,* p 309 (emphasis supplied).

correctional reform.[13] The purpose of the instant legislation is to reduce the intolerable level of overcrowding which characterizes Michigan's prison system. As part of a broad-based effort at correctional reform, it was intended to deal with a systemwide problem. Although the retroactive reduction of minimum sentences because of prison overcrowding has consequences similar to commutation, it derives from a wholly separate constitutional grant of power. The legislation was within the constitutional grant of authority to the Legislature in art 4, § 45 to "provide for * * * release of persons imprisoned or detained under such sentences". Further, the Legislature has done nothing to directly interfere with the Governor's function; he remains free to pardon or commute the sentences of individual prisoners as he, in his discretion, feels the circumstances warrant.

We have considered the other issues raised by the plaintiff in the Court of Appeals and found them without merit.

We reverse the Court of Appeals judgment and affirm that of the circuit court. The clerk is directed to issue the Court's judgment order forthwith, in accordance with GCR 1963, 866.3(c).

COLEMAN, C.J., and KAVANAGH, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

WILLIAMS, J. *(concurring in part; dissenting in part).* This Court is called upon to decide whether or not the Prison Overcrowding Emergency Powers Act, 1980 PA 519, approved by the Governor,

[13] This was not the only task force recommendation acted on by the 1980 Legislature. It also, for example, enacted legislation outlining a site selection process for correctional facilities (1980 PA 303) and placed before the people at the November election a proposal to increase the income tax, with the increase earmarked for prison construction.

January 26, 1981, unconstitutionally contravenes the Governor's exclusive power of commutation under Const 1963, art 5, § 14.

The Legislature presumably acted under the specific power granted them to provide for indeterminate sentences. Const 1963, art 4, § 45 provides:

"The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."

1980 PA 519 in § 4 provides:

"Unless the governor finds within 15 calendar days of the commission's request under section 3 that the commission acted in error, the governor shall declare a prison overcrowding state of emergency within that 15 days and the minimum sentences of all prisoners who have established minimum prison terms shall be reduced by 90 days by the director of the department of corrections." MCL 800.74; MSA 28.1437(4).

Under art 4, § 45 there should be no question but that the Legislature could prospectively provide for an indeterminate sentence based upon the conditions of release specified in 1980 PA 519, § 4. See *People v Cook,* 147 Mich 127, 131; 110 NW 514 (1907), upholding the constitutionality of the indeterminate sentencing act, 1905 PA 184. In this manner a sentencing judge would know that any sentence imposed was liable to future 90-day reductions under act 519, much as this same judge can anticipate later "good time" or "special good time" reductions. That being the case, there is no constitutional infirmity in a prospective application of 1980 PA 519 because it does not interfere with the Governor's power to commute *after* judicial sentencing.

The problem actually raised in this case, however, is whether 1980 PA 519 can constitutionally require the Governor to declare a state of emergency, thus setting in motion the process resulting in the reduction of the sentences of persons who were sentenced *before* that act went into effect and whose sentences therefore obviously were not conditioned upon this legislation. The Legislature, as shown by the task force study, was concerned with finding an emergency solution for a lingering condition. In other words, this Court must determine whether the Legislature has the power to mandate the reduction of certain minimum sentences already judicially imposed. It does not for two reasons.

First, art 4, § 45 contemplates prospective legislation only. It provides in pertinent part: "*The legislature may provide for* indeterminate sentences as punishment for crime and for the detention and *release of persons* imprisoned or detained under such sentences". Do the emphasized words mean that § 45 intended that the Legislature may release by reduction of sentence persons already judicially sentenced? While superficially such an interpretation is arguable, closer analysis compels an opposite conclusion. Importantly, the section pertinently reads: "The Legislature may provide * * * for the detention and release". Obviously the powers of "detention" and "release" must be read together, and the Legislature could therefore not provide for "release" where it could not analogously provide for "detention". In other words, since it is obvious that the Legislature was not authorized by § 45 to increase the detention of persons by legislation enacted after their judicial sentencing, then also it could not shorten the actual term of sentence. As a consequence, it must

be assumed that § 45 was intended to be construed prospectively, as a retrospective construction runs contrary to other constitutional provisions.

Second, it is basic statutory interpretation that a statute will not be construed in a way that would make it unconstitutional. Construing art 4, § 45 as done in the preceding paragraph, interpreting 1980 PA 519 as mandating that the Governor shall reduce sentences, imposed at a time when there was no condition of that sentence that it might be reduced because of prison overcrowding, invades the Governor's right of commutation. Art 5, § 14 provides:

> "The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law."

It is clear that § 4 of 1980 PA 519, retroactively mandating a 90-day reduction of minimum sentences, would usurp the Governor's exclusive power of commutation unless it were part of the Legislature's power of indeterminate sentencing, which this opinion has just held it is not where it is retroactive. As a consequence, to maintain the constitutionality of the statute, it is held that the § 4 90-day reduction of sentences imposed before the approval date of 1980 PA 519 is discretionary rather than mandatory as far as the Governor's action is concerned. Viewed in this manner, the retroactive application of 1980 PA 519 is a procedural device for bringing to the Governor's attention prison overcrowding problems which may be relieved through the discretionary exercise of the chief executive's commutation power.

It may be argued that the phrase in art 5, § 14,

which provides that the Governor's commutation power is "subject to procedures and regulations prescribed by law", permits such a law as 1980 PA 519 to infringe on this power. However, that phrase serves only to channel the way in which a Governor exercises his or her discretion to grant commutation, rather than requiring him or her to in fact exercise or not exercise that power with respect to any particular subject.

In conclusion it is held that art 4, § 45 permits 1980 PA 519 to be constitutional with respect to sentences judicially imposed subsequent to January 26, 1981, the date of act 519's approval by the Governor; however, with respect to sentences imposed prior thereto, 1980 PA 519 is constitutional only insofar as the Governor's actions which trigger sentence reductions are discretionary rather than mandatory.

PEOPLE v ROGERS

Docket No. 61879. Argued January 9, 1980 (Calendar No. 9).—Decided May 18, 1981.

Jan C. Rogers was convicted by a jury in Recorder's Court of Detroit, Dalton A. Roberson, J., of uttering and publishing a forged instrument. The defendant testified that she "asked" a teller at the main office of the National Bank of Detroit about a check drawn on the account of Udo L. Salk Electric Company which was payable to Jan C. Rogers and which the defendant had indorsed as the payee. The teller found that the check had been reported stolen, and the defendant was arrested. The Court of Appeals, R. M. Maher, P.J., and J. H. Gillis and McGregor, JJ., in an unpublished per curiam opinion, reversed the defendant's conviction on the ground that it was error for the trial court to refuse the request of defense counsel, before the deliberation of the jury had begun, to instruct the jury on attempted uttering and publishing (Docket No. 77-4532). The people appeal. *Held:*

1. Attempted uttering and publishing of a forged instrument is a necessarily lesser included offense of uttering and publishing. An issue at trial was whether the forged check was "presented". The defendant's testimony of her inquiry about the check falls short of the actual representation that the check is genuine, which is the presentment necessary for the completed crime of uttering and publishing. The evidence presented would support conviction of the attempted crime and the refusal to instruct the jury on attempt was reversible error. If the jury had been instructed on attempt, it might have given some credence to the defendant's testimony and her theory of the case, while still finding that the instrument was forged and was presented by the defendant.

2. Although the court rules permit written requests for

REFERENCES FOR POINTS IN HEADNOTES

[1] 36 Am Jur 2d, Forgery §§ 20, 44 *et seq.*, 51.

[2, 3] 36 Am Jur 2d, Forgery §§ 20, 46.

[4] 36 Am Jur 2d, Forgery § 51.

75 Am Jur 2d, Trial §§ 583, 584, 601, 906, 909.

instructions to the jury at or before the close of the evidence, the language of the court rules does not foreclose oral requests nor limit the time for making them. A request for instructions made before the jury is released to begin deliberation is timely. In this case, the trial lasted one-half day, and the jury was instructed immediately following the argument of counsel. When the prosecutor objected that the defendant's request for an instruction was untimely, the trial court found that the speed of the trial and the lack of opportunity to consult with counsel about the charge given by the court made the objection unrealistic. The defendant's request was made at the first available opportunity and prior to the commencement of deliberation by the jury; it therefore was timely.

Affirmed.

1. FORGERY — UTTERING AND PUBLISHING — ATTEMPT — LESSER INCLUDED OFFENSES — INSTRUCTIONS TO JURY.

Attempted uttering and publishing of a forged instrument is a necessarily included offense of uttering and publishing a forged instrument; accordingly, a defendant charged with uttering and publishing is entitled to a requested instruction on the attempted offense, and refusal so to instruct the jury is reversible error, if evidence has been presented which will support a conviction of the lesser included offense (MCL 750.92, 750.249; MSA 28.287, 28.446).

2. FORGERY — UTTERING AND PUBLISHING — ATTEMPT — PRESENTMENT.

Testimony by a defendant that she had "asked" a bank teller about a forged check, if it is given credence by the jury, falls short of the actual representation that the check is genuine, which is the presentment necessary for the completed crime of uttering and publishing (MCL 750.92, 750.249; MSA 28.287, 28.446).

3. FORGERY — UTTERING AND PUBLISHING — ATTEMPT — EVIDENCE — SUFFICIENCY.

Sufficient evidence was adduced at trial to support a conviction of attempted uttering and publishing of a forged instrument where the issue was whether the defendant presented a forged check, which had been reported as stolen by the business on which it was drawn and which was made payable to the defendant, to a teller and the defendant testified that she had "asked" the teller about the check before she was arrested (MCL 750.92, 750.249; MSA 28.287, 28.446).

4. CRIMINAL LAW — INSTRUCTIONS TO JURY — REQUEST FOR INSTRUCTIONS — TIMELINESS.

An oral request by the defendant for an instruction on an attempt to commit the crime charged, which was made when the trial court asked if there were any objections to the instructions given to the jury, is timely where the trial lasted one-half day, the jury was instructed immediately following the argument of counsel, the trial court found that the request was made at the first available opportunity, and it was made before the commencement of deliberation by the jury (GCR 1963, 516.1).

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Paul G. Bruno,* Assistant Prosecuting Attorney, for the people.

Beverly Clark for defendant.

WILLIAMS, J. *(for affirmance).* We granted leave to appeal in this matter to determine whether the trial court reversibly erred in refusing to instruct the jury as to attempted uttering and publishing, when the facts adduced at trial arguably supported a conviction on either a completed or an attempted offense. We hold that such refusal constituted reversible error. The Court of Appeals is affirmed.

I

On April 20, 1976, defendant Jan C. Rogers approached a teller at the main branch of the National Bank of Detroit. Ms. Rogers testified that she "asked" the teller about a check in the amount of $652.76, drawn on the Udo L. Salk

Electric Company, which she had indorsed as the payee. The teller reviewed bank records and determined that the check had been stolen. Ms. Rogers was directed to the management area, where she was arrested by Detroit police officers and charged with uttering and publishing a forged instrument, MCL 750.249; MSA 28.446.

On February 23, 1977, defendant was convicted in the Recorder's Court of the City of Detroit of uttering and publishing. The jury had been instructed to consider only two possible verdicts: guilty or not guilty of the charged offense. However, after the jury had been so instructed but before it commenced deliberations, defense counsel requested an additional instruction on the lesser included offense of attempted uttering and publishing. This instruction was refused because the trial court erroneously believed that attempt was not a lesser included offense of uttering and publishing. The jury subsequently brought in a verdict of guilty of the charged offense; defendant was sentenced to three years probation.

The Court of Appeals held that the trial court's refusal to give the properly requested instruction on a "necessarily" included lesser offense of attempt constituted reversible error. Defendant's conviction was set aside, and the case remanded for entry of a judgment of guilty of attempted uttering and publishing or, in the prosecutor's discretion, a new trial.[1]

The prosecution's application for leave to appeal was granted on February 6, 1979. 405 Mich 822 (1979). Oral arguments were conducted on January 9, 1980.

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[1] Unpublished per curiam opinion, Docket No. 77-4532, July 20, 1978.

II

In *People v Ora Jones,* 395 Mich 379, 390; 236 NW2d 461 (1975), we read:

> "The duty of the trial judge to instruct on lesser included offenses is determined by the evidence. *People v Phillips,* 385 Mich 30; 187 NW2d 211 (1971). If evidence has been presented which would support a conviction of a lesser included offense, refusal to give a requested instruction is reversible error. *Id.* at 36. *People v Hamilton,* 76 Mich 212; 42 NW 1131 (1889)."

The common-law definition of a "necessarily" lesser included offense is that the lesser must be such that it is impossible to commit the greater without first having committed the lesser. 4 Anderson, Wharton's Criminal Law and Procedure (1957 ed), § 1799, pp 631-632.

We recognized in the *Guilty Plea Cases,* 395 Mich 96, 131; 235 NW2d 132 (1975), that attempted uttering and publishing is a necessarily lesser included offense of uttering and publishing:

> "A person intent on committing this crime might, for example, enter a bank with a forged instrument and be *apprehended as he is withdrawing it from his wallet immediately before uttering it.* Such conduct could constitute the crime of attempted uttering and publishing." (Emphasis added.)

At issue during defendant's trial was whether the instrument was "presented". The defendant testified that she "asked" the teller about the check. Such an inquiry falls short of the actual representation that the check is genuine necessary for presentment.

The standard for determining whether an attempt instruction should have been offered upon request was enunciated in *People v Chamblis,* 395 Mich 408, 423; 236 NW2d 473 (1975):

> "In determining whether the instruction should be given, the trial court should consider whether, if the defendant had been originally charged only on the lesser offense, the evidence adduced at trial would have supported a guilty verdict on that charge. If it would have, the requested instruction must be given."

Since the evidence presented would support an original charge of attempted uttering and publishing, the requested attempt instruction was proper and the refusal to give it reversible error. *People v Phillips, supra.* Further, as in *People v Kamin,* 405 Mich 482; 275 NW2d 777 (1979), the instant jury may have been reluctant to acquit defendant where there was evidence tending to show that she was guilty of a lesser crime. If the jury had been instructed on attempted uttering and publishing, it might have given some credence to defendant's claimed lack of knowledge and intent, while still finding that the instrument was forged and was presented by the defendant. The requested instruction would avoid the *Kamin* problem by permitting the jury to convict defendant in accordance with her own testimony, evidence, and theory of the case.

We have found evidence to support a conviction of attempted uttering and publishing.

III

Another consideration in determining the pro-

priety of a lesser included offense instruction is the timeliness of the request.[2]

The trial in the instant case took place in a single afternoon. Immediately following the closing arguments, the trial court instructed the jury. Before deliberations began, comments on the instructions were solicited from counsel; at that juncture, defense counsel requested the attempt instruction. The prosecutor objected that the request was untimely, but the trial court noted that the speed of the trial and the lack of opportunity to consult with counsel about the charge made such an objection unrealistic.

Although GCR 1963, 516.1 provides that "[a]t or before the close of the evidence, any party may * * * file written requests" for instructions, such language does not foreclose oral requests nor limit the time for making them. *People v Smith,* 388 Mich 457; 203 NW2d 94 (1972). Further, it has been held that a request made before the jury is released to begin deliberations is timely. *People v Louis Jones,* 71 Mich App 270; 246 NW2d 381 (1976).

Since the request for instruction on attempted uttering and publishing was made at the first available opportunity, and prior to the commencement of the jury's deliberations, we find it timely. Thus, the final criterion of propriety is resolved in favor of defendant.

IV

We hold today that the trial court erred in

[2] Timeliness is not a factor in first-degree murder cases to the extent that the trial court is required to instruct the jury *sua sponte,* and even over objection, on the included offense of second-degree murder. *People v Jenkins,* 395 Mich 440; 236 NW2d 503 (1975).

refusing to instruct the jury on attempted uttering and publishing since there is evidentiary support for the attempt charge, and the request for instructions was timely made.

The Court of Appeals is affirmed.

COLEMAN, C.J., and KAVANAGH, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with WILLIAMS, J.

IN THE MATTER OF PROBERT

Docket No. 61331. Argued October 2, 1979 (Calendar No. 1).—Decided June 19, 1981.

The Judicial Tenure Commission found Charles V. Probert, who had been a judge in the Wyoming Municipal Court until his term of office ended on December 31, 1978, guilty of judicial misconduct and recommended that he be permanently enjoined from holding judicial office. The proceedings were begun while Probert was a judge, but were completed after his term expired. He has held no judicial office since then. He argues that the Judicial Tenure Commission lacked jurisdiction in the matter and that the issue is moot because he no longer holds judicial office.

In an opinion by Justice Ryan, joined by Chief Justice Coleman and Justices Williams, Fitzgerald, and Moody, the Supreme Court *held:*

The specific recommendations of the Judicial Tenure Commission cannot be implemented in this case because Probert is presently not a judge and because the Court is not expressly empowered to enter a permanent injunction. However, he is not beyond the disciplinary reach of the Court, and he is publicly censured and conditionally suspended for five years; should he regain judicial office during that time, he will nevertheless be debarred from exercising that office.

1. Probert argues that once a judge leaves office the question of judicial discipline is rendered moot and the jurisdiction of the Judicial Tenure Commission over him is lost. Implicit in the argument is the view that the constitution authorizes the recommendation and imposition of discipline for incumbent judges only. Indeed, it is difficult to conceive how one who does not hold judicial office could be suspended, retired, or removed from office. Nevertheless, the Court has on at least three occasions issued conditional suspensions that would have fore-

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REFERENCES FOR POINTS IN HEADNOTES

[1-27] 46 Am Jur 2d, Judges §§ 18-20, 50, 79.

63 Am Jur 2d, Public Officers and Employees §§ 177 *et seq.*, 222 *et seq.*

Power of court to remove or suspend judge. 53 ALR3d 882.

closed the exercise of any judicial office to which the disciplined person might have been elected or appointed in the future. Such a conditional suspension, therefore, is not appropriately taken against incumbent judges only. Further, one who does not hold judicial office could be censured. In light of the purposes of judicial discipline, the censure of a former judge may be entirely expedient.

2. When a case of misconduct in office arises, the Court is obliged to make a judgment concerning the respondent's fitness to be a judge in the light of his misconduct, and must thus respond to individual considerations. But the decision must also be responsive to a significant institutional consideration, the preservation of the integrity of the judicial system. When a judge charged with misconduct removes himself from judicial office to avoid the notoriety and ignominy of disciplinary proceedings and the possibility of sanctions, censure, if deserved, may be essential to the preservation of the integrity of the judicial system because the alternative, silence, may be construed by the public as an act of condonation.

3. Because the possibilities of censure and conditional suspension remain, a discipline case does not become moot the instant the judge leaves office. Effective relief can still be granted; a controversy still exists. Establishment of a rule, therefore, of immediate termination of proceedings of the Judicial Tenure Commission when a judge leaves office is both unwarranted and unwise. There is good reason for proceedings to continue until completed, notwithstanding the judge's resignation or failure to be re-elected after the filing of a complaint.

4. The Judicial Tenure Commission's policy of declining to act further after the termination of a respondent's judicial office developed, no doubt, from its estimation of the most effective allocation of its resources. Once an unfit or incompetent judge is separated from judicial power, the greatest danger has passed, but the Court should not and will not transform the policy into a fast, inflexible rule of law that would preclude contrary action when the commission, in its considered judgment and discretion, deems it appropriate. Furthermore, to hold that the Court has no power to discipline a former judge would mean that the Court's power to vindicate the integrity of the judiciary could be negated by wholly irrelevant occurrences while a case is pending, such as the expiration of the judge's term of office, his resignation, or the length of time the Court takes to decide the case.

5. The four types of discipline that the constitution expressly empowers the Court to impose do not appear to comprehend a

permanent injunction. However, the Court also has a separate constitutional power of superintending control. It is an extraordinary power which is hampered by no specific rules or means for its exercise, and it invests the Court with the power to determine that a person is unfit for judicial office and to prevent him from exercising judicial power in this state for as long as he is, in the judgment of the Court, judicially unfit. The constitution, in granting the power of superintending control, explicitly prohibits the use of that power to remove a judge. But that specific prohibition does not have a cognate prohibition against the permanent injunction recommended in this case. If a permanent injunction is truly a form of "permanent prospective removal", then consistency would require that the provision which authorizes the Court to "remove" a judge upon the recommendation of the Judicial Tenure Commission also permits the Court to enter a permanent injunction; but that is clearly not the case.

6. The lack of superintending power to remove does not unavoidably entail a similar lack of superintending power to enjoin permanently. Removal deprives the judge of a more significant and tangible interest, the existing judgeship, than the interest impinged upon by a permanent injunction, the potentiality of attaining a judgeship, which is more problematic and uncertain. However, a permanent injunction might implicate the right of the voters to choose those who would hold judicial office. That suffrage is bestowed by the constitution. The Court's power of superintending control should be construed, if possible, to harmonize with other constitutional provisions. Therefore, it does not comprehend the power to enjoin a person permanently from holding judicial office. Probert no longer holds judicial office. The recommendation of the Judicial Tenure Commission that he be removed from office is moot, and the recommendation that he be permanently enjoined from holding judicial office cannot be carried out. Nevertheless, the possibilities of censure and conditional suspension remain.

7. The Judicial Tenure Commission found that Probert habitually and willfully disregarded statutes, court rules, canons, and other ethical responsibilities in the administration of justice; improperly used his judicial office to benefit his friends and court employees; engaged in conduct giving rise to impropriety and the appearance of impropriety; and exhibited a gross lack of judicial temperament and impartiality. A review of the record shows that the findings of the commission are amply supported, and Probert has filed no objection to the master's report upon which they are based. Probert's actions, taken as a

whole, constitute conduct clearly prejudicial to the administration of justice, misconduct in office, and persistent failure to perform judicial duties, all proscribed by the constitution and the General Court Rules of 1963. Certainly such egregious misconduct and judicial perfidy warrant the imposition of disciplinary measures. The Court cannot ignore Probert's acts, because it is important not only that the integrity of the judiciary be preserved but that the appearance of that integrity be maintained. Probert is publicly censured and a five-year conditional suspension without pay imposed. Should he regain judicial office during that time, Probert will be barred from exercising the power and prerogatives of the office at least until the expiration of the suspension.

Justice Levin, joined by Justice Kavanagh, dissenting, would hold that the Judicial Tenure Commission is not empowered to recommend discipline of, nor may the Supreme Court on the commission's recommendation impose discipline on, a person who no longer holds judicial office.

1. The Constitution of 1963 carried forward the provisions of earlier constitutions granting the Supreme Court broad powers of superintending control, but expressly denied the Court the power to remove judges. An amendment to the judicial article adopted in 1968 established the Judicial Tenure Commission and gave the Court the power to discipline judges on the recommendation of the commission. The function of the commission is to monitor the conduct of persons charged with the administration of justice and to recommend disciplinary action to the Supreme Court. The focus of the constitutional provision establishing the commission is the discipline of persons with judicial tenure; the disciplinary actions which the commission may recommend—censure, suspension, retirement, or removal —are stated to be actions in discipline of "a judge". Accordingly, disciplinary action cannot be exerted against a person who has left judicial office.

2. Suspension, retirement and removal all involve the separation of a person from whatever judicial authority or office he has. The conditional suspension imposed by the Court would become effective only if Probert again attains judicial office during the period of conditional suspension; it has no present effect. Censure was intended to be the least severe form of discipline, reserved for situations where, while some disciplinary action is indicated, the judge is expected to correct his conduct with a minimum of reprobation. It skews the constitutionally prescribed scheme of discipline to construe censure as a discipline which may be imposed on a person determined to

be unfit to continue serving as a judge. Nor can a person who no longer holds judicial office be expected to correct his conduct. Further, the disciplines are listed in the alternative and their gradation in severity indicates that it was contemplated that a choice of discipline would be made according to the severity of the misconduct. The decision to impose both censure and conditional suspension for the same misconduct is thus at odds with the apparent intent of the constitution.

3. The general rule is that once jurisdiction is obtained over the parties it will not be defeated by a change of a party's status, such as residence, but that rule does not govern here. The power to act is defeated because the constitution authorizes the recommendation and imposition of discipline for incumbent judges only. It is that lack of power which defeats jurisdiction.

4. Continuing proceedings against Probert would serve no purpose other than to punish or make an example of him, or inform the public of his misdeeds. These are not functions of Judicial Tenure Commission proceedings, but merely consequences of the disciplinary function. Proceedings which should otherwise terminate should not be continued simply to effect those ends. If Probert is to be found guilty of conduct prejudicial to the administration of justice and that finding is to be the basis of disciplinary action by the Attorney Grievance Commission, the finding should be made in the context of attorney disciplinary proceedings so that the focus can be his conduct as a member of the bar and not his fitness for judicial office. A judge is subject to discipline for conduct prior to his taking office or during a previous tenure. Were Probert to regain judicial office, he would again be subject to proceedings before the Judicial Tenure Commission and, if appropriate, discipline might be recommended based on the record made in these proceedings.

5. There remains the possibility that a resigned or defeated judge will be assigned judicial duties by the Supreme Court pursuant to its powers under the constitution. Judges are assigned in the exercise of the Court's discretion; they have no tenure and no right to discharge judicial functions except as authorized by the Court. Communication with the Judicial Tenure Commission should be but one step in making an assignment. The court rule which provides for confidentiality of commission records before a complaint is filed also provides that the commission may release information about assigned judges to the State Court Administrator.

6. Education of the public, like education of other judges, is

merely a consequence of the disciplinary function, not an end in itself, to be pursued after the disciplinary function has ceased. If the Judicial Tenure Commission has the power to continue proceedings against a person who is no longer a judge, it might initiate proceedings for misconduct which has only come to light since the judge has left office, or it might feel obliged to employ the power not to protect the public but to appease the public clamor caused by the unearthing of misconduct. The resources of the commission should be dedicated to the essential constitutional purpose of preventing the abuse of judicial power by those who exercise it.

7. The power of superintending control is separate and distinct from the disciplinary power set forth in the constitution. The Court has no authority under its power of superintending control to permanently enjoin a person from holding judicial office. To construe the power to temporarily suspend a judge from the exercise of judicial office in the exercise of the power of superintending control as the equivalent of what was expressly withheld by the constitution, the power to remove from the office itself, would be to betray the trust placed in the Court's restraint by the constitutional convention, and would violate the understanding on which it was granted. The power to forbid the electorate from ever again exercising the franchise in favor of a particular person, a much greater power than the granted power to remove or suspend a judge, has not been expressly granted in this state as it has been in some others, and should not be inferred. The distinction between the power of superintending control and the authority to discipline a judge should not be blurred by using the Judicial Tenure Commission to fulfill the Court's duties of superintending control or by empowering the commission to investigate and recommend how the Court should exercise the discretion entrusted to it.

8. In some cases, the Court has suspended incumbent judges for periods longer than their terms of office. However, there is no indication that those cases considered whether the constitution authorizes imposition of a suspension which has no immediate effect. The question in this case is not how much is appropriate but whether there is power to discipline at all.

9. The opinion of the Court asserts that to end proceedings when a judge leaves office would be unwise. Such policy arguments cannot properly be the sole basis for a construction of the constitution unless the Court can say without a doubt that the normal meaning of the language is so absurd or unreasonable as to preclude its having been intended. It is not absurd,

unreasonable or even unwise to terminate disciplinary proceedings where the essential purpose of the Judicial Tenure Commission, keeping unfit judges off the bench, has been achieved by the judge simply leaving office.

10. Action against a person who has no judicial power to abuse does not promote the public's confidence that those who do have judicial power will not abuse it. The discipline ordered by the Court is punishment; its primary purpose is not to prevent the abuse of judicial authority but to react to abuse that has occurred. The constitutional procedures for the discipline of judges should not be employed to proclaim displeasure, however justified, with judicial misconduct. The public interest in the administration of justice and the interest in maintaining the good name of the judiciary are not served by further public airings of allegations and proofs of judicial misconduct. Clearly, once the judgeship is terminated the fundamental jurisdictional element ceases to exist.

The complaint should be dismissed without prejudice to the ability of the Judicial Tenure Commission to recommend discipline based on the record should Probert ever regain judicial office.

OPINION OF THE COURT

1. JUDGES — DISCIPLINE — MISCONDUCT.

The Supreme Court is obliged in a judicial discipline case to respond to individual considerations and also an institutional consideration, the preservation of the integrity of the judicial system (Const 1963, art 6, § 30; GCR 1963, 932).

2. JUDGES — DISCIPLINE — FORMER JUDGES — MISCONDUCT.

The censure of a former judge, if deserved, may be entirely expedient and essential to the preservation of the integrity of the judicial system because the alternative, silence, may be construed by the public as an act of condonation (Const 1963, art 6, § 30; GCR 1963, 932).

3. JUDGES — DISCIPLINE — FORMER JUDGES — MOOTNESS.

A judicial discipline case does not become moot the instant the judge leaves office, because the possibilities of censure and conditional suspension remain after a judge charged with misconduct steps down or fails to be re-elected (Const 1963, art 6, § 30; GCR 1963, 932).

4. JUDGES — DISCIPLINE — FORMER JUDGES — JUDICIAL TENURE COMMISSION.

A judge charged with misconduct should not have the power

simply by leaving office to short-circuit investigation by the Judicial Tenure Commission against him, leaving the proceedings incomplete and subject to the abrasion of time (Const 1963, art 6, § 30; GCR 1963, 932).

5. JUDGES — DISCIPLINE — FORMER JUDGES — JUDICIAL TENURE COMMISSION.

There is good reason for proceedings of the Judicial Tenure Commission to continue until completed, notwithstanding the judge's resignation or failure to be re-elected after the filing of a complaint of judicial misconduct (Const 1963, art 6, § 30; GCR 1963, 932).

6. JUDGES — DISCIPLINE — FORMER JUDGES — JUDICIAL TENURE COMMISSION.

A policy of the Judicial Tenure Commission that it declines to act further after the termination of a respondent's judicial office by resignation, failure to be re-elected, or death should not be transformed into a fast, inflexible rule of law that would preclude contrary action when the commission deems it appropriate (Const 1963, art 6, § 30; GCR 1963, 932).

7. JUDGES — DISCIPLINE — FORMER JUDGES — MISCONDUCT.

To hold that the Supreme Court has no power to discipline a former judge after he has left office would mean that the Court's power to vindicate the integrity of the judiciary could be negated by wholly irrelevant occurrences, such as the expiration of the judge's term of office, his resignation, or the length of time the Court takes to decide the case (Const 1963, art 6, § 30; GCR 1963, 932).

8. SUPERINTENDING CONTROL — CONSTITUTIONAL LAW — COURTS.

The power of superintending control conferred by the constitution on the Supreme Court is a power separate from its other powers of original jurisdiction and appeal, its purpose being to keep the courts themselves within bounds and to ensure the harmonious working of the judicial system (Const 1963, art 6, § 4).

9. JUDGES — SUPERINTENDING CONTROL — DISCIPLINE — CONSTITUTIONAL LAW — COURTS.

The constitutional power of superintending control invests the Supreme Court with the power to determine that a person is unfit for judicial office and to prevent him from exercising judicial power in this state for as long as he is, in the judgment of the Court, judicially unfit, even though the constitution, in

granting the power of superintending control, explicitly prohibits its use to remove a judge from office (Const 1963, art 6, § 4).

10. JUDGES — SUPERINTENDING CONTROL — DISCIPLINE — PERMANENT REMOVAL — ELECTIVE OFFICE.

The constitutional power of superintending control does not give the Supreme Court the power to enjoin a person permanently from holding judicial office because a permanent injunction might implicate the right of the voters to choose those who would hold judicial office and prevent the electorate from ever again exercising its constitutional suffrage in favor of a particular person (Const 1963, art 2, § 1; art 6, §§ 2, 4, 8, 12, 16).

11. JUDGES — DISCIPLINE — MISCONDUCT.

Actions by a judge which, taken as a whole, constitute conduct clearly prejudicial to the administration of justice, misconduct in office, and persistent failure to perform judicial duties, all proscribed by the constitution and the General Court Rules of 1963, certainly warrant the imposition of disciplinary measures (Const 1963, art 6, § 30; GCR 1963, 932.4).

12. JUDGES — DISCIPLINE.

It is important not only that the integrity of the judiciary be preserved but that the appearance of that integrity be maintained, and consequently the Supreme Court cannot ignore judicial misconduct, even though the judge has left office since.

DISSENTING OPINION BY LEVIN, J.

See headnote 10.

13. JUDGES — DISCIPLINE — CONSTITUTIONAL LAW.

The Judicial Tenure Commission is not empowered to recommend discipline of, nor may the Supreme Court, on the commission's recommendation, impose discipline on, a person who no longer holds judicial office (Const 1963, art 6, § 30; GCR 1963, 932).

14. JUDGES — DISCIPLINE — CENSURE.

Censure was intended to be the least severe form of discipline of a judge, reserved for situations where, while some disciplinary action is indicated, the judge is expected to correct his conduct with a minimum of reprobation (Const 1963, art 6, § 30; GCR 1963, 932).

15. JUDGES — DISCIPLINE — CENSURE.

It skews the constitutionally prescribed scheme of discipline of judges to construe censure as a discipline which may be im-

posed on a person determined to be unfit to continue serving as a judge (Const 1963, art 6, § 30; GCR 1963, 932).

16. JUDGES — DISCIPLINE — CENSURE.

The disciplines which the Supreme Court may impose on judges who are guilty of misconduct are listed by the constitution in the alternative, and their gradation in severity indicates that it was contemplated that a choice of discipline would be made according to the severity of the misconduct; a decision by the Court to impose both censure and conditional suspension for the same misconduct is at odds with the apparent intent of the constitution (Const 1963, art 6, § 30; GCR 1963, 932).

17. JUDGES — DISCIPLINE — FORMER JUDGES.

The interests in punishing a former judge, making an example of him, or informing the public of his misdeeds are not functions of the Judicial Tenure Commission and do not warrant continuation of the proceedings against a person who no longer holds judicial office (Const 1963, art 6, § 30; GCR 1963, 932).

18. JUDGES — DISCIPLINE — ATTORNEY GRIEVANCE COMMISSION — JUDICIAL TENURE COMMISSION.

The Attorney Grievance Commission has power to investigate and recommend discipline for conduct by a lawyer which has been the subject of proceedings in the Judicial Tenure Commission, and the record of the tenure commission proceedings is admissible into evidence at the hearing of the Attorney Grievance Commission; however, the Attorney Grievance Commission must find the facts itself and recommend the discipline it thinks appropriate even where conduct which is the basis of the discipline is the same (GCR 1963, 965).

19. JUDGES — DISCIPLINE — ATTORNEY GRIEVANCE COMMISSION — JUDICIAL TENURE COMMISSION.

The Attorney Grievance Commission and the Judicial Tenure Commission operate independently to protect distinct interests and maintain distinct professional standards; a judge's conduct might be prejudicial to the administration of justice while identical conduct by a lawyer might not be, and a person's conduct or temperament might render him unfit to hold judicial office while not substantially affecting his fitness to be a member of the State Bar (GCR 1963, 932, 950 et seq.).

20. JUDGES — DISCIPLINE — TIME OF MISCONDUCT.

A judge is subject to discipline for conduct prior to his taking office or during a previous tenure; if a judge who is accused of judicial misconduct ceases to hold office before disciplinary

proceedings run their course and then regains judicial office, the Judicial Tenure Commission may reactivate the inquiry into the judge's conduct and may recommend that the Supreme Court impose discipline for that conduct (GCR 1963, 932).

21. JUDGES — ASSIGNMENT — FORMER JUDGES.

Former judges who are assigned judicial duties pursuant to the constitutional power of the Supreme Court are assigned in the exercise of the Court's discretion, and have no tenure and no right to discharge judicial functions except as authorized by the Court; assignments in the exercise of constitutional power should be made after individual review, and only those ex-judges who have enhanced the judiciary in the past and who can be expected to do so in the future should be recalled to the bench (Const 1963, art 6, § 23).

22. JUDGES — DISCIPLINE — JUDICIAL TENURE COMMISSION.

Discipline of a judge which is not intended to rehabilitate the judge or protect the judicial office is mere punishment and not within the disciplinary power of the Judicial Tenure Commission (Const 1963, art 6, § 30; GCR 1963, 932).

23. JUDGES — DISCIPLINE — PUBLIC INTEREST.

The public's interest in judicial discipline is in assuring that justice is administered properly, in preserving the integrity of the courts and the judicial process, and in maintaining public confidence in the judiciary by assuring that judges conduct themselves in a manner befitting the judicial office (Const 1963, art 6, § 30; GCR 1963, 932).

24. JUDGES — DISCIPLINE — FORMER JUDGES — ATTORNEY GRIEVANCE COMMISSION.

The termination of proceedings of the Judicial Tenure Commission against a judge because he no longer holds judicial office does not preclude the operation of attorney disciplinary proceedings against the judge; if his misdeeds as a judge were such as to render him unfit to be a member of the State Bar, the Attorney Grievance Commission may recommend discipline (Const 1963, art 6, § 30; GCR 1963, 932, 950 et seq.).

25. SUPERINTENDING CONTROL — CONSTITUTIONAL LAW — DISCIPLINE — JUDICIAL TENURE COMMISSION.

The Supreme Court's power of superintending control is separate and distinct from the disciplinary powers the Court exercises on recommendation of the Judicial Tenure Commission; the constitutional convention, as a compromise, in effect granted the Court the power of temporary suspension of judges as being

essential to the proper superintending of the courts, but expressly withheld from the supervisory power the power to remove judges from office (Const 1963, art 6, §§ 4, 30).

26. JUDGES — CONSTITUTIONAL LAW — PERMANENT REMOVAL — ELECTIVE OFFICE.

The power to forbid the electorate from ever again exercising the franchise in favor of a particular person by permanently enjoining the person from holding judicial office has not been expressly granted to the Supreme Court, and should not be inferred (Const 1963, art 6, § 30; GCR 1963, 932).

27. JUDGES — DISCIPLINE — FORMER JUDGES.

The suspension from judicial office of a person who is not a judge and censure which cannot correct judicial conduct is not, in any proper sense, judicial discipline; the procedures provided by the constitution for the discipline of judges should not be employed to proclaim displeasure, however justified, with judicial misconduct because the primary purpose should be the protection of the public and the integrity of the judicial process by preventing the abuse of judicial authority by persons who are in a position to abuse it (Const 1963, art 6, § 30; GCR 1963, 932).

Joseph F. Regnier, Executive Director and General Counsel, *Stanley T. Dobry,* Co-Examiner, and *Thomas L. Prowse* and *Christopher S. Boyd,* Staff Attorneys, for the Judicial Tenure Commission.

Cholette, Perkins & Buchanan (by *Richard D. Ward* and *Robert A. Benson)* for respondent.

RYAN, J. We are presented in this case with questions pertaining to findings and recommendations of the Judicial Tenure Commission and the power of this Court as it relates to the discipline of members of the state judiciary. The questions are of first impression and arise because respondent Charles V. Probert, the subject of the proceedings before us, is no longer a judge.

Respondent maintains that his departure from judicial office since the institution of formal disci-

plinary proceedings divested the commission of jurisdiction over him and precludes this Court from imposing effective discipline. It follows, he contends, that we should reject the commission's recommendation of discipline. We find this argument unpersuasive.

In response to the conduct detailed in Part III of this opinion, the commission has recommended that respondent "be removed from judicial office and permanently enjoined from holding such office in the future". We conclude that because respondent is presently not a judge and because we are not expressly empowered to enter an injunction of the nature sought here, we cannot implement the specific recommendations of the commission.

We hold further, however, that respondent is not beyond our disciplinary reach and conclude that he should be censured and conditionally suspended for five years, regardless of any possible intervening election or appointment to judicial office.

The facts and procedural history of the case are fully delineated in Part I of Justice LEVIN'S opinion.

I

In 1968, the people of Michigan amended the state constitution and established the commission.

"(1) A judicial tenure commission is established consisting of nine persons selected for three-year terms as follows: Four members shall be judges elected by the judges of the courts in which they serve; one shall be a court of appeals judge, one a circuit judge, one a probate judge and one a judge of a court of limited jurisdiction. Three shall be members of the state bar who shall be elected by the members of the state bar of whom one

shall be a judge and two shall not be judges. Two shall be appointed by the governor; the members appointed by the governor shall not be judges, retired judges or members of the state bar. Terms shall be staggered as provided by rule of the supreme court. Vacancies shall be filled by the appointing power.

"(2) On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings." Const 1963, art 6, § 30 (hereinafter § 30).

Section 30(2) prescribes four kinds of discipline: censure, suspension (with or without salary), retirement, and removal. Respondent avers that once a judge leaves office the question of judicial discipline is rendered moot and the commission's jurisdiction over him is lost. Implicit in the argument is the view that § 30(2) discipline befits incumbent judges only. This is the position espoused by Justice LEVIN, who concludes that "§ 30 authorizes the recommendation and imposition of discipline for *incumbent judges only*".[1] Thus, upon a judge's resignation or the expiration of his term, our colleague holds, commission proceedings must cease and this Court's power to discipline that person under § 30(2) evaporates. We do not read that provision so narrowly.

Indeed, it is difficult to conceptualize how one who does not hold judicial office could be suspended, retired, or removed from office. Nevertheless, we have on at least three occasions issued

[1] Justice LEVIN's opinion, p 245 (emphasis added).

conditional suspensions that would have foreclosed the exercise of the prerogatives inhering in any judicial office to which the disciplined party might have been elected or appointed in the future, the condition being, of course, re-election or appointment to judicial office. *In the Matter of Mikesell,* 396 Mich 517, 549; 243 NW2d 86 (1976); *In the Matter of Del Rio,* 400 Mich 665, 672, fns 3-4; 256 NW2d 727 (1977); *In the Matter of Bennett,* 403 Mich 178, 200; 267 NW2d 914 (1978). The effect of those suspensions would have been to disengage the disciplined party from judicial power, but only had that person come to occupy judicial office again during the term of the suspension, and only to the extent that the terms of office and suspension coincided. Clearly, it is immaterial to a suspension of this nature whether or not the disciplined party holds judicial office when the suspension is imposed.[2] A conditional suspension, therefore, is not appropriately taken against incumbent judges only.[3]

Furthermore, it is not at all difficult to conceptualize how one who does not hold judicial office could be censured. Respondent himself concedes the possibility. In light of the purposes of judicial discipline,[4] the censure of a former judge may be entirely expedient.

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[2] The fact that the respondents in *Mikesell, Del Rio,* and *Bennett* were sitting judges when we imposed discipline and respondent is not is a distinction without a difference insofar as this Court's power to impose the conditional suspensions is concerned. If we lacked the power to suspend those persons from judicial offices not then held, the suspensions in those cases exceeded our power. However, nobody has made that claim, then or now.

[3] In contending that the case is moot, respondent implies that it is impossible to suspend, retire or remove a person from a position he does not hold. We agree. This is entirely consistent with the issuance of a conditional suspension that will become operative, if ever, only in the future against a person who does not presently occupy judicial office.

[4] For a concise description of these purposes, see the statement of the American Bar Association quoted in fn 10, *infra.*

When we are confronted with a case of misconduct in office and the question of judicial discipline arises, we are obliged to make a judgment concerning the respondent's fitness to be a judge in light of his misconduct. Thus, a decision to enter an order of judicial discipline must be responsive to individual considerations. But our concern encompasses more: when one commits judicial misconduct he not only marks himself as a potential subject of judicial discipline, he denigrates an institution.[5] Accordingly, a decision on judicial discipline must also be responsive to a significant institutional consideration, "the preservation of the integrity of the judicial system".[6] Institutional integrity, after all, is at the core of institutional effectiveness.

When a judge charged with misconduct removes himself from judicial office to avoid the notoriety and ignominy incident to disciplinary proceedings and the possibility of sanctions, censure, if deserved, may be essential to "the preservation of the integrity of the judicial system", especially if that integrity has been critically undermined, because the alternative, silence, may be construed by the public as an act of condonation.[7]

As earlier stated, respondent asserts that because he is no longer a judge the case is moot.

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[5] The relationship of a judge to the judiciary and the judiciary to the public are expressed in the words of Canon 1 of our Code of Judicial Conduct:

"A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself 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."

[6] *In the Matter of Del Rio,* 400 Mich 665, 725; 256 NW2d 727 (1977).

[7] See *In re Inquiry Relating to District Judge Harold L Hammond,*

Because the possibilities of censure and conditional suspension remain after a judge charged with misconduct steps down or fails to be reelected, a judicial discipline case does not become moot the instant the judge leaves office. Effective relief can still be granted; a controversy still exists. See generally *Del Rio, supra,* 685-686; *McCarthy v Wayne Circuit Judge,* 294 Mich 368, 373; 293 NW 683 (1940); *Detroit v Killingsworth,* 48 Mich App 181, 183; 210 NW2d 249 (1973). Establishment of a rule, therefore, calling for immediate termination of commission proceedings upon a judge's leaving office is unwarranted.

Such a rule would also be unwise. A judge charged with misconduct should not have the power, simply by leaving office, to short-circuit investigation of the allegations against him, leav-

224 Kan 745; 585 P2d 1066 (1978) (public censure of judge who had resigned due to physical disabilities).

Moreover, censure of a former judge would not preclude on double jeopardy grounds additional discipline, such as removal, based on the same misconduct were that person to regain judicial office in the future. As we noted in *In the Matter of Mikesell,* 396 Mich 517, 528; 243 NW2d 86 (1976), commission proceedings are *not* criminal in nature:

" 'The proceedings of the Judicial Board 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 Judicial Board'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.* At most, the proceedings of the Judicial Board could be characterized as quasi-judicial administrative hearings, and the Order of the Supreme Court as a judicial disciplinary order.' " (Emphasis in original) (quoting *Keiser v Bell,* 332 F Supp 608, 616 [ED Pa, 1971]).

Thus, we held in *Ransford v Graham,* 374 Mich 104, 109; 131 NW2d 201 (1964), that the refusal of the Michigan House of Representatives to vote for the judge's removal did not preclude, on double jeopardy grounds, our subsequent suspension of him because "[n]either the proceedings in this Court nor those in the legislature were criminal". Accordingly, constitutional provisions, insofar as they are designed to afford rights to criminal defendants, are inapposite to commission proceedings. See generally 53 ALR3d 882, § 12[a], pp 912-914. Compare fn 13, *infra.*

ing the proceedings incomplete and subject to the abrasion of time.[8] Events pertaining to alleged judicial misconduct and the recommendation of the commission with respect to those events should be as close in time as possible. There is good reason, therefore, for commission proceedings to continue until completed, notwithstanding a judge's resignation or failure to be re-elected after the filing of a complaint.

We are advised that as a matter of *policy,* "the [c]ommission has declined to act further after termination of a respondent's judicial office by resignation, by failure to be re-elected, or by death".[9] This policy no doubt developed in light of the commission's estimation of the most effectual allocation of its resources. Once an unfit or incompetent judge is separated from judicial power, the greatest danger has passed. Be that as it may, this Court should not and will not transform that

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[8] To the same effect is the following statement of the Supreme Court of North Carolina:

"[I]t would indeed be a travesty if a judge could avoid the full consequences of his misconduct by resigning from office after removal proceedings had been brought against him." *In re Inquiry Concerning a Judge No 53, Linwood T Peoples,* 296 NC 109, 150-151; 250 SE2d 890, 914 (1978).

Moreover, Justice LEVIN concedes as much:

"We recognize that the Judicial Tenure Commission's ability to recommend discipline based on prior misconduct in office might be embarrassed if judges were able to shield themselves from inquiry by resigning and could wait until evidence of misdeeds has faded with time, and then regain and hold judicial office with impunity." Justice LEVIN's opinion, fn 15.

This recognition leads my brother to qualify the ban against continuing proceedings after a judge leaves office:

"There might * * * be situations where it would be appropriate for this Court to direct the Judicial Tenure Commission to proceed against an ex-judge to the point of preserving testimony." *Id.*

We are not convinced that such a limitation on the commission's range of action is prudent.

[9] Brief in Support of Dissenting [Commission] Opinion and Minority Recommendation, p 2.

policy into a fast, inflexible rule of law that would preclude contrary action when the commission, in its considered judgment and discretion, deems it appropriate.[10]

Furthermore, to hold that this Court has no power to discipline a former judge would work undue mischief, which would be most apparent, for example, in a case in which a judge leaves office after his case is submitted to us and only the question of discipline remains. Such a holding would mean that at a time when the commission has completed its work and we have before us all the information and materials necessary to render judgment, our power to vindicate the integrity of the judiciary could nonetheless be negated by wholly irrelevant occurrences such as the expira-

[10] Considerations affecting the decision to continue proceedings against a judge after he has left office may include, but are not limited to, the likelihood of re-election to judicial office, the gravity of the misconduct, and the importance of official reprobation to public confidence and trust in the integrity of the Michigan judicial system. In this regard, those charged with the task of supervising the conduct of our judges must always bear in mind the functions of judicial discipline:

"*[T]he major purpose of judicial discipline is not to punish judges,* but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves." ABA Standards Relating to Judicial Discipline and Disability Retirement (Tentative Draft, 1977, approved by ABA House of Delegates, February, 1978), p 2 (emphasis added).

It might be argued that permitting proceedings to *continue* against a judge who leaves office during the pendency of proceedings would require us to permit the commission to *begin* proceedings against a judge after he leaves office. This reasoning, however, is not cogent. To forbid the filing of a complaint after a judge has left office is simply to give effect to considerations underlying our various statutes of limitations. It would also tend to ensure that the commission is not acting pursuant to motives unrelated to its proper mission. Finally, a distinction related to the purpose of commission proceedings can be drawn between filing a complaint against a sitting judge and a former judge: a well-founded complaint may encourage the sitting judge, who is guilty of misconduct, to resign or not run for re-election. These pressures, which are germane to the essential purpose of the commission—keeping unfit judges off the bench—have no relevance to a former judge.

tion of the judge's term of office, his resignation, or the length of time we take to decide the case.

II

The question whether this Court is empowered to permanently enjoin respondent from holding judicial office in the future remains. Our authority to discipline members of the state judiciary flows from two sources, §§ 30 and 4 of article 6 of the Michigan Constitution.

The four types of discipline § 30 empowers this Court to impose—censure, suspension, removal, and retirement—do not appear to comprehend the permanent injunction sought here.[11]

Section 4 embodies a more general grant of power, the power of superintending control.

"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 supreme court shall not have the power to remove a judge." Const 1963, art 6, § 4 (hereinafter § 4).

As explained in *In re Huff,* 352 Mich 402, 418; 91 NW2d 613 (1958):

"The superintending control conferred by Constitution on this Court is a power separate, independent and distinct from its other original jurisdiction and appellate powers, its purpose being 'to keep the courts themselves "within bounds" and to insure the harmonious

[11] "Suspension" is defined as "[a]n ad interim stoppage or arrest of official power and pay; —not synonymous with 'removal' which terminates wholly the incumbency of the office or employment". Black's Law Dictionary (4th rev ed), p 1616.

"Retirement" refers to divestiture of office for reasons pertaining to physical or mental infirmity, rather than misconduct, and is not in issue here. ABA Standards Relating to Judicial Discipline and Disability Retirement, *supra,* Commentary to Standard No. 6.7, pp 52-53; Standard Nos. 8.1-8.8, pp 60-63.

Neither "suspension" nor "removal" connotes a *permanent* disqualification from office.

working of our judicial system.' Such power having been conferred by Constitution upon this Court, it also received all the power necessary to make that control and its implementing orders and writs effective." (Citations omitted.)

The *Huff* Court also outlined the great breadth of the power:

" 'The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. Moreover, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted. This power is not limited by forms of procedure or by the writ used for its exercise. Furthermore, it is directed primarily to inferior tribunals, and its relation to litigants is only incidental.' " *Id.,* 417-418.

It is true that § 4 explicitly prohibits this Court from utilizing its power of superintending control to *remove* a judge.[12] Nevertheless, "for the purpose of protecting the purity of judicial processes and maintaining public confidence in the administration of justice", we indefinitely enjoined a judge "from exercising the powers and duties of [his] office" pursuant to our power of superintending control. *Ransford v Graham,* 374 Mich 104, 108;

[12] In contrast, we may utilize the power conferred by § 30 to remove a judge. Aside from § 30, the power to remove a judge resides in our Governor and Legislature. Const 1963, art 6, § 25 (for "reasonable cause" short of grounds for impeachment); art 11, § 7 (impeachment of civil officers, including judges "for corrupt conduct in office or for crimes or misdemeanors").

131 NW2d 201 (1964); *In re Graham,* 366 Mich 268, 280-281 fn of REPORTER; 114 NW2d 333 (1962) (same case); accord, *In re Mussman,* 112 NH 99; 289 A2d 403 (1972); *In the Matter of DeSaulnier,* 360 Mass 787; 279 NE2d 296 (1972).

It is important to stress that our opinion today does not signal a retreat from the sound principles enunciated in *Huff, supra,* and *Graham, supra.* As the head of the state judiciary, it is this Court's duty " 'to keep the [Michigan] courts * * * "within bounds" and to insure the harmonious working of our judicial system' ". *Huff, supra,* 418. That system is only as good as its constituent judges. Accordingly, § 4 invests this Court with the power to determine that a person is unfit for judicial office and to prevent him from ever exercising judicial power in this state for as long as he is, in our judgment, judicially unfit.[13]

Section 4 does not explicitly bar us from permanently enjoining one from holding judicial office. The provision, however, does declare that we have no power to *remove* a judge. We do not find in this

[13] This, of course, is not to say that we are empowered to act arbitrarily or capriciously. A determination of judicial unfitness must always be accompanied by the safeguards of procedural due process. See, *e.g., In re Graham,* 366 Mich 268, 275; 114 NW2d 333 (1962); *In re Heideman,* 387 Mich 630, 632; 198 NW2d 291 (1972); *In the Matter of Del Rio,* 400 Mich 665, 682-689; 256 NW2d 727 (1977). See generally GCR 1963, 930, 932.

Most cases of judicial discipline are handled within the provisions of § 30. The question of this Court's power under § 4 to discipline judges, however, is independent of that fact.

In *In the Matter of Del Rio,* 400 Mich 665, 679; 256 NW2d 727 (1977), the commission recommended that Judge Del Rio "be enjoined from *holding* judicial office in the future". In a separate concurring opinion, I stated that I "would enjoin him from *serving* in any state judicial office in the future". *Del Rio,* p 727 (emphasis added). As we reaffirmed in that case, "the right of the people of a judicial circuit to the *service* of a judge whom they have elected is subject to express and distinct limitations and qualifications provided for by the Constitution and statutes". 400 Mich 685, fn 6 (emphasis added) (construing *In re Huff,* 352 Mich 402; 91 NW2d 613 [1958]).

specific prohibition a cognate prohibition against the permanent injunction recommended here. If a permanent injunction were truly a form of "removal", consistency would compel the judgment that § 30, which authorizes us to "remove" a judge, permits us to enter a permanent injunction, but, clearly, this is not the case.[14]

The language of § 4 neither permits nor forbids us to issue a permanent injunction against the holding of judicial office. The lack of superintending power to remove does not itself unavoidably entail a similar lack of superintending power to permanently enjoin. Removal deprives the judge of a more significant and tangible interest—his existing judgeship—than the interest impinged upon by a permanent injunction—the *potentiality* of attaining a judgeship—which is more problematic and uncertain.[15]

Nonetheless, a permanent injunction might implicate the right of the voters of Michigan to choose those who would hold judicial office. As our Brother LEVIN correctly observes, the recommended injunction would "prevent the electorate from ever again effectively exercising the franchise in favor of a particular person".[16] That suffrage is bestowed by our constitution. Const 1963, art 2, § 1; art 6, §§ 2, 8, 12, 16. Section 4 should be construed, if possible, to harmonize with other constitutional provisions.[17] We agree, therefore,

[14] See fn 11, *supra*.

[15] "[The] opportunity to be re-elected * * * is much too intangible an interest to invoke the protection of due process." *Gruenburg v Kavanagh*, 413 F Supp 1132, 1136-1137 (ED Mich, 1976), quoted in *In the Matter of Del Rio*, 400 Mich 665, 685; 256 NW2d 727 (1977).

[16] Justice LEVIN'S opinion, p 259.

[17] "Of primary importance are two basic rules of constitutional construction.

"1. Every statement in a state constitution must be interpreted in the light of the whole document.

"2. Because fundamental constitutional principles are of equal

that § 4 does not comprehend the power to permanently enjoin a person from holding judicial office.[18]

III

Charles V. Probert no longer holds judicial office. The commission recommends that he "be [(1)] removed from judicial office and [(2)] permanently enjoined from holding such office in the future".

The first recommendation is moot.

The second recommendation cannot be carried out for the reasons discussed in Part II.

Nonetheless, the possibilities of censure and conditional suspension remain,[19] and, therefore, our decision to deny the commission's recommendation does not foreclose the question of discipline.

The commission divided its findings into four general categories:

"(1) Respondent habitually and willfully disregarded statutes, court rules, canons and other ethical responsibilities in the administration of justice;

"(2) Respondent improperly used his judicial office to benefit his friends and court employees;

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dignity, none must be so construed as to nullify or substantially impair another." *People v Blachura,* 390 Mich 326, 333; 212 NW2d 182 (1973).

[18] This is consistent with the fact that neither of our coordinate branches of government is constitutionally authorized to permanently enjoin a person from holding judicial office. Even in the case of the most extreme civil sanction that can be inflicted upon a judge—impeachment—the penalty "shall not extend further than removal from office". Const 1963, art 11, § 7.

[19] Aside from deciding that our power of superintending control, Const 1963, art 6, § 4, does not enable us to issue a permanent injunction against holding judicial office, we reserve the question whether and to what extent we could properly exercise the power in this case.

"(3) Respondent engaged in conduct giving rise to impropriety and the appearance of impropriety; and

"(4) Respondent exhibited a gross lack of judicial temperament and impartiality."

The commission elaborated its findings as follows:

"(1) As to the first general category, we adopt, as fully supported by the record, the findings that respondent wrongfully: thwarted the right of criminal defendants to appointed counsel; denied defendants the right to reasonable bail and perverted the bail process to unsuitable and improper purposes; denied defendants the right to an appeal bond; routinely denied the clear statutory right of misdemeanants to post a ten percent bond; and habitually abused his contempt power. Respondent's extrajudicial confiscation of weapons, however well motivated, constituted an act of judicial lawlessness. Under the same general category, respondent's refusal to obey an order of a superior court was an act of insubordination and conduct clearly prejudicial to the administration of justice. See *In the Matter of Bennett,* 403 Mich 178; 267 NW2d 914 (1978).

"Concerning the allegation in paragraph 12, the proofs showed respondent's unlawful acceptance in the *Jacobs* case of a guilty plea to a felony written on an appearance ticket. This is an action without any jurisdiction or justification and is a serious disregard of proper procedure. It pales by comparison to respondent's subsequent alteration of court and police records, his perjury in the court records, and his falsification of judicial records, all in an effort to cover up his misconduct.

"We find that the foregoing misconduct evaluated in its totality constitutes conduct clearly prejudicial to the administration of justice, misconduct in office, and persistent failure to perform judicial duties as proscribed by Const 1963, art 6, § 30, and GCR 1963, 932.4.

"(2) With regard to the second general category, we make the following observations: respondent improperly used his judicial office to benefit his friends and court employees. He abused the processes of the court, including his contempt power, to obtain a material benefit for

the nephew of his court constable. In a similar manner, he procured an employment test for his friend, and assisted her in preparing answers in advance of the test. * * *

"We find that this constitutes misconduct in office and conduct clearly prejudicial to the administration of justice within the purview of Const 1963, art 6, § 30, and GCR 1963, 932.4.

"(3) As to the third general category, conduct giving rise to impropriety and the appearance of impropriety, we find respondent's public intoxication and associated misconduct to be a grave breach of his responsibilities. * * *

"Respondent's drunkenness as proven did not involve his activities on the bench. However, his notorious, flagrant, and boorish behavior in the bars around Wyoming, Michigan, created a public spectacle, and doubtless scandalized the community. Thereby, he violated his duty to behave, 'in a sense * * * as though he is always on the bench'. *Bennett, supra.*

"We find that his behavior failed to avoid impropriety and its appearance and was conduct clearly prejudicial to the administration of justice within the meaning of Const 1963, art 6, § 30, and GCR 1963, 932.4. We find further that respondent's conduct aforesaid was such as to bring his office into disrepute.

"(4) As to respondent's gross lack of judicial temperament and impartiality, there are two general areas of misconduct. The first is respondent's injudicious behavior during arraignments and sentencings. The concrete examples of misconduct are legion and are fully and adequately discussed in the report of the master. Frequently, respondent interjected extraneous matters into the proceeding and made it appear that his determination in the case rested on them. He bullied and badgered defendants. In a number of cases as proven, the judge brandished his peculiar conceptualization of the relationship between the court and the police, referring to 'my police officers'. Particularly shocking conduct appears in *People v Joseph Bouwhuis,* and its companion cases. There, he told the defendants that there were 'pimps, murderers and homosexuals out at the Kent

County Jail' and the defendants would be 'some fresh meat for them'. Respondent's frequent statements at arraignments, as in that particular case, that the defendants 'don't need an attorney, but need a miracle worker instead' necessarily suggested that respondent had prejudged their case.

"In *People v Gary Schultz,* respondent referred to the defendant as a 'little bastard' from the bench. In *People v Charles Sharpe,* respondent's demeaning, sarcastic remarks about the defendant's admitted homosexuality made it obvious that Judge Probert sentenced him not for what he did, but for what he was.

"Another aspect of respondent's partiality and unjudicial temperament manifested itself during the preliminary examinations or trials in *People v Gary Bolot, People v Scott Selkirk, People v Thomas McKellar, People v Alan Metzger,* and *People v Nicholas Busser.* In the most crude and overbearing way, respondent interfered with the normal course of these proceedings and sought to obtain the desired result without the formality of a trial. Under these circumstances, respondent, like Judge Del Rio, himself improperly coerced guilty pleas. *Del Rio,* 702.

"We find this to be misconduct in office and conduct clearly prejudicial to the administration of justice, in contravention of the provisions of Const 1963, art 6, § 30, and GCR 1963, 932.4."

A review of the record reveals that the findings of the commission are amply supported. Further, respondent has filed no objection to the master's report upon which they are based. We therefore adopt the findings of fact and conclusions of law in the quoted portions of the commission's opinion.

To sum up, we find, as did the commission, that respondent's actions, taken as a whole, constitute conduct clearly prejudicial to the administration of justice, misconduct in office, and persistent failure to perform judicial duties, all proscribed by Const 1963, art 6, § 30, and GCR 1963, 932.4.

Certainly, this egregious misconduct and judicial perfidy warrant the imposition of disciplinary measures. This Court cannot ignore respondent's acts, not only because they violate the laws of this state, but also because, as stated in *Del Rio:*

"[T]he *real* issue in this case [is] the preservation of the integrity of the judicial system.

"The functions and decisions of a judge have an incalculable impact on the community at large. A citizen's experience with the law is often confined to contact with the courts. Therefore, it is important not only that the integrity of the judiciary be preserved but that the appearance of that integrity be maintained." *Del Rio,* 725.

The foregoing analysis applies with equal force to respondent.

Accordingly, in light of the nature and extent of his misconduct as documented by the commission, and pursuant to GCR 1963, 932.25, we hereby censure Charles V. Probert and impose a five-year conditional suspension without pay effective the date of this decision. Should he regain judicial office during that time, Mr. Probert will nevertheless be debarred from exercising the power and prerogatives of the office until at least the expiration of the suspension. Pursuant to GCR 1963, 866, the clerk of the Court is ordered to issue final process immediately upon release of this opinion.

COLEMAN, C.J., and WILLIAMS, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

LEVIN, J. *(dissenting).* The Judicial Tenure Commission has recommended that Charles V. Probert, who no longer holds judicial office, "be removed from judicial office and permanently enjoined from holding such office in the future".

We agree with the majority that a person cannot be permanently enjoined from holding judicial office.

The majority "conditionally suspends" Probert for five years from this date and censures him. We dissent because the commission is not empowered to recommend the discipline of, nor is this Court empowered, on the commission's recommendation, to discipline a person who no longer holds judicial office.

I

On April 17, 1978, the Judicial Tenure Commission filed a formal complaint against Charles V. Probert who was then municipal judge for the City of Wyoming. A supplemental complaint was filed May 24. A master was appointed to hear the charges and public hearings were held intermittently from July 11 to September 21.

The Wyoming Municipal Court was abolished by statute effective January 1, 1979 and replaced by a two-judge district court. Probert was defeated in his efforts at election to one of the new positions in November, 1978. His office expired December 31, 1978, and he has held no judicial office since that time.

The master's report was filed on January 3, 1979. The master found misconduct in office.[1]

[1] Probert refused to appoint counsel for indigent defendants; set excessive bail in order to coerce defendants to provide the court with information; insisted on cash bonds on appeal notwithstanding that a statute provides for surety bond; denied traffic offense and misdemeanor defendants their statutory right to post ten percent bond; freely fined and imprisoned persons for indirect contempt without formal notice of contempt charges, opportunity to employ counsel or hearing upon the charges; forced defendants to turn rifles and guns in to the court, in one case as a condition for setting bond; refused to obey an order of the circuit court to conduct a preliminary examination; accepted a plea of guilty of a felony, which was beyond his

Probert filed no objection to the master's report. On January 18, he filed in this Court a motion to dismiss for lack of jurisdiction and mootness. We denied the motion to dismiss "without prejudice to his raising the question of mootness in a petition to reject or modify the commission's recommendation under GCR 1963, 932.24(a)".

Probert was informed by letter that since he had filed no objections to the master's report, the Judicial Tenure Commission would consider the report without hearing and oral argument.[2] On April 9, 1979, a five-member majority of the commission adopted the master's findings of fact and conclusions of law and recommended that Probert be "removed from judicial office and permanently enjoined from holding such office in the future".[3]

Three members of the commission recommended that the complaint be dismissed because the commission's jurisdiction is limited to recommendations concerning persons holding judicial office when the recommendation is made.

The record was transmitted to this Court in

jurisdiction, and later falsified court records to show that the defendant was arraigned on a lesser charge; ordered a defendant before him on a contempt charge to vacate his home within 48 hours and deliver possession to the niece and nephew of a court employee who had purchased the house notwithstanding that no action for possession was pending before him; provided a friend with copies of a written examination and a typing test so that she would be able to pass the tests when actually administered and be eligible to become his deputy clerk; became intoxicated in public and called attention to himself by staggering about, speaking loudly about his judicial authority, soliciting sexual activity from a female stranger and openly engaging in sexual activity with another woman; argued with, badgered, and belittled defendants and suggested to them that the police would independently impose sanctions forbidden by law; attempted to induce guilty pleas by coercion; involved himself with witnesses concerning matters not before the court; and readily assumed the prosecutorial role in dealing with criminal defendants.

[2] GCR 1963, 932.16.

[3] The commission consists of nine persons. Eight persons participated in the decision in this case.

accordance with GCR 1963, 932.23, and Probert filed a petition to reject the commission's recommendation.

II

The 1963 Constitution carried forward prior constitutional provisions granting this Court broad powers of superintending control.[4] However, the power to remove a judge from office was expressly denied;[5] a judge could be removed only by action of the Governor and the Legislature or by impeachment.[6]

The judicial article (art 6) of the 1963 Constitution was amended in 1968 by ratification of § 30, which establishes the Judicial Tenure Commission, sets forth the qualifications and method of selection of its members, and provides:

"On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings."

This Court promulgated GCR 1963, 932 implementing § 30.

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[4] Const 1963, art 6, § 4.

[5] *Id.*

[6] "For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution." Const 1963, art 6, § 25.

Impeachment is provided for in art 11, § 7.

A

The function of the Judicial Tenure Commission is to monitor the conduct of persons charged with the administration of justice and to recommend disciplinary action to this Court.

The focus of § 30 is on the discipline of persons with judicial tenure; indeed, the commission is denominated the Judicial Tenure Commission. This suggests that § 30 is concerned with the discipline of persons who have judicial tenure—persons who currently hold judicial office.

Further, the four types of disciplinary action listed in § 30—censure, suspension, retirement or removal—are stated to be actions in discipline of "a judge". A person who has left judicial office, by resignation, retirement or failure to gain re-election, is no longer a judge. Accordingly, by reason of the specific language of § 30, disciplinary action cannot be exerted against a person who has left judicial office; only judges are subject to discipline under § 30.

This reading of § 30 is also supported by an analysis of the types of disciplinary action authorized. Suspension, retirement and removal all involve the separation of a person from whatever judicial authority or office he has.[7] One may characterize an order which bars a person who is no longer a judge from holding judicial office in the future as a "suspension" (or, for that matter, as a "retirement" or "removal"), but such a characterization is a strained meaning of those words. The

[7] Removal is the means by which judges guilty of serious misconduct are divested of office. Retirement is intended for judges who, although guilty of no misconduct, are nevertheless unable to perform judicial duties. Suspension is not a divestiture of office; it is merely a separation of the judge from his judicial powers and duties. It is appropriate where misconduct or disability is serious but the situation is not thought to require that the judge be removed.

normal meaning of "suspension", which we are bound to accept,[8] is an act which has the present effect of separating *a judge* from the judicial authority or office he holds. The "conditional suspension" imposed by the majority would become effective only if the former judge again attains judicial office during the period of "conditional suspension" and is totally ineffective unless he does so—it has no present effect.

A person who has held but no longer holds judicial office may, indeed, be censured if "censure" is given its generic meaning as an utterance of strong disapproval, which can be directed to anyone, ex-judge or not, rather than its more specific meaning under § 30 as a level of discipline which, by identifying misconduct, seeks to cause a judge to correct his behavior in the future. "Censure" should not be read as intended to have a generic meaning when only the more specific meaning—discipline intended to correct the behavior of an incumbent judge—is consistent with the normal meaning of the other three types of discipline and with the accompanying modifying language that any discipline, including censure, be of "a judge". The meaning of a word may be known from the words accompanying it.[9] It is to be construed in context, not in the abstract.[10]

Censure was intended to be the least severe form of discipline, reserved for situations where, while some disciplinary action is indicated, the judge is expected to correct his conduct with a

[8] See, *e.g., Production Credit Associations of Lansing v Dep't of Treasury,* 404 Mich 301, 312; 273 NW2d 10 (1978).

[9] *State ex rel Wayne Prosecuting Attorney v Levenburg,* 406 Mich 455, 466-467, fn 8; 280 NW2d 810 (1979); Black's Law Dictionary (4th ed), p 1209.

[10] See, *e.g., Dussia v Monroe County Employees Retirement System,* 386 Mich 244, 248; 191 NW2d 307 (1971).

minimum of reprobation. Censure is appropriate where, while the judge has engaged in some misconduct, he is nonetheless fit to continue serving as a judge, and therefore retirement, suspension or removal is not appropriate.

It skews the constitutionally prescribed scheme of discipline to construe "censure" as a discipline which may be imposed on a person determined to be unfit to continue serving as a judge. Nor is it consonant with that scheme of discipline to censure a person who, since he no longer holds judicial office, cannot be expected to correct his conduct.

B

We do not agree with the Court that it is within the intent of § 30 for this Court to both censure and impose some other form of discipline at the same time for the same misconduct.

Section 30 provides that this Court may, on recommendation of the Judicial Tenure Commission, "censure, suspend with or without salary, retire or remove a judge". The disciplines are listed in the alternative, and their gradation in severity indicates that it was contemplated that a choice of discipline would be made according to the severity of the misconduct.[11] The majority's decision to impose both censure and "conditional suspension" is thus at odds with the apparent intent of § 30.

III

The commission argues that these proceedings should continue because

[11] See fn 7, *supra.*

i) Probert was a judge when the complaint was filed and the commission therefore had jurisdiction over the matter; once jurisdiction attaches it will not be defeated by subsequent events, even of a character which would have prevented it from attaching in the first instance. Thus, the commission and this Court have jurisdiction although Probert is no longer a judge.

ii) The proceedings still have a purpose because a) Probert can be censured and permanently removed from office, b) the Attorney Grievance Commission should have the benefit of this Court's determination, and c) a decision on the merits would provide guidance regarding proper conduct to the judiciary and the Judicial Tenure Commission.

A

The commission accurately states the general rule regarding loss of jurisdiction. That rule of jurisdiction, however, does not govern this case.

When a person over whom jurisdiction has been properly obtained leaves the state, no question arises whether the court has power to continue to hear the case and enter a judgment binding on the person whose residency has changed because it is well established that a court has power to enter a judgment binding upon a non-resident over whom it has obtained personal jurisdiction. Since the court's power to enter final judgment is not limited to residents, its jurisdiction, once obtained, is not defeated by a party's change in status to a non-resident.

In this case, however, the issue is *whether* the power of the commission and this Court to act is defeated by a change in status from judge to ex-

judge. Thus it is the premise of the general rule regarding loss of jurisdiction—that the court's power to enter judgment is not affected by a party's change in status—which is in question here. The general rule cannot, of course, be cited as authority for its own premise.

Here, the power to recommend discipline and to enter a final order of discipline is defeated because § 30 authorizes the recommendation and imposition of discipline for incumbent judges only. Since the commission has no power to recommend discipline and the Court has no power to order discipline under § 30, neither the commission nor the Court has power to continue to address the merits of the disciplinary proceeding. It is the lack of power to recommend and to order discipline under § 30 which defeats jurisdiction under § 30.

B

Since, as we all agree, this Court has no power to permanently enjoin Probert from holding judicial office (Part IV, *infra),* and there is no power to otherwise discipline him (Part II, *supra),* continuing proceedings would serve no purpose other than to punish or make an example of him, or inform the public of his misdeeds.[12] These are not independent functions of Judicial Tenure Commission proceedings, but merely consequences of the disciplinary function. Proceedings which should otherwise

[12] This case is thus distinguished from *In re Inquiry Concerning a Judge No 53, Linwood T Peoples,* 296 NC 109; 250 SE2d 890 (1978), upon which the commission relies, where a judge's removal for misconduct operated under North Carolina law as a disqualification from holding future office. Thus, embraced in the grant of the power to remove was the grant of the power and, implicitly, the obligation to determine whether the judge should ever hold judicial office in the future. This question remained after Peoples voluntarily left office.

terminate should not be continued simply to effect these ends.

1

The commission urges us to address the merits because "[a] finding in this proceeding that respondent's conduct was conduct prejudicial to the administration of justice would be highly persuasive in the proceedings before the Attorney Grievance Commission under the doctrine of stare decisis".

While the Attorney Grievance Commission has power to investigate and recommend discipline for conduct which has been the subject of Judicial Tenure Commission proceedings and the record of Judicial Tenure Commission proceedings is admissible at the hearing,[13] the Attorney Grievance Commission must find the facts itself and recommend the discipline it thinks appropriate. This is so even where the basis of discipline is the same kind of misconduct. The two commissions operate independently to protect distinct interests and maintain distinct professional standards.

A judge's conduct might be prejudicial to the administration of justice while identical conduct by a lawyer might not be. A person's conduct or temperament might render him unfit to hold judicial office while not substantially affecting his fitness to be a member of the bar.

If Probert is to be found guilty of conduct prejudicial to the administration of justice and that finding is to be the basis of attorney disciplinary action, the finding should be made in the context of attorney disciplinary proceedings so that the focus can be his conduct as a member of the bar and not his fitness for judicial office.

[13] GCR 1963, 965.

2

The commission argues that a disposition on the merits of this case will provide guidance for other judges and the commission itself.

To be sure, when a judge is publicly disciplined for specified misconduct other judges are informed what conduct may result in discipline and they may be deterred from that conduct. But the commission cannot properly conduct proceedings for this purpose alone when it otherwise lacks the power to proceed. A prosecutor cannot continue proceedings against, for example, a person who becomes incompetent or dies during the pendency of the proceedings on the rationale that although the court cannot convict him, other persons will learn what conduct will be the basis of criminal charges and will be deterred from that conduct.

3

The commission stresses that Probert has not disavowed an intent to seek judicial office in the future and that the only reason he is not now a judge is that his old office was abolished and he was not elected to a new position. Proceedings should continue, it is argued, because he might be elected or, as a former elected judge, be assigned to judicial office in the future.

A holding that this Court does not have authority under § 30 to discipline Probert at this time would not, however, absolve him of responsibility for judicial misconduct.

A judge is subject to discipline for conduct prior to his taking office or during a previous tenure.[14] Were Probert to regain judicial office after Judicial

[14] GCR 1963, 932.4(d).

Tenure Commission proceedings terminated without imposition of discipline, he would again be subject to commission proceedings and, if appropriate, discipline might be recommended based in part on the record made in those proceedings.[15]

There remains the possibility that a resigned or defeated judge will be assigned judicial duties by this Court pursuant to its power under art 6, § 23 to authorize former elected judges to perform judicial duties for limited periods.

Continuation of Judicial Tenure Commission proceedings is not necessary to guard against improper exercise of the § 23 power. Judges are

[15] We recognize that the Judicial Tenure Commission's ability to recommend discipline based on prior misconduct in office might be embarrassed if judges were able to shield themselves from inquiry by resigning and could wait until evidence of misdeeds has faded with time, and then regain and hold judicial office with impunity. There might therefore be situations where it would be appropriate for this Court to direct the Judicial Tenure Commission to proceed against an ex-judge to the point of preserving testimony, or for this Court to initiate proceedings to that end pursuant to this Court's superintending authority under art 6, § 4. See GCR 1963, 930, providing for the superintendence of the judiciary of Michigan.

We have dealt by court rule with the corollary problem in civil cases. GCR 1963, 303 provides that "[a] person who desires to perpetuate his own testimony or that of another" may, before commencing an action, petition for an order authorizing the taking of depositions. "If the court is satisfied that the perpetuation of testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories."

We need not here decide what action the Judicial Tenure Commission may take in order to preserve testimony. In this case, the Judicial Tenure Commission has proceeded well past the point of preserving testimony. We have before us hearing transcripts, a master's report and findings, and the Judicial Tenure Commission's findings and recommendation. All that we could possibly authorize has been done.

Nor need we decide today what opportunity should be afforded the ex-judge to himself preserve testimony or to object to the commission's findings if proceedings have progressed to that point. The proceedings below were conducted pursuant to court rule with Probert's participation, and Probert has never objected to the master's findings. See GCR 1963, 932.16.

assigned in the exercise of this Court's discretion; they have no tenure and no right to discharge judicial functions except as authorized by this Court. Assignments should be made after individual review and only those ex-judges who have enhanced the judiciary in the past and who can be expected to do so in the future should be recalled to the bench. Communication with the Judicial Tenure Commission should be but one step in the assignment process. The court rule which provides for confidentiality of commission records before a complaint is filed also provides that the commission may release information about assigned judges to the State Court Administrator.[16]

4

It might be argued that the commission should be permitted to proceed against ex-judges to protect the public's interest in being informed. We are persuaded that continuing proceedings for this purpose would exceed the grant of authority in § 30 and distort the intended function of the Judicial Tenure Commission.

Judicial tenure proceedings are confidential until a complaint is filed and are public thereafter. When a complaint has been filed and hearings have been conducted, as in this case, the public will have access to all information made a part of the record by the commission. Terminating proceedings when a judge resigns or retires or his office expires will only mean that discipline is not imposed—the public will still have access to information concerning his conduct.

When a judge ceases to hold office at an earlier stage in commission proceedings, or before pro-

[16] GCR 1963, 932.22, subds (d) and (e).

ceedings commence, less information will be available to the public through the commission. Education of the public, like education of other judges, is, however, merely a consequence of the disciplinary function. Section 30, creating a commission responsible for recommending discipline for persons holding judicial office, does not suggest that the education of the public is an end in itself, to be pursued after the disciplinary function has ceased.

The Judicial Tenure Commission, created to recommend discipline for judges in order to maintain the quality of the judiciary, was not constituted as a watchdog agency to pursue judges for the purpose of publicizing misconduct. Its function is to recommend corrective discipline or necessary removal. When a judge ceases to hold judicial office, the potential threat to the judiciary, and perforce, to the public, is removed and the authority of the commission to conduct proceedings to remove that threat necessarily ends. Discipline not intended to rehabilitate the judge or protect the judicial office is mere punishment. Judicial Tenure Commission proceedings are intended to be remedial, not penal.

Moreover, the termination of commission proceedings does not mean that the public will be inadequately informed. Other institutions, notably the press, serve the public's interest in being informed and may be expected to do so regardless of whether official commission proceedings continue.

Indeed, the press often reports on alleged judicial misconduct before the commission files a formal complaint. Rightly or wrongly, the practical reality is that this publicity and the prospect of commission proceedings cause some judges to resign or retire and some judges seeking re-election

to be defeated. If it is thought that a judge's resignation or retirement from office or his failure to win re-election does not adequately serve other public interests, the press—the institution primarily responsible for protecting the public interest in information—can continue investigating and reporting.

The public's interest in judicial discipline is in assuring that justice is administered properly, in preserving the integrity of the courts and the judicial process, and in maintaining public confidence in the judiciary by assuring that judges conduct themselves in a manner befitting their judicial office. The ex-judge holds no such office, does not administer justice and is removed from the courts and the judicial process.

5

Nor does the termination of commission proceedings preclude the operation of attorney disciplinary rules. If the judge's misdeeds were such as to render him unfit to be a member of the bar, the Attorney Grievance Commission may recommend discipline. Additionally, the ex-judge is subject to the criminal law. And, in an appropriate case, this Court could, in the exercise of its supervisory power, initiate or continue an investigation of its own if it appeared that the public interest required such extraordinary action.[17]

It should also be remembered, as stated earlier, that a judge who has left office is not thereby absolved of misconduct occurring prior to his election or appointment to office. If a judge who ceases to hold office before disciplinary proceedings run

[17] See GCR 1963, 930, providing for the superintendence of the judiciary of Michigan.

their course regains judicial office, the Judicial Tenure Commission may reactivate a previous inquiry into the judge's conduct and may recommend discipline based on that conduct.

The attorney discipline rules provide that a lawyer against whom a complaint is filed may not resign from the bar without admitting guilt.[18] If he does not sign an affidavit to that effect, proceedings will continue until termination.

Such rules were adopted pursuant to this Court's plenary authority to regulate the legal profession. The Court does not, however, have such plenary authority to expand or alter the requirements or terms of § 30. Such a limitation on the power to resign is not contained in § 30.

6

If the commission has the power to *continue* proceedings against one who is no longer a judge, it is difficult to discern a reason why it might not *initiate* proceedings against one who is not a judge for misconduct in office which has only come to light since the judge has left office. The commission then would have the power to require any retired or defeated judge, without regard to whether a complaint had been filed before he left office, to defend against charges of misconduct notwithstanding that these ex-judges may never intend or have the opportunity to hold judicial office in the future.

If the power asserted by the Judicial Tenure Commission in the instant case is recognized, the commission might feel obliged, as it apparently did in this case, to implement what the members of the commission who dissented from the majority's

[18] GCR 1963, 964.13.

recommendation characterized as "a policy of pursuit into retirement".

If the power exists, the public clamor caused by the unearthing of misconduct may cause the commission to feel obliged to employ it, with the result that the commission would be acting not to protect the public but to appease it. As a result, the commission's resources would be diverted from its primary function of protecting judicial office from misconduct to investigating and publicizing alleged misdeeds of persons who no longer hold, and may never again hold, judicial office. The resources of the commission should be dedicated to the essential purpose of § 30: preventing the abuse of judicial power by those who exercise that power.

IV

The commission has recommended that Probert be permanently enjoined from holding judicial office. It argues that the constitution empowers this Court to permanently remove judges from judicial office, and therefore commission proceedings should not be terminated merely because a judge ceases to hold office.

A

The commission contends that this Court needs no express authorization to permanently disqualify a removed judge from judicial office when Const 1963, art 6, § 4, is read in conjunction with § 30.

Art 6, § 4 expresses this Court's power of superintending control:

"The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appel-

late jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge."

The power of superintending control is separate and distinct from the disciplinary power set forth in § 30. This Court may act pursuant to § 30 only on recommendation of the Judicial Tenure Commission, and may impose no discipline not based on a commission finding of specified cause.[19] In contrast, the commission has no role with respect to this Court's supervisory powers under § 4. That power is exercised without commission recommendation, and the commission has no authority to recommend action. See Part IVB, *infra.*

Moreover, this Court has no authority under its power of superintending control to permanently enjoin a person from holding judicial office.

This Court has been empowered to exercise general superintending control over all courts since the adoption of the Constitution of 1850.[20] The limitation on this power by the express withholding of the power to remove judges was added in the 1963 Constitution. The debates of the constitutional convention preceding the adoption of that constitution show that there was considerable concern that the superintending power as it then existed gave this Court too much power.[21] An amendment was offered that would have withheld the power not only to remove but also to suspend.

Delegates speaking in opposition to the amendment emphasized the value of granting broad superintending authority to the Court, and that any limitation was unnecessary in light of the re-

[19] *In the Matter of Mikesell,* 396 Mich 517, 524-527; 243 NW2d 86 (1976).

[20] Const 1850, art 6, § 3.

[21] 1 Official Record, Constitutional Convention 1961, pp 1269-1287.

straint shown by the Court during the 112 years it had possessed the "unlimited" power: no judge had ever been removed. Additionally, the power to at least temporarily suspend a judge was seen as essential to the proper superintending of the courts.

As a compromise, the convention adopted an amendment withholding the power to remove, thereby in effect granting the power of temporary suspension. Considerable trust was thus placed in this Court's restraint: the delegates were willing to take the risk of such a broad grant of power primarily because of their trust in the restraint the Court had shown in exercising it.

A permanent injunction against holding judicial office is not only tantamount to a removal for the term of office but also operates as a permanent removal *in futuro.*[22] To construe what was granted in § 4—the power temporarily to suspend from the exercise of judicial office—as the equivalent of what was expressly withheld—the power to remove from the office itself—would be to betray that trust, and would violate the understanding on which it was granted. We would not allow another arm of government to so expand its power; more so should we not allow ourselves.[23]

[22] It is this additional effect of a permanent injunction beyond the effect of a removal that precludes finding, as the majority states consistency would compel (Opinion of the Court, p 232), that § 30's authorization of a removal authorizes a permanent injunction.

[23] Although the majority concludes that § 4 does not authorize a permanent injunction against holding judicial office because such an injunction might defeat the electorate's constitutional right of suffrage, the majority states that "[t]he lack of superintending power to remove [under § 4] does not itself unavoidably entail a similar lack of superintending power to permanently enjoin." (Opinion of the Court, p 232). This is so, it is argued, because removal deprives a person of a "more significant and tangible interest" than does a permanent injunction. The former deprives one of "his existing judgeship" and the latter deprives one only of "the *potentiality* of attaining a judgeship". This conclusion is supported by a redacted quotation from

Under § 30, this Court was granted the power, previously expressly reserved, to remove judges from office. Removal was made subject to the safeguards of a two-step process—recommendation by the Judicial Tenure Commission and action by this Court.

Several jurisdictions provide by constitution or statute that a judge who has been removed from

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Gruenburg v Kavanagh, 413 F Supp 1132, 1136-1137 (ED Mich, 1976), quoted in *In the Matter of Del Rio,* 400 Mich 665, 685; 256 NW2d 727 (1977): " '[The] opportunity to be re-elected * * * is much too intangible an interest to invoke the protection of due process.' "

When the quotation from *Gruenburg* included in *Del Rio* is placed in context or when the excised language is replaced, it is apparent that the courts were speaking of the damage to a judge's *prospects* for re-election caused by a temporary suspension, not of the complete denial of the *right* to hold judicial office if re-elected, which would be the effect of a permanent injunction in the instant case. Had the courts in either *Gruenburg* or *Del Rio* been asked to consider the denial of the right to hold a judicial office to which one has been elected or appointed, a deprivation similar to that of a convicted felon's right to hold certain elective offices, rather than the damage to one's prospects for re-election caused by the reputational damage of a suspension, it is doubtful that either court would have concluded that no interest entitled to due process protection was affected.

Moreover, to distinguish between the power to divest a sitting judge of his office and the power to enjoin a prospective judge from assuming any office he may gain through election or appointment is to ignore the effect of such an injunction.

If such an injunction has any effect at all, it is either as a removal (if the judge, despite the injunction, has become otherwise entitled to hold office through election or appointment) or as a threat of removal (if a prospective judge does not seek office because to do so would be futile in light of the injunction).

While it is clear from the terms of § 4 that this Court has no power to issue an injunction effective as a removal, the majority states that this lack of power does not necessarily preclude the issuance of an injunction effective as a threat of removal—assuming, apparently, that the threat will effectively keep a person from seeking office so that the injunction will never have the impermissible effect of actually removing an elected or appointed judge.

In other words, the majority suggests that the Court may threaten to do what it is constitutionally prohibited from doing. This is apparently based on the assumption that the threat will be effective. For only if the threat is effective in preventing the prospective judge from obtaining office will the force of the injunction be limited to removing the potential of attaining judicial office rather than removing the judge from an office he has attained.

office is thereafter disqualified from holding judicial office.[24] Michigan has no such provision.

[24] "A judge retired by the Supreme Court shall be considered to have retired voluntarily. A judge removed by the Supreme Court is ineligible for judicial office and pending further order of the court is suspended from practicing law in this State." Cal Const, art 6, § 18(d).

"Pending the determination of the proceedings, the Trial Division in its discretion may suspend the respondent from the exercise of his office. After full hearing, the Trial Division shall render such judgment as the facts may justify. No judgment shall extend further than: (1) to removal of the respondent from office, with or without disqualification to hold any public office of honor, trust, or profit under this State, or (2) to compulsory retirement from office; but such a proceeding, regardless of result, shall not bar or prejudice any other proceeding, civil or criminal, authorized by law." Okla Const, art 7-A, § 4(d).

"The justices of the Supreme Court and the judges of the superior court shall be subject to impeachment, and any judicial officer impeached shall not exercise his office until acquitted. The judges of the superior court shall also be subject to removal from office by the Supreme Court for such causes and in such manner as shall be provided by law." NJ Const, art 6, § 6, ¶ 4.

"If the Supreme Court finds beyond a reasonable doubt that there is cause for removal, it shall remove the judge from office. A judge so removed shall not thereafter hold judicial office." NJ Stat Ann 2A:1B-9.

"A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office." NY Const, art 6, § 22(h).

"The jurisdiction of the court of appeals and the commission pursuant to this article shall continue notwithstanding that a judge resigns from office after a determination of the commission that the judge be removed from office has been transmitted to the chief judge of the court of appeals, or in any case in which the commission's determination that a judge should be removed from office shall be transmitted to the chief judge of the court of appeals within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such judge. Any determination by the court of appeals that a judge who has resigned should be removed from office shall render such judge ineligible to hold any other judicial office. The chief administrator of the courts shall give written notice to the commission of the resignation of any judge who is the subject of an investigation within five days after his receipt thereof." NY Judiciary Law, art 2A, § 47 (McKinney).

"Upon recommendation of the Commission, the Supreme Court may censure or remove any judge for willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Upon recommendation of the Commission, the Supreme Court may remove any judge for mental or physical incapacity

In those jurisdictions, the electorate has expressed its judgment that one who has been removed from office should never again be invested with the public trust and has, in effect, given up its own power to re-elect such a person after removal. The Michigan electorate has expressed no similar sentiment except with regard to the eligibility for legislative office of persons who have been convicted of subversion or a felony.[25] Indeed it has expressed a contrary sentiment in regard to persons removed by impeachment.[26]

We are asked to hold that in adopting § 30 the electorate intended not only to grant the power to remove their elected judges from office in order to protect their interest in the proper administration

interfering with the performance of his duties, which is, or is likely to become, permanent. A judge removed for mental or physical incapacity is entitled to retirement compensation if he has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. A judge removed for other than mental or physical incapacity receives no retirement compensation, and is disqualified from holding further judicial office." NC Gen Stat § 7A-376.

"A judge or district justice convicted of misbehavior in office by a court, disbarred as a member of the bar of this Commonwealth or removed under Subchapter C (relating to discipline and removal by Judicial Inquiry and Review Board) shall forfeit automatically his judicial office and thereafter be ineligible for judicial office." Pa Cons Stat Ann, tit 42, § 3305.

"The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence and shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The Supreme Court, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary." Tex Const, art 5, § 1-a(9).

[25] Const 1963, art 4, § 7.

[26] "No person shall be convicted without the concurrence of two-thirds of the senators elected and serving. Judgment in case of conviction shall not extend further than removal from office, but the person convicted shall be liable to punishment according to law." Const 1963, art 11, § 7.

of justice, but also to give up their power to re-elect judges to office after they have been removed.

The power to prevent the electorate from ever again effectively exercising the franchise in favor of a particular person is a much greater power than the granted power to remove or to suspend a judge. This greater power has not been expressly granted in this state, and should not be inferred. The grant should be unambiguous as in other jurisdictions.

We thus conclude that this Court has no authority under § 4 or § 30 to permanently enjoin Probert from holding judicial office.

B

In light of the commission's reliance upon this Court's § 4 power as authority for imposing discipline pursuant to § 30 proceedings, it is necessary to clarify that the powers granted this Court under § 4 are distinct from those granted under § 30. It would be improper for the commission or this Court to view § 4 as expanding the power to investigate and discipline pursuant to § 30 beyond the powers actually granted the commission and this Court by § 30.

This case comes to the Court pursuant to § 30. The commission initiated its investigation pursuant to its authority under that section. The commission's proceedings were or should have been limited by the disciplines it is empowered to recommend under § 30, not whatever action this Court could properly take under § 4. The power to recommend and impose discipline under § 30 differs from this Court's power to act under § 4. For example, pursuant to § 30 the Court may remove a judge, although it may not do so under § 4.

The Court should not blur the distinction between its superintending authority under § 4 and its authority to act in conjunction with the Judicial Tenure Commission under § 30 by using the commission to discharge this Court's duties under § 4, or by empowering the commission to investigate and recommend how this Court should exercise the discretion entrusted to it under § 4.[27]

C

The majority concludes that it has the power to "conditionally suspend" because on three previous occasions it has done so. The majority relies on *Mikesell,*[28] *Del Rio,*[29] and *Bennett,*[30] in which incumbent judges were suspended for one and one-half years, five years and one year respectively "regardless of respondent's possible intervening reelection to office or election to any other state court".

The majority states that the "effect of those suspensions *would have been* to disengage the disciplined party from judicial power, *but only had that person come to occupy judicial office again* during the term of the suspension". (Emphasis supplied.) This statement omits the pivotal distinction between the cited cases and the instant case.

In each of the cited cases, there was nothing "conditional" about the suspension at the time it was ordered. Each suspension operated to separate

[27] Turning a § 30 proceeding into a § 4 proceeding would effectively supplant the carefully drafted procedure for investigating and considering misconduct in office which this Court, in exercise of its § 4 powers, has provided in GCR 1963, 930 separate and apart from GCR 1963, 932 implementing § 30.

[28] *In the Matter of Mikesell, supra.*

[29] *In the Matter of Del Rio,* 400 Mich 665; 256 NW2d 727 (1977).

[30] *In the Matter of Bennett,* 403 Mich 178; 267 NW2d 914 (1978).

an incumbent judge from the authority of the judicial office he then held. In each case, the Court was required to act with regard to a sitting judge whose misconduct required that he be separated from the authority of his office. The Court ordered suspension.

The majority in the instant case ignores that the suspensions ordered in the cited cases were all of sitting judges, and focuses on the period of suspension ordered, *i.e.,* that the judges were suspended for periods longer than their terms of office. The only alternative to such an order, however, given that the Court had determined that it was necessary to separate the judge from his office and that the proper period of suspension was in excess of the judge's term, would have been to suspend the judge for the duration of his term without prejudice to reinstituting proceedings should the judge be re-elected or appointed. Perhaps such bifurcated and duplicative proceedings would have more closely conformed to the limitations of § 30. In any event, there is no indication that the Court considered that possibility or, indeed, that the Court considered the question for which the majority cites the cases as authority: whether § 30 authorizes imposition of a suspension which has *no* immediate effect.

Having determined that it was necessary to separate the judges in *Mikesell, Del Rio* and *Bennett* from the judicial powers or offices they then held, the Court was faced with the question of the appropriate period of suspension. The threshold question in the instant case, in contrast, is not how much discipline is appropriate but whether there is power to discipline at all. How the Court in *Mikesell, Del Rio* and *Bennett* resolved the question of how much discipline to impose is not

authority on the question whether this Court has the power to discipline in the first instance.

D

The majority's treatment of the *Mikesell-Del Rio-Bennett* cases is critical because it is the only aspect of its argument which approximates authoritative support for its conclusion that, although § 30 provides only for discipline "of a judge", it also authorizes discipline of a person who is not a judge when disciplined. The other arguments of the majority are in the nature of what § 30 *should* authorize, as a matter of policy and wisdom, rather than what § 30 as adopted by the people *does* authorize, as a matter of construction of the language used and of the intent of the amendment.

Thus the majority asserts that to end commission proceedings when a judge leaves office would be "unwise" because a judge "should not have the power" to end commission proceedings "simply by leaving office". Such policy arguments are properly addressed to the framers of § 30. They cannot properly be the sole basis for a construction of § 30 which is opposed to the normal meaning of its language unless the Court can say without doubt that the normal meaning is so absurd or unreasonable as to preclude its having been intended.

We do not think it absurd, unreasonable or even "unwise" to terminate commission proceedings when, as stated by the majority, "the essential purpose of the commission—keeping unfit judges off the bench" has been achieved by the judge's "simply * * * leaving office".[31]

In this regard, we note that the American Bar

[31] Majority opinion, fn 10, and p 226.

Association appears to have adopted just such an "unwise" position in its Standards Relating to Judicial Discipline and Disability Retirement.[32] Standard 3.1, titled "Jurisdiction Over Sitting Judge", provides that the *judicial* disciplinary commission should have exclusive jurisdiction over the conduct of sitting judges.[33] Standard 3.2, titled "Jurisdiction Over Former Judge", provides that the *lawyer* disciplinary agency should have jurisdiction over a lawyer who is no longer a judge for conduct during his judicial tenure, unless the judicial discipline proceeding has resulted in a final determination.[34]

The situation presented by the instant case—that of a judge who ceases to hold office before a final determination has been reached in the judicial discipline proceedings—appears to be addressed by the commentary to Standard 3.2:

"Action by the commission or the court resulting in voluntary resignation or retirement should not be a bar to further action by the lawyer disciplinary agency involving the same conduct. This is true unless, on the court's own motion or application of the judge, and after notice and opportunity to be heard is given to the

[32] ABA Standards Relating to Judicial Discipline and Disability Retirement (Tentative Draft, 1977, approved by ABA House of Delegates, February, 1978).

[33] Standard 3.1 provides:

"*Jurisdiction Over Sitting Judge.* Other than jurisdiction through impeachment, the commission should have exclusive jurisdiction over the conduct of all sitting judges, including part-time judges. This jurisdiction should include conduct that occurred prior to a judge assuming judicial office."

[34] Standard 3.2 provides:

"*Jurisdiction Over Former Judge.* The lawyer disciplinary agency should have jurisdiction over a lawyer who is no longer a judge with reference to allegedly unethical conduct that occurred during or prior to the time when the lawyer held judicial office, provided such conduct has not been the subject of judicial disciplinary proceedings as to which a final determination has been made by the court."

lawyer disciplinary agency, the court orders that the lawyer disciplinary agency not proceed further."

Thus, under the ABA Standards, the judicial disciplinary commission is concerned with judges and the lawyer disciplinary agency with lawyers, including lawyers who were judges at the time of the alleged misconduct, even if judicial discipline proceedings had been commenced. Although the majority labels such a division of authority "unwise" and "unwarranted", it impresses us as simple and appropriate and, what is more important, seems to be precisely the division of authority intended by § 30, as appears from both the language of the section, which speaks of discipline "of a judge", and from an understanding of, in the majority's words, "the essential purpose of the commission—keeping unfit judges off the bench".

As indicated in the one reference to the ABA Standards made by the majority, the purpose of judicial discipline is not to punish but, rather, to correct:

> "[T]he major purpose of judicial discipline is not to punish judges, but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves." ABA Standards, *supra,* p 2.

The public is protected and the integrity of the judicial process is preserved by preventing the abuse of judicial authority. Public confidence in the judiciary and "institutional integrity" are maintained by fostering the belief and expectation that those appearing before the courts will be treated with fairness and that the judges before whom they appear will not abuse their office. That

belief and expectation is fostered by preventive action against persons who are in a position to abuse judicial power. Disciplining a defeated judge neither protects the public or the "institution" (the justice system) nor does it foster that belief and expectation. Action against one who has no judicial power to abuse does not promote the public's confidence that those who do have judicial power will not abuse it.

The "discipline" ordered by the majority is punishment, not discipline. Its primary purpose is not to prevent the abuse of judicial authority but to react to abuse that has occurred. While we may agree that what the majority denominates the "egregious misconduct and judicial perfidy" of Probert warrants punishment, § 30 authorizes only discipline. We cannot agree that the suspension from judicial office of one who is not a judge and censure which cannot correct judicial conduct is, in any proper sense, judicial discipline. The procedure of § 30 should not be employed to provide a means to proclaim displeasure, however, justified, with judicial misconduct.

The Judicial Tenure Commission dissenters in this case said:

"Historically, both during the pendency of formal complaints and immediately preceding their issuance, the commission has declined to act further after termination of a respondent's judicial office by resignation, by failure to be re-elected or by death. *E.g., Matter of Grimm,* Formal Complaint No. 22; *Matter of Kapcia,* Formal Complaint No. 17; *Matter of Gruenburg,* Formal Complaint No. 14; *Matter of Riebel,* Formal Complaint No. 13; *Matter of Maras,* Formal Complaint No. 3. In fact, the final commission resolution in *Riebel, supra,* unanimously dismissed the proceedings because the commission 'lost jurisdiction' by virtue of the respondent's resignation.

* * *

"Consistency and good reason both require that this policy continue. The public interest and the interest in maintaining the good name of the judiciary are not served by further public airings of allegations and proofs of judicial misconduct. Continuation of this proceeding is in the true sense of the phrase 'beating a dead horse.' Clearly, once the judgeship is terminated the fundamental jurisdictional element ceases to exist."

V

Charles Probert is no longer a judge and therefore there is no present need to discipline him. The chances of Probert ever again becoming a judge in Michigan appear to be virtually nil. We have, however, a full record replete with the details of his conduct. Should he ever regain office, this record will be available for evaluation by the Judicial Tenure Commission along with evidence pertaining to his interim conduct.

We would grant Probert's motion to dismiss without prejudice to the Judicial Tenure Commission's authority to recommend discipline based in part on the instant record should Probert ever regain judicial office.

KAVANAGH, J., concurred with LEVIN, J.

MORGAN v CINCINNATI INSURANCE COMPANY

Docket No. 63465. Argued April 15, 1980 (Calendar No. 6).—Decided June 19, 1981.

Helen Morgan brought an action against Cincinnati Insurance Company to recover under a fire insurance policy for fire damage to a home which she and her estranged husband Robert Morgan owned as tenants by the entireties, and to personal property. The plaintiff's claim had been denied by the insurer under the fraud provision of the policy after it was determined that Robert Morgan had intentionally started the fire. The Calhoun Circuit Court, Creighton R. Coleman, J., granted summary judgment for the defendant as to the claim for the real property on the ground that fraud by one coinsured party bars recovery by another coinsured party. The Court of Appeals, D. E. Holbrook, Jr., P.J., and R. B. Burns and Bashara, JJ., affirmed (Docket No. 78-3514). Plaintiff appeals. *Held:*

The fraud of the plaintiff's husband in setting the fire does not bar recovery by the wife. The plaintiff's right to recover is determined by her rights under the contract of insurance, not by her interest in the insured property. The statutory clause limiting the fire insurer's liability in case of fraud by "the insured" will be read to bar only the claim of an insured who has committed the fraud, and not the claim of any insured who is innocent of fraud.

1. The insurer argues that whether the plaintiff can recover

REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur 2d, Insurance § 194.

[2] 17 Am Jur 2d, Contracts § 300.
74 Am Jur 2d, Suretyship §§ 7, 8.

[3] 43 Am Jur 2d, Insurance § 239.

[4, 7, 15] 43 Am Jur 2d, Insurance §§ 762, 1011.
44 Am Jur 2d, Insurance § 1365.
Fraud, false swearing, or other misconduct of insured as barring recovery on property insurance by innocent coinsured. 24 ALR3d 450.

[8-12, 16] 41 Am Jur 2d, Husband and Wife §§ 55, 56.

[9] 41 Am Jur 2d, Husband and Wife §§ 16, 17, 536, 537.

[12] 41 Am Jur 2d, Husband and Wife §§ 72, 106.

[13] 43 Am Jur 2d, Insurance § 762.

[14] 41 Am Jur 2d, Husband and Wife § 2.

in this case depends on whether the interests of the insured in the property are considered joint or several, and that the interests of tenants by the entireties are unified, but this misses the point, because no interest in the insured property was tainted by fraud, nor does that bear on the question before the Court. The plaintiff's right is determined not by interest in the insured property but by the rights under the contract of insurance.

2. The disparity in the bargaining positions of the companies which write insurance and the consumers who buy it has been recognized by statute and judicial decisions, which aim at making certain that the interests of every insured are protected. The statutory fire insurance policy in this case provides that it will be void if "the insured" has committed fraud. The insurer argues that the fraud provision should be read as if it said "any person insured"; such a reading is unwarranted. The provision must be read as applying only to the insured who committed the fraud and makes claim under the policy. The provision has no application to any other person described in the policy as an insured.

3. The general law of contracts is that if two or more persons promise the same performance there is necessarily a relation of suretyship between them. However, it is unlikely that the Legislature intended to impose a mutual obligation of suretyship on each of several persons insured so that each insured must undertake to prevent each of the other insured from engaging in fraud on pain of losing all interests under the insurance policy, because an insured often has no control over the conduct of others.

4. The application of the theory of implied suretyship is no longer appropriate in insurance law. Limitations on recovery under an insurance policy must be clearly stated in the contract. The implication of a mutual obligation of suretyship among several insured persons is, in effect, a limitation on recovery by implication and not to be permitted.

5. Because the insurance policy does not expressly create a joint obligation of suretyship, to read the fraud provision as creating one would be contrary to the reasonable expectations of an insured. An ordinary person seeing his or her name included in an insurance contract without limiting language would suppose his or her interest to be covered. It appears that the policy in this case names "Robert Morgan and Helen Morgan", without more, as the insured under the policy.

The summary judgment is set aside, and the case is remanded to the circuit court for further proceedings.

Justice Fitzgerald, writing separately, would hold that deci-

sion in this case must rest on the law of real property, not on the law of personal property, and that the tenancy by the entireties is not so indivisible an estate as to make the husband and wife "one" and impute wrongful conduct of the husband to the wife. She should be able to recover one-half of the damages within policy limits.

1. The general rule is that if the interests of the insured parties are considered joint and non-separable, an innocent coinsured party is barred from recovery on an insurance policy following an act of fraud or other misconduct by another coinsured party. The Court has held that if a wife is able to show that her interest in personal property is divisible from that of her husband, then his unilateral act should not foreclose the wife from recovery under the insurance policy, and in that case specifically rejected any view which automatically ascribes the actions of the husband to the wife; other courts have found traditionally non-separable interests to be divisible on the equities of the factual circumstances. The decision in this case, however, must rest on concepts of real property and not personal property law.

2. A tenancy by the entireties is an estate of the common law created by operation of law rather than by the act of the parties through deed or will, based upon the common-law concepts of the unity of husband and wife and the disabilities of coverture of married women. The salient feature of the tenancy by the entireties was the concentration of power in the husband; he was able to exercise all the incidents of ownership except determining succession at his death should he predecease his wife. Beginning in the 1800's, married women's property acts established that a wife can exist as a separate legal entity; the automatic dominance of the husband was rejected. However, in Michigan, because the statute did not specifically mention the tenancy by the entireties, it continued to exist as it did at common law. It is the quality of survivorship that imbues the tenancy with an aura of indestructibility, for the act of one spouse cannot impair the rights of the other. The wisdom of perpetuating such an indivisible estate is questionable in view of the equities of the controversy in this case.

3. The general rule that an innocent coinsured may not recover on an insurance policy following an act of fraud by another coinsured hinges on whether the interests of the coinsured are considered joined or severable. The rationale for the rule is the idea that parties who hold joint interests in insured property have a joint obligation, resting on an implied condi-

tion of the insurance contract, to refrain from fraud, and so the fraud of one party necessarily becomes the fraud of the other. The tenancy by the entireties is a product of the common law characterized by a massive concentration of power in the husband and an indestructible right of survivorship. While Michigan has traditionally adhered to a strictly literal view of the tenancy by the entireties, it cannot in good conscience be held that the wrongful conduct of a husband may be imputed to his wife and serve to bar her from recovering the proceeds of an insurance policy. To hold today that they are "one" impermissibly ignores the separate legal status of the innocent spouse. One spouse may not be held responsible for the crime of the other. Vicarious liability is not an attribute of marriage.

4. The plaintiff may recover to the extent of her interest in the property. As tenants by the entireties, one spouse has no greater interest in the property than the other. The quantity of interest being equal and the liability being several, the innocent coinsured party may recover one-half of the damages within the limits of the policy.

Chief Justice Coleman did not participate in the decision.

91 Mich App 48; 282 NW2d 829 (1979) reversed.

OPINION OF THE COURT

1. INSURANCE — FRAUD — CONTRACTS.

An insured's right to recover on an insurance policy on real property is determined by the rights under the contract of insurance, not by the insured's interest in the property insured.

2. CONTRACTS — SURETYSHIP AND GUARANTEE — IMPLICATION.

The general law of contracts is that if two or more persons promise the same performance there is necessarily a relation of suretyship between them.

3. INSURANCE — SURETYSHIP AND GUARANTEE — IMPLICATION.

The implication of a mutual obligation of suretyship among several insured persons is in effect a limitation on recovery under the insurance policy and not to be permitted, because such limitations on recovery must be clearly stated in the insurance contract.

4. INSURANCE — FRAUD — FIRE INSURANCE — NAMED INSURED — VICARIOUS LIABILITY.

The provision of a fire insurance policy that it will be void if "the insured" has committed fraud must be read as applying only to the insured who committed the fraud and makes claim under

the policy; the provision has no application to any other person described in the policy as an insured (MCL 500.2832; MSA 24.12832).

5. INSURANCE — FRAUD — FIRE INSURANCE — NAMED INSURED — HUSBAND AND WIFE — REASONABLE EXPECTATIONS.

To read the provision of a fire insurance policy that it will be void if "the insured" has committed fraud as creating a joint obligation of suretyship would be contrary to the reasonable expectations of an insured where the policy names a husband and wife, without more, as the insured under the policy; an ordinary person seeing his or her name included in an insurance contract without limiting language would suppose his or her interest in the property insured to be covered (MCL 500.2832; MSA 24.12832).

6. INSURANCE — FRAUD — NAMED INSURED — HUSBAND AND WIFE — PROPERTY.

The fraud of a husband will not bar the wife's recovery on an insurance policy on real property which the husband and wife owned as tenants by the entireties where the insurance policy names the husband and wife, without more, as the insured under the policy.

SEPARATE OPINION BY FITZGERALD, J.

7. INSURANCE — FRAUD — COINSUREDS — VICARIOUS LIABILITY.

The general rule is that if the interests of insured parties are considered joint and non-separable an innocent coinsured party is barred from recovery on an insurance policy following an act of fraud or other misconduct by another coinsured party.

8. HUSBAND AND WIFE — PROPERTY — TENANTS BY THE ENTIRETY — COMMON LAW.

A tenancy by the entireties is created when a conveyance of land is made to a husband and wife, absent explicit language to the contrary; it is an estate of the common law created by operation of law rather than by the act of the parties through deed or will, based upon the common-law concepts of the unity of husband and wife, and the disabilities of coverture of married women.

9. HUSBAND AND WIFE — PROPERTY — MARRIED WOMEN'S PROPERTY ACT — COMMON LAW — COVERTURE.

Married women's property acts were passed to remove the common-law disabilities of coverture; married women were given the power to contract, convey and acquire real property, sue

and be sued as separate legal entities, free from any spousal interference (Const 1963, art 10, § 1; MCL 557.1; MSA 26.161).

10. HUSBAND AND WIFE — PROPERTY — TENANTS BY THE ENTIRETY — COMMON LAW.

The salient feature of the tenancy by the entireties was the concentration of power in the husband; he was able to exercise all the incidents of ownership except determining succession at his death should he predecease his wife.

11. HUSBAND AND WIFE — PROPERTY — TENANTS BY THE ENTIRETY — COMMON LAW — MARRIED WOMEN'S PROPERTY ACT.

Because the married women's property act did not specifically mention the tenancy by the entireties, it continued to exist as it did at common law (MCL 557.1; MSA 26.161).

12. HUSBAND AND WIFE — PROPERTY — TENANTS BY THE ENTIRETY — DIVORCE.

The husband alone is entitled to possess, use, and manage entireties property, but he may do nothing without the express consent of his wife to defeat her right of survivorship; the law is not frequently called upon to adjust controversies between husband and wife as tenants by the entireties because if relations become strained and a divorce is obtained, the tenancy by the entireties ends.

13. INSURANCE — FRAUD — HUSBAND AND WIFE — PROPERTY — TENANTS BY THE ENTIRETY — IMPUTED FRAUD.

The wrongful conduct of a husband may not be imputed to his wife and serve to bar her from recovering the proceeds of an insurance policy for property which the husband and wife owned as tenants by the entireties; to hold that the husband and wife are "one" would impermissibly ignore the separate legal status of the innocent spouse.

14. HUSBAND AND WIFE — VICARIOUS LIABILITY — CRIMINAL LAW.

Vicarious liability is not an attribute of marriage; one spouse may not be held responsible for the crime of the other because married people are still individuals and responsible for their own acts.

15. INSURANCE — FRAUD — FIRE INSURANCE — HUSBAND AND WIFE — PROPERTY — TENANTS BY THE ENTIRETY.

A wife may recover benefits under a fire insurance policy of one-half of the damages within the limits of the policy for a house which the wife and her estranged husband owned as tenants by the entireties where the husband had intentionally started the

fire which damaged the house and the wife was the innocent coinsured party on the policy.

16. HUSBAND AND WIFE — PROPERTY — TENANTS BY THE ENTIRETY.

One spouse has no greater interest in property owned in tenancy by the entireties than the other; the quantity of interest being equal, where the liability of the spouses is several the innocent spouse may recover one-half of the interest insured under a fire policy when the fire is set by the other spouse.

Edgar A. Hord for plaintiff.

Allen, Letzring & Denenfeld for defendant.

Amicus Curiae: *Harold Helper.*

KAVANAGH, J. We granted leave to appeal to consider whether the intentional burning of a home by one spouse will bar recovery under a statutory fire insurance policy where the policy names both spouses as "the insured". We hold in this case that it will not.

Plaintiff and her husband, as tenants by the entireties, owned a home which was insured by defendant. On January 20, 1974, it was extensively damaged by a fire started by plaintiff's husband, who was living apart from plaintiff as divorce proceedings between them were then pending. Plaintiff filed a claim under the insurance policy, which the defendant denied. Defendant asserted that since plaintiff and her husband were the insured and owned inseparable interests in the property as tenants by the entireties the fraud of plaintiff's husband was imputed to plaintiff. Plaintiff's suit was dismissed on defendant's motion for summary judgment. The Court of Appeals affirmed "with extreme reluctance". *Morgan v Cincinnati Ins Co,* 91 Mich App 48, 50; 282 NW2d 829 (1979). We reverse.

On appeal defendant contends that the question

whether an innocent insured may recover on property insurance after another insured has committed some act of fraud depends on whether the interests of the insured are considered joint or several. Defendant asserts that the property interests of parties holding as tenants by the entireties are unified and cannot be separated and therefore plaintiff cannot show an interest in the insured property separate from that interest which has been tainted by fraud.

This argument misses the point, for no interest in the insured property was tainted by fraud, nor does that bear on the question before us. Claimant's right in this matter is determined not by interest in the insured property but by the rights under the contract of insurance.

In *Monaghan v Agricultural Fire Ins Co of Watertown, NY,* 53 Mich 238; 18 NW 797 (1884), this Court addressed the issue of recovery by an innocent insured notwithstanding fraud by another insured. In *Monaghan* three minors owned a parcel of property and a house and barn on it by deed from their father. After the father's death their mother, who owned no interest in the real property, procured a fire insurance policy on the premises and contents, naming herself and the three minors as insured. After a fire damaged the house it was determined that the mother had committed fraud in reporting as destroyed certain items which she had removed from the house prior to the fire. The three minors instituted the action for recovery of fire insurance proceeds. The Court stated that recovery under the insurance contract was to be determined irrespective of the nature of ownership of the property insured.[1] Recovery was

[1] "When the insurance was obtained nothing was said as to the precise nature of the interest, whether separate or joint, in the property insured. Nor was it necessary. The policy was good for all,

to be determined according to the contract interests held by the respective parties. The Court in *Monaghan* construed the contract interests created by the insurance policy to be joint.[2] As a direct result of making the initial determination that the contract interests of the parties were joint the Court made the statement for which the case has come to be recognized, *i.e.,* "And if the right of action has become barred as to one of the joint contractors, it has to all of them". 53 Mich 238, 252.

Since the decision in *Monaghan* the law applicable to insurance contracts has undergone considerable development. Recognizing the disparity in the bargaining positions of the companies which write insurance and the consumers who buy the policies, both the statutory law and judicial decisions have aimed at making certain that the interests of every insured are protected.

The rule stated in *Monaghan* is a general law of contracts. Under contract law "[i]f two or more persons promise one and the same performance, there is necessarily a relation of suretyship between them". 4 Corbin, Contracts, § 925, p 702. Thus some courts have held that " '[b]ecause the agreement not to commit fraud is joint, with each insured promising that he and the other would not commit fraud, the breach caused by intentional destruction is chargeable to both insureds and

whether their interests were joint or several. *Castner v Farmers' Mut Fire Ins Co,* 46 Mich 15 [8 NW 554 (1881)]." *Monaghan v Agricultural Fire Ins Co of Watertown, NY,* 53 Mich 238, 252 (1884).

[2] "We can see good reasons in this case for holding the contract for insurance to be joint and not several, which might, and probably did, influence the defendant in entering into it. Mrs. Monaghan was the only adult party among the insured, and the one upon whom the defendant would rely to make the proper proofs of loss in case of fire, and, the only one it could hold to perform the conditions of the policy." *Id.*

precludes recovery by the innocent joint insured' ". *Klemens v Badger Mutual Ins Co of Milwaukee,* 8 Wis 2d 565, 567; 99 NW2d 865, 866 (1959).

Without limiting the principles of law applicable to contracting parties generally, consistent with the effort to protect the interest of the insured we are moved to limit the rule of law articulated in *Monaghan.*

The standard fire insurance policy prescribed by statute provides:

> "This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto." MCL 500.2832; MSA 24.12832.

The insurer in this case would have us read this provision as if it stated "[t]his entire policy shall be void if * * * any person insured" has committed fraud. We believe such a reading is unwarranted, and hold that the provision voiding the policy in the event of fraud by "the insured" is to be read as having application only to the insured who committed the fraud and makes claim under the policy. The provision has no application to any other person described in the policy as an insured.

To adopt the reading of the insurer would require ascribing to the Legislature an intent to impose a mutual obligation of suretyship on each of several persons insured; that each insured must not only undertake to forbear from fraud himself, but must also undertake to prevent each of the other persons insured from engaging in fraud on pain of losing all interests under the policy. Such an intent is unlikely; as this case aptly illustrates,

an insured often has no control over the conduct of others.

We no longer consider the application of the theory of implied suretyship appropriate in insurance law. In Michigan limitations on recovery under an insurance policy must be clearly stated in the contract. The implication of a mutual obligation of suretyship among several insured persons is in effect a limitation on recovery by implication and not to be permitted under Michigan law.

Furthermore, since the provision quoted above does not expressly create a joint obligation of suretyship, to read the fraud provision as creating one would be contrary to the reasonable expectations of an insured. An ordinary person seeing his or her name included in an insurance contract without limiting language would suppose his or her interest to be covered. It appears that the instant policy names "Robert Morgan and Helen Morgan", without more, as the insured under the policy.

Henceforth whenever the statutory clause limiting the insurer's liability in case of fraud by the insured is used it will be read to bar only the claim of an insured who has committed the fraud and will not be read to bar the claim of any insured under the policy who is innocent of fraud.

The summary judgment herein is set aside and the cause remanded for further proceedings.

Costs to plaintiff.

WILLIAMS, LEVIN, RYAN, and BLAIR MOODY, JR., JJ., concurred with KAVANAGH, J.

COLEMAN, C.J., took no part in the decision of this case.

FITZGERALD, J. We are asked to decide whether the intentional burning of a home, held in tenancy by the entireties, by one spouse, will bar recovery by the innocent spouse under a statutory fire insurance policy naming them both as the insured.

I

Helen and Robert Morgan owned a home as tenants by the entireties. The home was insured by the defendant Cincinnati Insurance Company. On January 20, 1974, a fire occurred which extensively damaged both the dwelling and the personal property located in it. The Morgans were living separately at the time; divorce proceedings instituted by the plaintiff were pending. It was subsequently determined that Robert Morgan was responsible for starting the fire.

Mrs. Morgan filed a claim with the Cincinnati Insurance Company for benefits under the policy, seeking to recover for both the damage to the residence and personal property. This claim was denied. She then began this action to recover the proceeds under the policy. Defendant filed and was granted a motion for summary judgment regarding the real property claim on the grounds that the fraud by one coinsured acts as a bar to recovery by the innocent coinsured. The Court of Appeals affirmed, albeit reluctantly, finding that a tenancy by the entireties is an indivisible interest which precludes recovery by one innocent party. *Morgan v Cincinnati Ins Co,* 91 Mich App 48; 282 NW2d 829 (1979).

The question of the destroyed personal property was decided upon a stipulated statement of facts submitted by the parties and is not at issue before

this Court. We consider here only the real property question.

II

The Michigan standard fire insurance form provides:

"This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in the case of any fraud or false swearing by the insured relating thereto." MCL 500.2832; MSA 24.12832.

The Morgans' policy was issued in both of their names. It is defendant's position that the long-standing law in Michigan is that where recovery is barred by the fraud of one named insured, it is barred to them all. The cases cited to support this position are *Monaghan v Agricultural Fire Ins Co of Watertown, NY,* 53 Mich 238; 18 NW 797 (1884), and *Ijames v Republic Ins Co,* 33 Mich App 541; 190 NW2d 366 (1971). In the *Monaghan* case, Kate Monaghan, a widow, lived with her three minor children in a home that had been given to the children by deed. In August 1880, Mrs. Monaghan applied for and obtained from defendant insurance company a policy insuring herself and her children against loss or damage to their dwelling by fire or lightning. The policy contained the standard provisions regarding forfeiture in case of any misrepresentations, concealment or fraud relating to any such loss or damage. In the middle of September 1880, a fire occurred which destroyed the home and its contents. In October, Mrs. Monaghan made an affidavit stating which items were

lost in the fire and which were saved. The insurance company learned that certain items of personal property which Mrs. Monaghan claimed to be destroyed had in fact been removed by her prior to the fire. When the insurance company threatened to prosecute, Mrs. Monaghan executed a release of all action against defendant.

In November, a guardian for the three minor children was appointed. On behalf of the children, he gave the insurer a proof of loss for the insured home. This claim stated that Kate Monaghan's interest was only in the personal property; the children were the owners of the real estate and dwelling and they were not part of any fraud or wrongdoing.

In March 1881, Kate Monaghan assigned to her three children all of her rights, title and interest in and to all claims against the defendant arising from the insurance policy. When the loss on the real property was not paid, the guardian, on behalf of the children, filed suit to recover the amount of the insurance. The decision of the Supreme Court in favor of the insurance company was based, in part, on the nature of the insured's interest in the property. The way in which the children held title was not considered important. Rather, the Court looked to see whether or not the contract was divisible. The Court considered the fact that there was one unapportioned premium paid, and reasoned that the insurance company, when entering the contract, probably looked only to Mrs. Monaghan, the one adult party, to perform the conditions of the policy.

"We are clearly of opinion that no action could be brought by any of the insured, less than the whole, to recover a loss under this policy, unless in a case where the interests of one had been assigned to the other joint

contractors. And if the right of action has become barred as to one of the joint contractors, it has to all of them. It follows that the plaintiffs, by obtaining an assignment of Mrs. Monaghan's claim and interest in the policy, can stand in no better position than they would be in had the action been brought in the names of all the joint contractors; and whatever would be a defense were she one of the plaintiffs, is equally available when suit is brought by her assignees. Any attempt on her part to defraud the company by not complying with the conditions of the policy, or any false swearing or concealment or fraud in reference to the proofs of loss, would defeat a recovery." *Monaghan, supra,* pp 252-253.

Thus, this Court held that the children, assignees of their mother's interest in the policy, received no greater rights upon the assignment than their assignor. Their interest was derivative; the fact that they held title to the realty was not determinative. Their mother's attempt to defraud the company by falsifying the affidavit barred them from any recovery on the policy.

The Court of Appeals in *Ijames v Republic Ins Co* relied on the *Monaghan* case when deciding the question, "Does the *attempted* fraud of one of two named insureds under a Michigan statutory fire insurance policy bar recovery for the whole amount of the contents loss?" *Ijames, supra,* p 542. Holding the contract indivisible as between the rights of the various named insureds, the Court stated, "*Monaghan* clearly stands for the proposition that if recovery is barred as to one of the named insureds, it is barred to them all." *Ijames, supra,* p 545. The Court later commented, "The rule of law may be harsh and inequitable. It may be in need of re-examination. If this be so, only the Supreme Court may make the re-examination which would result in a change in the precedent

which binds our bench as well as the trial bench of the state." *Ijames, supra,* p 547.

Michigan has, on the basis of these two cases, been said to adhere to the general rule that if the interests of the insured are considered joint and non-separable, an innocent coinsured is barred from recovery on an insurance policy following an act of fraud or other misconduct by another coinsured.[1] Our Court, however, departed from this axiomatic rule when in *Simon v Security Ins Co,* 390 Mich 72; 210 NW2d 322 (1973), we held that under the facts of that case the alleged theft of personalty by a husband should not automatically foreclose an innocent wife's recovery on the insurance policy. Concluding that the plaintiff wife should have the opportunity to demonstrate a separable interest in the lost articles and without expressly overruling *Monaghan,* a unanimous Court held that, especially considering the trend towards married women's separate status for certain legal purposes, "If plaintiff wife is able to show that her interest in the property is divisible from that of her husband, then his unilateral act of misconduct (if any) should not automatically foreclose plaintiff from recovery under the policy." *Simon, supra,* p 80. The emphasis in *Simon* was the need to treat the plaintiff as an individual; what was specifically rejected in that case was "any view which automatically ascribes the actions of the husband to the wife".[2] The cases cited in *Simon* demonstrate instances where courts found traditionally non-separable interests to be divisible based on the equities of the factual circumstances.[3] The statutes cited reveal the Legisla-

[1] See Anno: *Insured's Fraud—Coinsured's Rights,* 24 ALR3d 450. Also, 5A Appleman, Insurance Law and Practice, § 3594.

[2] *Simon,* pp 82-83.

[3] See *Mercantile Trust Co v New York Underwriters Ins Co,* 376

ture's attempt to remove the common-law disabilities of the wife during coverture so that she may be treated and viewed as a separate legal entity.[4] "Certainly the day is long gone when women were lumped together with children and 'other incompetents' as requiring rigid protection from such rigors as separate ownership of property." *Simon, supra,* p 83. *Monaghan* was not expressly overruled; the *Simon* Court refused, however, to apply its "conclusive presumption". In *Monaghan,* the children's rights were joint with their mother's; as coinsureds they were viewed as joint contractors with no greater defenses available to them than those of their assignor. Considered as joint contractors in the policy, their interests were non-separable and recovery was barred. The facts of the *Simon* case necessitated a different response. The Court was unwilling to label a husband and wife automatically as joint contractors on an insurance policy with an unquestionably indivisible interest. The same considerations motivate me here.

I agree with the defendant that this decision must rest on real property concepts and not personal property law. We are concerned with whether or not the insurance company is obligated to pay the proceeds to its insured, not whether such proceeds should be characterized as personal property, potentially outside the scope of property held as tenants by the entireties. I look therefore to the nature of property held as a tenancy by the entireties.

F2d 502 (CA 7, 1967) (trust company's interest divisible from homeowner's); *Hoyt v New Hampshire Fire Ins Co,* 92 NH 242; 29 A2d 121; 148 ALR 484 (1942) (that tenants in common would assume their individual interests were covered by the policy without qualification).

[4] See MCL 600.2001; MSA 27A.2001 which removed the common-law prohibition on the ability of the wife to sue or be sued without her husband's consent. Also, Const 1963, art 10, § 1.

A tenancy by the entireties is created when a conveyance of land is made to a husband and wife.

"And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common, for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my* [by all and not by the half], the consequence of which is, that neither the husband nor the wife can dispose of any part, without the assent of the other, but the whole must remain to the survivor."[5]

Similar to the joint tenancy inasmuch as the unities of time, title, interest and possession must exist at the time the tenancy is created and both carry the distinguishing right of survivorship, the tenancy by the entireties has the additional requirement that a valid marriage exist between the parties at the time the estate is created. It is an estate of the common law created by operation of law rather than by the act of the parties through deed or will.[6] The tenancy is based on the common-law concept of the unity of husband and wife though in retrospect an accurate evaluation would have to be that, "in the eye of the common law, husband and wife are one person, and that one is the husband".[7] The marital union, rather than a merger of two individuals, has been aptly characterized a "supplanting of the one by the other".[8] Conceived in feudal England as part of a system of land tenures that necessitated ownership of land

[5] Blackstone, Commentaries (Gavit, ed), p 334.

[6] See Cribbet, Principles of the Law of Property (2d ed), p 95; 41 Am Jur 2d, Husband and Wife, § 57, pp 62-63; 41 CJS, Husband and Wife, § 31, p 440; *Jacobs v Miller,* 50 Mich 119; 15 NW 42 (1883).

[7] 1 Schouler, Marriage, Divorce, Separation and Domestic Relations (6th ed), § 6, p 6.

[8] Honigman, *Tenancy by Entirety in Michigan,* 5 Mich SBJ 196-197 (1926).

by men capable of bearing arms, "For purposes of property and of contract, the married woman was under a complete legal black out termed coverture."[9] She was unable to contract or convey property without her husband's consent. She could not sue nor was she capable of being sued unless her husband was made a party.[10] Upon marriage, by the right of *jure uxoris,* the husband acquired complete dominion and control over all real property held by his wife. By the right of *jus mariti,* he obtained rights in all of her personal estate. His power included all rights to possession, use, income and usufruct of his wife's property during coverture. The wife maintained a bare legal existence. Property owned by her before marriage was considered hers, although subject to *jure uxoris.* If expressly authorized, she could act as an agent for her husband.[11] While serving to consolidate in the husband the total use of her property, the disabilities of coverture were seen as serving to protect and benefit women. The idea that married women were incapable of managing their business dealings prevailed along with the belief that if a wife were allowed to control her own property, the inevitable outcome would be familial dissension.

Beginning in the 1800's, married women's property acts were passed to remove the common-law disabilities of coverture.[12] Married women were

[9] Phipps, *Tenancy by Entireties,* 25 Temple LQ 24 (1951).

[10] 41 Am Jur 2d, Husband and Wife, § 16, p 30.

[11] Honigman, *supra,* p 197. See, also, Phipps, *supra,* p 26.

[12] "That the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with the like effect as if she were unmarried." MCL 557.1; MSA 26.161.

given the power to contract, convey and acquire real property, sue and be sued as separate legal entities, free from any spousal interference. The effect of these statutes on the tenancy by the entireties differed significantly among the states.[13] The salient feature of the tenancy by the entireties was the concentration of power in the husband; he was able to exercise all the incidents of ownership except determining succession at his death, should he predecease his wife. The new statutes established the concept that a wife can exist as a separate legal entity; the automatic dominance of the husband was rejected.

While some states interpreted the passage of this legislation to mean that the tenancy by the entireties could no longer exist, or must exist, if at all, in some other form, Michigan viewed the married women's act as an aspect of the relationship between husband and wife; the woman's change in legal status was not seen as affecting the characteristics of the tenancy by the entireties. Since the statute did not specifically mention the

[13] Some states adopted the view that the married women's act abolished the tenancy by the entireties. See, for example, *Clark v Clark,* 56 NH 105 (1875).

Many took the position that the tenancy by the entireties may still exist but in a modified form with each spouse having equal power to control the entireties property. See, for example, *Ross v Ross,* 35 NJ Super 242; 113 A2d 700 (1955):

"It is well settled in this state that where title to real property is held by husband and wife as tenants by the entirety, 'the wife holds in her possession during their joint lives one-half of the estate in common with her husband, and, as between themselves, the respective rights of the parties are those of tenants in common.' "

Michigan, along with Massachusetts and North Carolina, took the view that the tenancy by the entireties was not affected by the married women's acts and continued to exist as at common law. See *Fisher v Provin,* 25 Mich 347 (1872); *Morrill v Morrill,* 138 Mich 112; 101 NW 209 (1904); *Arrand v Graham,* 297 Mich 559; 298 NW 281, 300 NW 16 (1941); *Schram v Burt,* 111 F2d 557 (CA 6, 1940).

For an excellent comparison of these differing approaches, see Phipps, *supra,* pp 28-35, 46-57.

tenancy by the entireties, the tenancy was believed to continue to exist as it did at common law.[14]

"[T]he estate by the entirety was in its origin a mere joint tenancy, adorned with the disabilities of coverture and a fortuitously conceived notion of an indestructible right of survivorship."[15] The presumption exists that absent explicit language to the contrary, a conveyance to a husband and wife creates a tenancy by the entireties.[16] The majority view is that a divorce converts entireties property into a tenancy in common.[17] A joint tenant may partition or convey an undivided share of his estate without the mutual consent of the other joint tenants. Doing so, however, defeats the right of survivorship in the ordinary joint tenancy. A tenancy by the entireties may not be so defeated. At common law the husband was able to convey as a life estate his interest in property by the entireties, but such conveyance could only last as long as the joint lives of the husband and wife with the

[14] "The rights of husband and wife in such an estate are purely common-law rights, to be tested and interpreted by the rules of that law as they existed before the wife was emancipated as to her individual property interests. By the common law the husband controlled his wife's estate, and had the usufruct, not only of real estate standing in both their names, but of that sole seised by his wife, whether in fee simple, fee tail or for life. It remains the law that, while coverture continues, the husband has the control, use, rents, and profits of an estate by entirety." *Way v Root,* 174 Mich 418, 429-430; 140 NW 577 (1913).

See, also, *Morrill, supra,* p 114; *Arrand, supra,* pp 561-563.

[15] Honigman, *supra,* p 199.

In *Way v Root,* pp 427-428, the Court stated:

"When the husband and wife have thus together acquired an unincumbered title to real estate they have laid up treasures, where, without their concerted action, neither moth, nor rust, nor thieves, nor creditors, nor anything else but death or the tax gatherer can divest them."

[16] *Hoyt v Winstanley,* 221 Mich 515; 191 NW 213 (1922); *DeYoung v Mesler,* 373 Mich 499; 130 NW2d 38 (1964).

[17] Phipps, *supra,* p 35.

third party becoming a tenant in common with the wife for this period.[18] Any such conveyance would be subject to the wife's right of survivorship. In Michigan, the husband alone is entitled to possess, use, and manage the entireties property, but he may do nothing without the express consent of his wife to defeat her right of survivorship. It is this survivorship quality that imbues the tenancy with an aura of indestructibility, for the act of one spouse cannot impair the rights of the other.

I question the wisdom of perpetuating such an indivisible estate in view of the equities of the controversy before us.

The general rule that an innocent coinsured may not recover on an insurance policy following an act of fraud by the coinsured hinges on whether or not the interests of the coinsured are considered joint or severable. The rationale for the rule is the idea that "spouses who hold joint interests in insured property have a joint obligation to refrain from fraud, and so the fraud of one spouse necessarily becomes the fraud of the other".[19] This obligation rests on an implied condition of the insurance contract that policyholders will do nothing which would serve to destroy the insured property and it is assumed that they will use their best efforts to protect the property.[20]

"The law has not frequently been called upon to adjust controversies between husband and wife tenants by the entireties. If relations become strained and a divorce is obtained, this type of tenancy ends and the controversies cease to be a part of the law of tenancies by the entireties."[21]

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[18] Spiessbach, *Weeding Out the Troublesome Plant of Tenancy by the Entirety,* 2 Seton Hall L Rev 415, 418 (1971).

[19] *Steigler v Insurance Co of North America,* 384 A2d 398, 399 (Del, 1978).

[20] *Shearer v Dunn County Farmers Mutual Ins Co,* 39 Wis 2d 240, 248; 159 NW2d 89, 93 (1968).

[21] 4A Powell on Real Property, ¶ 623, pp 701-702.

I feel it would be wrong to deny recovery of the insurance proceeds to Helen Morgan. The tenancy by the entireties is a product of the common law characterized by a massive concentration of power in the husband and an indestructible right of survivorship.

While Michigan has traditionally adhered to a strictly literal view of the tenancy by the entireties, I cannot in good conscience hold that the wrongful conduct of a husband may be imputed to his wife and serve to bar her from recovering the proceeds of an insurance policy. The policy was taken out in the names of a husband and wife. To hold today that they are "one" impermissibly ignores the separate legal status of the innocent spouse. *Monaghan* is inapposite. One spouse may not be held responsible for the crime of the other. Though based on different circumstances, I agree with the words of Chief Justice Hallows of the Wisconsin Supreme Court. "Married people are still individuals and responsible for their own acts. Vicarious liability is not an attribute of marriage."[22]

Having determined that the insurance company is responsible to pay the innocent coinsured on the policy, I hold that Mrs. Morgan may recover to the extent of her interest in the property. The contract of insurance is a personal agreement of the parties, subject to the interpretation and enforcement of our courts.[23]

As tenants by the entireties, one spouse has no greater interest in the property than the other. The quantity of interest being equal and the liability being several, the innocent coinsured may

[22] *Shearer, supra,* p 249.

[23] *Clay Fire & Marine Ins Co v Huron Salt & Lumber Mfg Co,* 31 Mich 346 (1875); *Eghotz v Creech,* 365 Mich 527; 113 NW2d 815 (1962).

recover one-half of the damages within the limits of the policy.

The decision of the Court of Appeals should be reversed.

PEOPLE v BARKER

PEOPLE v SLAYTON

PEOPLE v LYNN

Docket Nos. 63359, 63503. Argued May 6, 1980 (Calendar Nos. 3, 4).—Decided June 19, 1981. Rehearing denied as to *Lynn post,* 1157.

James H. Barker and Claude A. Slayton, Jr., were charged with kidnapping and first-degree criminal sexual conduct. A jury in Wayne Circuit Court, John R. Kirwan, J., convicted Barker of kidnapping and third-degree criminal sexual conduct, and convicted Slayton of kidnapping but acquitted him of criminal sexual conduct. The complaining witness testified that the defendants forced her into their automobile, knocked her unconscious, drove her 15 to 18 miles into the country, and raped her. The trial court instructed the jury that the asportation element of kidnapping would be satisfied if they found that there was movement of the complainant incidental to the offense of criminal sexual conduct. The Court of Appeals, R. M. Maher and D. C. Riley, JJ. (Danhof, C.J., dissenting), reversed the convictions of kidnapping on the ground that the instruction on the inference of asportation was erroneous and that the element of asportation was a question of fact for the jury to decide (Docket Nos. 77-2171, 78-839). The people appeal.

James A. Lynn was convicted by a jury in Wayne Circuit Court, Michael L. Stacey, J., of kidnapping and first-degree criminal sexual conduct. The complaining witness, who was 10-1/2 years old, testified that the defendant came to her apartment, brand-

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REFERENCES FOR POINTS IN HEADNOTES

[1-4] 1 Am Jur 2d, Abduction and Kidnapping §§ 9, 11, 12, 18.

[3] 75 Am Jur 2d, Trial § 623.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

[5] 1 Am Jur 2d, Abduction and Kidnapping §§ 11, 12, 18.
73 Am Jur 2d, Statutes § 346.

[6] 1 Am Jur 2d, Abduction and Kidnapping §§ 20, 21.
73 Am Jur 2d, Statutes § 346.

[7] 1 Am Jur 2d, Abduction and Kidnapping § 9.

ished a knife, and took some money from her older brother, and that after the robbery the defendant carried her to another apartment and forced her to engage in fellatio and attempted to have sexual intercourse with her. The trial court instructed the jury that asportation that is incidental to the commission of the criminal sexual conduct is sufficient to satisfy the asportation element of the kidnapping charge. The Court of Appeals, Cynar, P.J., and D. C. Riley, J. (D. E. Holbrook, Jr., J., concurring in result), reversed the conviction of kidnapping and remanded that matter for a new trial on the ground that the instruction on asportation was erroneous (Docket No. 77-3309). The people appeal.

In an opinion by Justice Fitzgerald, joined by Chief Justice Coleman and Justices Williams and Moody, and concurred in by Justices Levin and Ryan except as to limiting its application to pending and future cases, the Supreme Court *held:*

An instruction that asportation of the victim that is incidental to the commission of the coequal sexual offense is sufficient to satisfy the asportation element of kidnapping is erroneous.

1. Virtually any assault, any battery, any rape, or any robbery involves some "intentional confinement" of the person of the victim. To read the kidnapping statute literally is to permit a prosecutor to aggravate the charges against any assailant, robber, or rapist by charging the literal violation of the kidnapping statute which must inevitably accompany each of those offenses. Just as it is obvious that the Legislature did not intend the kidnapping statute to expose virtually every other crime against the person to capital sanctions, so too it is obvious that the language of the statute provides no standards for determining who shall be punished for its violation. The solution to cure the overbreadth of the statute is to interpolate the requirement of asportation. The element must not be merely incidental to the commission of a lesser underlying crime, it must be incidental to the commission of the kidnapping.

2. This solution serves to prevent the escalation of charges from a lesser offense to a greater capital offense. A similar concern exists when the underlying crime is equal as to its punishment. Movement, to be sufficient to meet the asportation requirement for kidnapping, must be shown to have significance independent of any accompanying offense. A course of movement incidental to a kidnapping and another offense could be of such a quality and character as to supply the element of asportation for kidnapping.

3. The instructions to the juries in these cases allowed the

juries to infer the required element of asportation from movement which is merely incidental to the underlying crime. Essentially, the instructions were that if the jury found there was movement either for the purpose of kidnapping the victim or to commit the crime of criminal sexual conduct, this would be sufficient for the asportation element of kidnapping. This instruction did not inform the jury that asportation for the purpose of kidnapping was essential, and served to usurp from their province the necessity of finding that crucial element. It was reversible error to instruct that the asportation element of kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the underlying coequal offense of first-degree criminal sexual conduct. Where applicable, the element of asportation is crucial, regardless of the length of punishment mandated by the Legislature. To hold otherwise would be to assert that the overbreadth problem in the statute is immaterial in cases where another serious crime is committed.

4. The holding in this case does not preclude the possibility of the concurrent commission of first-degree criminal sexual conduct and kidnapping. A properly instructed jury could find, under the facts of a particular case, for example, that movement of the rape victim was sufficient to satisfy the requisite element of asportation for a conviction of kidnapping.

Justice Kavanagh concurred in the result, but disagreed with the reasoning. It was unnecessary and erroneous to read the element of asportation into the kidnapping statute to save it from being unconstitutionally overbroad. Conviction under the statute properly requires proof either of forcibly carrying or sending a person out of the state, or of confining a person within the state for one of three ultimate purposes specified in the statute. Unless the kidnapping charged involves carrying or sending a person out of Michigan, no element of asportation is implicated in the statute. Any overbreadth would be avoided by requiring proof of the intent specified in the kidnapping statute as the ultimate purpose of the criminal act so that a misdemeanor would not be elevated to a felony. In these cases the ultimate purpose of the confinement of the complainants was shown to be the commission of criminal sexual conduct. Confinement for that purpose is not covered by the kidnapping statute.

Affirmed.

90 Mich App 151; 282 NW2d 266 (1979) affirmed.

91 Mich App 117; 283 NW2d 664 (1979) affirmed.

OPINION OF THE COURT

1. KIDNAPPING — ASPORTATION — OTHER CRIMES.

The element of movement or asportation in a kidnapping must not be merely incidental to the commission of another crime, it must be incidental to the kidnapping (MCL 750.349; MSA 28.581).

2. KIDNAPPING — ASPORTATION.

The element of asportation must be shown to be movement having significance independent of any accompanying offense, whether the accompanying offense charged carries equal punishment or is a lesser offense (MCL 750.349; MSA 28.581).

3. KIDNAPPING — ASPORTATION — OTHER CRIMES — INSTRUCTIONS TO JURY.

An instruction to the jury that the element of asportation in a kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the concurrent commission of first-degree criminal sexual conduct is reversible error (MCL 750.349, 750.520a *et seq.;* MSA 28.581, 28.788[1] *et seq.).*

4. KIDNAPPING — ASPORTATION — RAPE — CRIMINAL SEXUAL CONDUCT.

There may be a concurrent commission of first-degree criminal sexual conduct and kidnapping arising from the same conduct; a jury which is properly instructed could find under the facts of a particular case, for example, that movement of the rape victim was sufficient to satisfy the requisite element of asportation for a conviction of kidnapping (MCL 750.349, 750.520a *et seq.;* MSA 28.581, 28.788[1] *et seq.).*

OPINION CONCURRING IN RESULT BY KAVANAGH, J.

5. KIDNAPPING — ASPORTATION — INTENT — STATUTES.

An element of asportation need not be read into the kidnapping statute to save it from being unconstitutionally overbroad; unless the kidnapping charged involves carrying or sending a person out of Michigan, no element of asportation is implicated in the statute (MCL 750.349; MSA 28.581).

6. KIDNAPPING — INTENT — STATUTES.

Any overbreadth of the kidnapping statute would be avoided by requiring proof of the intent specified in the statute as the ultimate purpose of the confinement of the person kidnapped, i.e., *either the intent to extort money or other valuable thing, or the intent to cause the person to be secretly confined, or the*

intent to cause the person to be held to service against his or her will, where the kidnapping charged does not involve carrying or sending a person out of Michigan (MCL 750.349; MSA 28.581).

7. KIDNAPPING — INTENT — CRIMINAL SEXUAL CONDUCT.

Confinement of a person in Michigan for the ultimate purpose of committing criminal sexual conduct is not covered by the kidnapping statute (MCL 750.349, 750.520a et seq.; MSA 28.581, 28.788[1] et seq.).

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people.

Bell & Hudson, P.C., for defendant Slayton.

State Appellate Defender (by *Nora J. Pasman)* for defendant Lynn.

FITZGERALD, J. We granted leave to appeal in these cases to decide whether, in a prosecution for kidnapping and first-degree criminal sexual conduct, the trial court erred reversibly in instructing that the asportation element of kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the commission of the underlying *coequal*[1] offense of first-degree criminal sexual conduct. 407 Mich 902 (1979).

We hold that the trial courts erred in instructing the jurors that asportation of the victims that is incidental to the commission of the sexual offense is sufficient to satisfy the asportation element of the kidnapping charge. We adopt the pertinent statement of facts in the Court of Appeals opinions.

[1] *Coequal* is in reference to the length of punishment mandated by the Legislature for the offense.

I. *People v Barker*

"Defendants were each charged with one count of kidnapping, MCL 750.349; MSA 28.581, and one count of first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1). Each crime is punishable by any term of imprisonment up to life. The complainant charged that defendants forced her into their automobile, knocked her unconscious, drove some 15 to 18 miles into the country and there raped her.

"Defendant Barker was convicted by a jury of kidnapping and third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and was sentenced to two concurrent prison terms of 18 months. Defendant Slayton was convicted of kidnapping, but acquitted of any criminal sexual conduct, and was sentenced to five years of probation, six months of which were to be spent in prison." *People v Barker,* 90 Mich App 151; 282 NW2d 266 (1979).

Defendant Slayton appealed as of right. Defendant Barker was granted a delayed appeal. Their appeals were consolidated for review by the Court of Appeals.

On appeal, the Court of Appeals reversed the kidnapping convictions of both defendants, holding that the trial court committed reversible error by instructing the jury that they could satisfy the required asportation element of kidnapping by finding the existence of movement that is merely incidental to the offense of criminal sexual conduct.

The Court opined that the rule set forth in *People v Adams,* 389 Mich 222, 236; 205 NW2d 415 (1973),[2] is not limited solely to the prevention of

[2] Movement "merely incidental to the commission of" an underlying lesser offense is insufficient to satisfy the asportation element of kidnapping.

the distortion of lesser offenses into those more serious, but to further prevent one crime from being transformed into two *(e.g.,* kidnapping and rape), and that those decisions holding *Adams* applicable to coequal offenses represent the better reasoned approach.

II. *People v Lynn*

"On June 22, 1977, defendant was found guilty of one count of kidnapping, MCL 750.349; MSA 28.581, and one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). On July 7, 1977, he was sentenced to concurrent terms of life imprisonment. Defendant now appeals as of right.

"At trial, Tammy Trombley, the 10-1/2-year-old complainant, testified that on the night of February 24, 1977, she was home with her 13-year-old brother. At approximately 8:30 p.m., a man, later identified as defendant, came to their apartment and asked to use the phone. After obtaining admittance to the premises he brandished a knife and took some money from the complainant's brother. The complainant's preliminary examination testimony, which was read at trial, also established that the defendant had also taken a ring from the apartment.

"The complainant testified that after the robbery defendant carried her to a nearby apartment. At this time he forced her to engage in fellatio and unsuccessfully attempted to engage in sexual intercourse with her." *People v Lynn,* 91 Mich App 117; 283 NW2d 664 (1979).

The Court of Appeals reversed defendant's conviction of kidnapping and remanded for a new trial because the trial court erroneously charged the jury that the asportation needed to establish the kidnapping charge could be incidental to the commission of first-degree criminal sexual conduct.

III

We note disagreement among Court of Appeals panels on the issue of whether the asportation element required for kidnapping may be incidental to another offense when the punishment for that offense is equal to that for kidnapping.[3]

In *People v Adams,* 389 Mich 222; 205 NW2d 415 (1973), we upheld the constitutionality of the Michigan kidnapping statute, MCL 750.349; MSA 28.581. The problem we confronted was expressed in Judge LEVIN's analysis in *People v Otis Adams,* 34 Mich App 546, 560-561; 192 NW2d 19 (1971):

"It is obvious that virtually any assault, any battery, any rape, or any robbery involves some 'intentional confinement' of the person of the victim. To read the kidnapping statute literally is to convert a misdemeanor, for example, assault and battery, into a capital offense. A literal reading of the kidnapping statute would permit a prosecutor to aggravate the charges against any assailant, robber, or rapist by charging the literal violation of the kidnapping statute which must inevitably accompany each of those offenses.

* * *

"Just as it is obvious that the Legislature did not

[3] In *People v Worden,* 71 Mich App 507, 513-514; 248 NW2d 597 (1976), where the charges were kidnapping and armed robbery, coequal offenses, the Court of Appeals held *Adams* applicable:

"While it is true that the *Adams* Court was concerned with the conversion of a simple crime into a capital offense, the logic of the opinion goes further and is directed to prohibiting any conversion of a single offense into two offenses. Thus it matters not whether the single offense is a minor misdemeanor such as simple assault or a capital felony such as armed robbery."

To the contrary is *People v Hardesty,* 67 Mich App 376; 241 NW2d 214 (1976), which relied on the Court's quotation from *People v Miles,* 23 NY2d 527, 540; 245 NE2d 688, 695 (1969), that the *Adams* rule " 'was designed to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal' ". 389 Mich 232. The panel in *Hardesty* held that *Adams* was limited in application to situations where the underlying or other offense constituted a "lesser crime".

intend the kidnapping statute to expose virtually every other crime against the person to capital sanctions, so too it is obvious that the language of the statute provides no standards for determining who shall be punished for its violation."

The solution to cure the overbreadth of the statute was to interpolate the requirement of asportation. As to this requirement, we held:

"[T]he movement element must not be merely incidental to the commission of a lesser underlying crime, *i.e.,* it must be incidental to the commission of the kidnapping." 389 Mich 222, 236.

Our decision in *Adams* served to prevent the escalation of charges from a lesser offense to a greater capital offense by requiring the jury to find asportation or its equivalent in order to find the accused guilty of the separate crime of kidnapping. A similar concern exists when the underlying crime is coequal as to its punishment.[4]

Adams established the rule that movement, to

[4] As noted by the Court of Appeals panel in *People v Barker,* 90 Mich App 151, 156-157; 282 NW2d 266 (1979):

"We are of the opinion that the thrust of *Adams* is not limited solely to the prevention of the distortion of lesser offenses into those more serious, but to further prevent one crime from being transformed into two *(e.g.,* kidnapping and rape), and that those decisions holding *Adams* applicable to coequal offenses represent the better reasoned approach.

"It may be argued that a danger perceived by *Adams,* that of excessive prosecutorial zeal, is not as prevalent where two capital offenses are involved, inasmuch as the result would be two concurrent sentences of up to life instead of one.

"While it is certainly true that multiple sentences in Michigan run concurrently, it is also true that the conversion of a single capital offense into two capital offenses by charging incidental movement of the victim results in not only perhaps an additional concurrent sentence up to life, but also in two chances for conviction instead of only one. It is entirely possible for the jury to acquit on the charge underlying the kidnapping but convict on the latter. For this reason, the danger of 'excessive prosecutorial zeal' is equally present."

be sufficient to meet the asportation requirement for kidnapping, must not be "merely incidental" to an underlying lesser offense, "it must be incidental to the commission of the kidnapping".

When it is necessary to find asportation in order to find guilt of kidnapping, it must be shown to be movement having significance independent of any accompanying offense. A course of movement incidental to both a kidnapping and another offense could be of such quality and character as to supply the asportation element of kidnapping.

In *Adams* we recognized that finding movement sufficient to satisfy the asportation element is a complex determination. To aid the factfinder in making this determination we set forth factors to be considered.[5] In cases where a defendant has chosen to be tried by a jury, the following declaration expressed in *Adams* applies:

" 'Jurors are the sole judges of the facts and neither the trial court nor this court can interfere with their exercise of that right.' *People v Miller,* 301 Mich 93, 100 [3 NW2d 23] (1942). And in *People v Putnam,* 323 Mich 374, 379 [35 NW2d 279] (1948), Justice BOYLES stated, 'It

[5] "2. The movement element is not sufficient if it is 'merely incidental' to the commission of another underlying lesser crime.

"3. If the underlying crime involves murder, extortion or taking a hostage, movement incidental thereto is generally sufficient to establish a valid statutory kidnapping.

"4. If the movement adds either a greater danger or threat thereof, that is a factor in considering whether the movement adquately constitutes the necessary legal asportation, but there could be asportation without this element of additional danger so long as the movement was incidental to a kidnapping and not a lesser crime.

"5. Where appropriate, secret confinement or some other non-movement factor may supply a necessary alternative to asportation to complete statutory kidnapping.

"6. Whether or not a particular movement constitutes statutory asportation or whether there is an appropriate alternative element must be determined from all the circumstances under the standards set out above and is a question of fact for the jury." 389 Mich 222, 238.

is not the province of the Court to usurp the proper functions of the jury in determining issues of fact. It is not for the Court to say that the jury would have so found, if the issue had been submitted to it.' " 389 Mich 222, 238-239.

The jury instructions given in these cases allowed the jury to infer the required asportation element for kidnapping from movement which is merely incidental to the underlying crime. Essentially, the instructions directed that if the jury found there was movement *either* for the purpose of kidnapping of the victim *or* to commit the crime of criminal sexual conduct, this would be sufficient for the asportation element of kidnapping. This instruction did not inform the jury that asportation for the purpose of kidnapping was essential, and served to usurp from their province the necessity of finding that crucial element.

We hold that it was reversible error for the trial courts in these cases to instruct the jury that the asportation element of kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the commission of the underlying *coequal* offense of first-degree criminal sexual conduct. In all cases where the charge is kidnapping, except as noted in *Adams,* in order to find defendant guilty, the factfinder must be satisfied that there was movement sufficient to satisfy the asportation requirement or its equivalent. Where applicable, the asportation element is crucial, regardless of the length of punishment mandated by the Legislature. To hold otherwise would be to assert that the overbreadth problem we confronted in *Adams* is immaterial in cases where another serious crime is committed.

Our holding does not preclude the possibility of the concurrent commission of first-degree criminal

sexual conduct and kidnapping. A properly instructed jury could find under the facts of a particular case, for example, that movement of the rape victim was sufficient to satisfy the requisite asportation element for a kidnapping conviction.

We affirm the Court of Appeals in both of these cases.[6]

COLEMAN, C.J., and WILLIAMS and BLAIR MOODY, JR., JJ., concurred with FITZGERALD, J.

LEVIN and RYAN, JJ. We concur in the reasoning and the result of Justice FITZGERALD's opinion except for the footnote 6 provision limiting its application to pending and future cases and would defer decision on that point until a case is presented in which the issue is raised.

KAVANAGH, J. *(concurring in the result).* I agree that the defendants' convictions of kidnapping should be set aside and the decision of the Court of Appeals affirmed but disagree with the reason for so doing stated in the opinion of the majority.

The element of asportation was read into our statute in *People v Adams,* 389 Mich 222; 205 NW2d 415 (1973), for the stated purpose of saving the statute from a perceived overbreadth. I am now of the opinion that it was not only unnecessary but erroneous to do so, for the statute is not overbroad.

Conviction of kidnapping under this statute properly read requires proof of:

1) Forcibly carrying or sending a person out of the state, or

2) Confining such person within the state for the ultimate purpose of:

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[6] This holding is limited to pending and future cases where the issue has been preserved.

a) Extorting money or other valuable thing thereby, or

b) Causing such person to be secretly confined or imprisoned within this state against his will, or

c) Causing such person to be held to service against his will.

I am now persuaded that unless the charged kidnapping involves carrying or sending a person across the state line no element of asportation is implicated in our statute. The overbreadth we feared in *Adams* is avoided by insisting on proof of the intent specified in the statute as the *ultimate purpose* of the criminal act. So interpreted the statute would not elevate a misdemeanor to a felony as we feared in *Adams*. See 389 Mich 222, 232-233.

Our concentration on asportation in *Adams* now strikes me as misplaced. The holding of the hostages there for the purpose of extorting a hearing on grievances should have determined whether this statute was violated. I now think it was and that we wrongly decided *Adams*.

In the instant cases while the defendants in fact confined the complainants, the ultimate purpose of such confinement was shown to be criminal sexual conduct. Confinement for that purpose is not covered by our kidnapping statute.

IN THE MATTER OF DAGGS

Docket No. 64341. Argued November 14, 1980 (Calendar No. 10).—Decided June 19, 1981.

LeRoy W. Daggs, an attorney, was found guilty of professional misconduct and gross negligence in representing three clients. The complaint also described, in two counts, three other disciplinary investigations against the respondent, in 1970, 1971 and 1976, which had resulted in discipline for similar professional misconduct. The hearing panel in this case dismissed the 1976 misconduct as unsupported by the evidence and refused to consider the 1970 and 1971 misconduct, and ordered the respondent suspended from the practice of law for two years. The Attorney Discipline Board affirmed the findings and denied the respondent's request for a rehearing on the ground of newly discovered evidence, but reduced the suspension to one year. The parties appeal. *Held:*

The inclusion of the two counts relating to previous misconduct, while improper, does not require a rehearing before a different hearing panel in this case because the panel recognized the impropriety and dismissed one count and refused to consider the other. Evidence regarding an altered receipt is not such newly discovered evidence as to require a further hearing. The Attorney Discipline Board did not abuse its discretion in reducing the period of suspension to one year.

1. The separation of the prosecutorial and adjudicative functions of the former State Bar Grievance Board into the Attorney Grievance Commission and the Attorney Discipline Board was deemed necessary to obviate the appearance of, and potential for, unfairness where the State Bar Grievance Board both supervised the work of the State Bar Grievance Administrator and adjudicated the charges which the administrator filed. In addition certain procedural changes were made. The respondent's contention that more substantive due-process rights must be accorded to a respondent because of the changes addresses the form, not the substance, of the change.

2. Only after a decision on the merits of the alleged miscon-

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REFERENCE FOR POINTS IN HEADNOTES

[1-10] 7 Am Jur 2d, Attorneys at Law §§ 87-97.

duct is evidence of prior misconduct relevant for the formation of an order of discipline. However, Daggs was not unfairly prejudiced by the inclusion of the counts relating to prior misconduct. The record shows that the hearing panel was fully cognizant of the potential for unfair prejudice stemming from them, and expressly noted and exercised its discretion by limiting the Grievance Administrator to his proofs in one count and in refusing to consider the other. Daggs also argues that the reference to prior discipline rendered his testimony less credible. However, much of the hearing panel's findings refer to undisputed and unexplained delays during which the rights of the respondent's clients were prejudiced, and his testimony is characterized by a continued lack of responsiveness to questions, numerous contradictory statements, and frequent lapses of memory. The record shows nothing on which to conclude that the standard of the preponderance of the evidence was not met. In this factual setting, a rehearing before a new hearing panel is not required.

3. To obtain a new disciplinary hearing on the ground of newly discovered evidence the respondent must show that the evidence and not merely its materiality is newly discovered, that it is not merely cumulative, that a different result is probable on remand, and that reasonable diligence could not have discovered and produced the evidence. It is undisputed that an exhibit in this case, a receipt for a fee signed by Daggs, has been altered from $500 to $2,500. Daggs testified that the client paid him only $500 and denied altering the receipt. In an amended petition for review of the disciplinary hearing, he presented an affidavit of an expert on questioned documents who concluded that the word "twenty" in the phrase "twenty-five hundred" was not written by him. The substance of the affidavit is merely cumulative and is not newly discovered. Nor is a different result probable on remand since the credibility of the witnesses and the materiality of the alteration were assessed by the hearing panel in reaching its decision. Daggs cannot plausibly maintain that he exercised due diligence in discovering and producing the evidence concerning the alteration of the receipt. He was put on notice of the alteration on the first day of hearing when the receipt was offered into evidence, and cross-examination of the client's wife indicates that Daggs was aware of the materiality of the alteration. He took no steps during the ensuing 5-1/2 months to request expert examination of the receipt or, after the report of the hearing panel, to request a new hearing. Therefore, he has not met the requisite standard for relief under a theory of newly

discovered evidence. The fraud alleged as to the amount paid to Daggs is distinctly collateral to the issue whether he accepted money to protect the client's right of appeal. The hearing panel concluded that an undetermined amount was paid to him, and that he failed to protect the complainant's right of appeal, and the alleged wrongdoing by the client did not prejudice Daggs or deprive him of substantial justice.

4. The Attorney Discipline Board has the power to amend the order of the hearing panel. The broad grant of power is not unlimited; an abuse of discretion may be found under proper circumstances. The Attorney Discipline Board must state reasons for the modification of an order of a hearing panel, and failure to do so precludes an exercise of discretion. The opinion of the board sufficiently gave the reasons for reducing the suspension that the Court was able to exercise its function of review, and was not so bereft of explanation as to provide no guidance to future hearing panels and to the Attorney Discipline Board when confronting similar or analogous facts.

5. To impose a standard of abuse of discretion on the Attorney Discipline Board for review of orders of hearing panels would operate to prevent the board from effectively carrying out its function of overseeing the continuity and consistency of discipline imposed. The board did not abuse its discretion in this case. It found the imposition of a two-year suspension too severe in light of the misconduct proved, and exercised its function of overview and reduced the length of the suspension. Review of the whole record shows that the action of the Attorney Discipline Board was principled and reasoned.

Affirmed.

1. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — DUE PROCESS.

The separation of the State Bar Grievance Board into two independent bodies, the Attorney Grievance Commission to serve the prosecutorial function and the Attorney Discipline Board to perform the adjudicative functions, does not require that a lawyer be accorded more substantive due-process rights in disciplinary proceedings before the Attorney Discipline Board (GCR 1963, 957, 959).

2. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — PRIOR MISCONDUCT.

Only after a decision on the merits of the alleged misconduct in an attorney discipline case is evidence of prior misconduct

relevant for the formulation of an order of discipline (GCR 1963, 964.2).

3. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — COMPLAINT — PRIOR MISCONDUCT.

A lawyer charged with professional misconduct was not unfairly prejudiced by the inclusion in the complaint of allegations concerning his prior professional misconduct where the record shows that the hearing panel of the Attorney Discipline Board was fully cognizant of the potential for unfair prejudice stemming from the allegations and expressly noted and exercised its discretion by limiting the Grievance Administrator to his proofs in one of the prior matters and refusing to consider the others, many of the findings by the hearing panel refer to undisputed and unexplained delays during which the rights of the respondent's clients were prejudiced, the respondent's credibility was seriously undermined by his own testimony, and there is nothing in the record upon which to conclude that the preponderance of evidence standard was not met (GCR 1963, 964.2).

4. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — NEWLY DISCOVERED EVIDENCE.

To obtain a new disciplinary hearing on the ground of newly discovered evidence a respondent lawyer must show that the evidence and not merely its materiality is newly discovered, the evidence is not merely cumulative, a different result is probable on remand, and reasonable diligence could not have discovered and produced the evidence.

5. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — NEWLY DISCOVERED EVIDENCE.

A respondent lawyer is not entitled to a new disciplinary hearing on the ground of newly discovered evidence because of an affidavit by an expert on questioned documents who concluded that the respondent did not make the alteration of the amount of a receipt given to his client, which was admitted in evidence against the respondent, where the substance of the affidavit is merely cumulative and not newly discovered, the credibility of the witnesses and the materiality of the alteration were assessed by the hearing panel in reaching its decision in the first hearing, and the respondent took no steps during the ensuing 5-1/2 months of the proceedings after the hearing to request expert examination of the alteration, or a new hearing after the hearing panel made its report.

6. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — FRAUD.

A respondent lawyer's allegation of fraud by the complaining client is insufficient as a basis for a new disciplinary hearing where the fraud alleged, the alteration of the amount of a receipt signed by the respondent, is distinctly collateral to the issue whether the respondent accepted money to protect the client's rights, the hearing panel concluded that an undetermined amount was paid to the respondent, and that the respondent failed to protect the client's rights.

7. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — ORDER OF DISCIPLINE — AMENDMENT.

The Attorney Discipline Board has the power to amend an order of discipline against a lawyer by a hearing panel; reduction of the length of a respondent's suspension from the practice of law is, perforce, an amendment of the hearing panel's order of discipline (GCR 1963, 967.4).

8. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — ORDER OF DISCIPLINE — APPEAL.

The powers granted to the Attorney Discipline Board to review the order of a hearing panel in disciplinary proceedings against a lawyer are substantially identical to those granted to its predecessor, the State Bar Grievance Board; but the broad grant of power is not unlimited, and abuse of discretion may be found under the proper circumstances (GCR 1963, 967.4).

9. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — ORDER OF DISCIPLINE — AMENDMENT.

The Attorney Discipline Board must state reasons for the modification of an order by a hearing panel so that its explanation will provide guidance to future hearing panels, and to the Attorney Discipline Board, when confronting similar or analogous facts (GCR 1963, 967.4).

10. ATTORNEY AND CLIENT — DISCIPLINARY PROCEEDINGS — ORDER OF DISCIPLINE — MODIFICATION.

The Attorney Discipline Board did not abuse its discretion in reducing an order of a hearing panel suspending a lawyer from the practice of law for two years to suspension for one year where the board found the imposition of a two-year suspension too severe in the light of the misconduct proved, a review of the whole record shows that the action of the board was principled and reasoned, and the board sufficiently explained its reasons that the Supreme Court was able to exercise its function of review (GCR 1963, 967.4, 971).

Louis Rosenzweig, Counsel to Grievance Administrator.

F. Philip Colista and *Richard C. Kaufman* for respondent.

FITZGERALD, J. Respondent attorney LeRoy W. Daggs was found grossly negligent in the representation of three clients and was ordered suspended from the practice of law for two years. The Attorney Discipline Board affirmed these findings but reduced the suspension to one year. We affirm.

On February 23, 1978, the State Bar Grievance Administrator (now Grievance Administrator) filed a formal complaint against LeRoy W. Daggs, a member of the State Bar of Michigan. He was charged with five counts of unprofessional conduct.

Oakland County Hearing Panel No. 7 heard testimony on July 18, 1978, and November 7, 1978. In a decision filed January 10, 1979, the panel found the evidence supported counts I, III and IV, dismissed count II as unsupported, and refused to consider count V.[1] The panel found respondent's conduct violated the Code of Professional Responsibility and was grossly negligent in representing the interests of the clients.[2] The panel ordered respondent suspended from the practice of law for two years.

Respondent petitioned the Attorney Discipline Board for review of the panel's order of discipline. The administrator cross-petitioned for review of the panel's refusal to consider count V. Approxi-

[1] We adopt the numbering of the counts used in the formal complaint. The panel considered the counts in the order in which proofs were presented.

[2] The panel found respondent's conduct violated Canons 1, 6 and 7 of the Canons of Professional Responsibility and specifically DR 1-102(A), subds (4), (5), and (6); DR 6-101(A), subds (1), (2), and (3); and DR 7-101(A), subds (1), (2), and (3).

mately 3-1/2 months later, respondent filed an amended petition alleging newly discovered evidence.

The board, in a divided opinion, affirmed the panel's findings, but reduced the suspension to one year. Respondent's request for remand due to newly discovered evidence was denied. The dissent cited the inclusion of counts II and V as the source of an impermissible taint of the panel's proceedings.

We granted leave to consider the following questions:

(1) Does the inclusion of counts II and V in the complaint require a rehearing? (2) Should the case have been remanded for the hearing of additional evidence regarding the alteration of the receipt? (3) Did the Attorney Discipline Board abuse its discretion in reducing the period of suspension?

I

Before turning to the questions presented, we will briefly state the three counts upon which the panel found misconduct.

A

Count I alleged respondent was retained by Mr. Sceola Kuykendall and paid $3,900 to perfect an appeal from a Federal criminal conviction. A claim of appeal was filed, respondent appearing as attorney of record. No further action was taken and the appeal was eventually dismissed for want of prosecution. It was further alleged that respondent represented to Mr. Kuykendall that the appeal had been denied.

The panel found the complaint's allegations were supported by a preponderance of the evi-

dence, although the exact sum paid to respondent could not be ascertained. The panel further found respondent attempted to persuade Mr. Kuykendall to withdraw his complaint in exchange for payment of money. This attempt to secure withdrawal of the complaint occurred after the panel had been appointed to investigate the complaint and shortly before the first day of the hearing.

B

Count III averred respondent was retained to probate the estate of Wihelmina Bailey. The estate consisted of a single piece of property in the City of Detroit. Count III alleged it took respondent approximately 20 months to file a petition for administration and approximately 7 years to close the estate.

The panel found no acceptable or excusable reasons for the undisputed delay in probating this estate. The panel noted that this delay "constitute[d] total failure on the part of the respondent to fulfill his obligation to this client".

C

Count IV recited that respondent was appointed to pursue post-conviction remedies for an imprisoned felon and that 13 months passed before the claim of appeal was filed. Respondent then formally requested that he be discharged as appointed counsel. It was further alleged that respondent delayed an additional two months before filing the substitution order.

The panel found that respondent "failed to properly and diligently present his request to be relieved of his appointment, that his delay was inexcusable, and that his obligation was to

promptly seek entry of an order [relieving] him of his responsibility".

II

Does inclusion of counts II and V require a rehearing?

The formal complaint against respondent consisted of five counts. Count II described the details of a 1976 investigation against respondent and alleged that the resulting reprimand indicates respondent's failure to meet the requisite standards for members of the bar. Count V recited respondent's 1970 reprimand and 1971 three-month suspension, *State Bar of Michigan v Daggs,* 384 Mich 729; 187 NW2d 227 (1971), and alleged "a pattern of gross negligence and incompetence in handling his client's affairs" in violation of Code of Professional Responsibility and Canons, DR 6-101.

As earlier stated, the panel dismissed count II as unsupported by competent evidence and refused to consider count V.

Respondent contends that bifurcation of the attorney discipline process demonstrates this Court's awareness of the increased adversariness of disciplinary proceedings and that the fact that proceedings are governed by the General Court Rules and the Rules of Evidence supports this idea. GCR 1963, 964.1, 964.9(a). In effect, respondent asserts that under the new procedure of bifurcation, *more* process is due.

It is noteworthy that this is the first attorney disciplinary proceeding to reach this Court since bifurcation of the prosecutorial and adjudicative functions of the State Bar Grievance Board.[3] Bifur-

[3] The effective date for bifurcation of attorney discipline hearings was October 1, 1978. 402 Mich clvi. Although the hearing before the panel began on July 18, 1978, it was adjourned to and completed on November 7, 1978.

cation was deemed necessary to obviate the appearance of, and potential for, unfairness where the State Bar Grievance Board both supervised the work of the administrator and adjudicated charges the administrator filed.

Bifurcation created two separate and independent boards. The Attorney Grievance Commission was established to serve the prosecutorial function in supervising and disciplining Michigan attorneys (GCR 1963, 957); the Attorney Discipline Board performs the adjudicative functions (GCR 1963, 959). In addition, certain procedural changes were made. Respondent's contention that more process is due because of bifurcation addresses the form, not the substance, of the change.

Respondent asserts that the thrust of the substantive allegations in counts I, III and IV was inaction. In counts II and V, the panel was informed that repondent had been disciplined in the past for inaction. Respondent argues that the reference to prior discipline tainted the panel's objectivity, rendering his present testimony less credible. This resulted in denial of a fair hearing.

The administrator, in argument before the panel and the board, took the position that non-substantive counts are properly included in the complaint whenever the overriding issue is an attorney's competence to practice law. The administrator, in his brief to this Court, says merely that the error was harmless, thus apparently conceding that inclusion of counts II and V was error.[4]

Based upon an examination of the record of the

[4] In claiming that the error was harmless, the administrator relies in part on the miscarriage of justice standard of review in GCR 1963, 956.1. The administrator argues that respondent was clearly guilty of counts I, III and IV. Therefore, the mere presence of counts II and V in the complaint did not result in a miscarriage of justice. The weakness of this argument is that it begs the question of credibility raised by the respondent.

proceedings, we conclude that respondent was not unfairly prejudiced by the inclusion of counts II and V. The record discloses the panel was fully cognizant of the potential for unfair prejudice stemming from these counts. The panel expressly noted and exercised its discretion both in limiting the administrator to his proofs in count II and in refusing to consider count V.

In connection with count V, the chairman stated he did not want the panel "influenced in this matter by virtue of what transpired in previous suspensions or disciplinary action", and, absent a decision from this Court, or a law, would not consider the count. The other members of the panel, when polled, specifically agreed.

While respondent raises the issue of credibility in the context of counts II and V, much of the panel's findings refer to undisputed and unexplained delays during which the rights of respondent's clients were prejudiced. In addition, his credibility, without more, was seriously undermined by his own testimony which is characterized by continued lack of responsiveness to questions, numerous contradictory statements and frequent lapses of memory. Credibility of the witnesses and the respondent was for the panel to evaluate. The record reveals nothing upon which to conclude the preponderance of evidence standard was not met. GCR 1963, 964.10. *State Bar Grievance Administrator v Posler,* 390 Mich 581; 213 NW2d 133 (1973).

We hold that the inclusion of counts II and V in this factual setting does not require a rehearing. We also hold that evidence of prior misconduct is not alleged misconduct for purposes of preparing a complaint. Only after a decision on the merits of the alleged misconduct is evidence of prior miscon-

duct relevant for the formulation of an order of discipline.

III

Should the case have been remanded for the hearing of additional evidence regarding the alteration of a receipt?

State Bar Exhibit No. 5 is a receipt for $2,500 signed by respondent. This exhibit was admitted without objection during testimony by the wife of complainant Kuykendall. Mrs. Kuykendall testified she received the receipt from her husband. Mr. Kuykendall later testified that the receipt was for money paid to respondent to perfect his appeal.

It is undisputed that the receipt was originally made out for $500. Respondent testified that complainant paid him only $500; he categorically denied altering the receipt. Complainant testified he gave respondent $2,500 and demanded that respondent make out a receipt for the true amount of cash paid. He left respondent's office with the altered receipt.

Respondent alleged in his amended petition for review that there was additional evidence that the receipt was altered from $500. Respondent attached to the amended petition the supporting affidavit of a qualified expert witness in the field of questioned documents. The document examiner expressed the opinion that the word "twenty" in the phrase "twenty-five hundred" was not written by respondent. The examiner expressed no opinion about the raised "2" before the "500".

Respondent argued that the linchpin of count I was credibility. Since the affidavit proved he did not alter the receipt, contrary to complainant's testimony, and since complainant admitted the

receipt never left his possession or control, respondent contended that the alteration of the receipt, if not fraudulent, at least adversely reflected on complainant's credibility. Either conclusion would cast doubt on the panel's findings.

Although respondent described the affidavit as newly discovered evidence which would entitle him to relief from the panel's order of discipline, the board denied the petition since the affidavit was not part of the record before the panel. We agree with the board's result but reach the merits of respondent's argument because the record before us is sufficient to dispose of it and render a final judgment in this case. GCR 1963, 971.5.

Michigan law on newly discovered evidence as the basis for a new trial is settled. *Canfield v City of Jackson,* 112 Mich 120; 70 NW 446 (1897). It is necessary to show:

1) The evidence and not merely its materiality is newly discovered;

2) The evidence is not merely cumulative;

3) A different result is probable on remand;

4) Reasonable diligence could not have discovered and produced the evidence.

Respondent's argument that the affidavit is newly discovered evidence requires examination of the contents of the affidavit in light of the standard.

After the altered receipt was admitted into evidence, both Mr. and Mrs. Kuykendall were cross-examined about the alteration. The panel was asked to take "judicial notice" of the alteration and agreed to do so. Respondent categorically denied making the alteration. We note the affidavit merely concludes that respondent did not make the alteration.

We find that the substance of the affidavit is merely cumulative and is not newly discovered.

Nor is a different result probable on remand since the credibility of the witnesses and the materiality of the alteration were assessed by the panel in reaching its decision.

Respondent also cannot plausibly maintain that he exercised due diligence, notwithstanding the limited discovery available during the prehearing phase of attorney discipline hearings. Respondent was put on notice of the alteration on the first day of hearing at the time the receipt was offered into evidence. Cross-examination of Mrs. Kuykendall indicates respondent was also aware of the materiality of the alteration. Respondent took no steps during the ensuing 5-1/2 months to request expert examination of this evidence or, after the panel's report, to request a new hearing in order to raise this point. We conclude respondent has not met the requisite standard to be entitled to a remand under a newly discovered evidence theory.

Our review of the panel's findings also convinces us that respondent's allegation of fraud, standing alone as a basis for remand, is insufficient. Assuming without deciding that complainant did commit a fraud upon the panel as to the amount he paid respondent, the fraud alleged is distinctly collateral to the issue whether respondent accepted money to protect complainant's right of appeal. Receipts signed by respondent were introduced into evidence, without objection, which showed respondent received either $900 or $2,900 from complainant.[5] The panel concluded that an undetermined amount was paid to respondent to protect complainant's right of appeal and that no

[5] State Bar Exhibit No. 4 is a receipt for $400. It bears the following notation:

"Re: Federal Court Case (Transcript Fee)".

State Bar Exhibit No. 5 bears the notation:

"Costs of Printing".

further action was taken after the claim of appeal was filed. The appeal was dismissed for want of prosecution. Even if respondent agreed only to protect complainant's right of appeal, as a factual matter, he failed to do so. It is clear that the alleged wrongdoing by the complainant did not prejudice respondent or deprive him of substantial justice.

Since we conclude that the substance of the affidavit is not newly discovered and merely cumulative, that the findings of the panel adopted by the board on credibility have proper evidentiary support on the whole record, *State Bar Grievance Administrator v Estes,* 390 Mich 585; 212 NW2d 903 (1973), and that the fraud, if proved, is nonprejudicial, we hold that no remand for the taking of additional evidence on the alteration is necessary.

IV

Did the Attorney Discipline Board abuse its discretion in reducing the period of suspension?

The board affirmed the panel's findings but reduced the period of suspension from two years to one year. The administrator appeals the reduction, arguing that the board's action is so contrary to the evidence and findings it amounts to an abuse of discretion. The administrator also argues abuse of discretion because the board did not state explicit reasons for the reduction.

We do not agree that the board abused its discretion by reducing respondent's suspension. The board has the power to "affirm, *amend,* reverse, or nullify the order of the hearing panel in whole or in part or order other discipline". GCR 1963, 967.4. (Emphasis supplied.) Reduction of re-

spondent's suspension is, *perforce,* an amendment of the panel's order of discipline. Nor is this discretion a departure from the past. The powers granted the board under GCR 1963, 967.4 are substantially identical to those granted its predecessor, the State Bar Grievance Board, in State Bar Rule 16.16.

The broad grant of power given to the board is, of course, not unlimited. Abuse of discretion may be found under proper circumstances. The administrator correctly notes that the board must state reasons for modification of a hearing panel order and that failure to do so precludes such an exercise of discretion. *State Bar Grievance Administrator v Gillette,* 393 Mich 26; 222 NW2d 513 (1974), *(After Remand),* 394 Mich 1; 228 NW2d 220 (1975); *State Bar Grievance Administrator v Williams,* 394 Mich 5; 228 NW2d 222 (1975).

Although the board did not overelaborate, we were sufficiently enlightened about the reasons for reducing the suspension to one year that we were able to exercise our final review function. The opinion was also not so bereft of explanation as to provide no "guidance to future hearing panels and to the board itself when confronting similar or analogous factual situations". *State Bar Grievance Administrator v Williams, supra,* 15.

Finally, the administrator challenges the standard of review employed by the board. The administrator contends that abuse of discretion should be the appropriate standard and that the consequence of the existing standard is exemplified by the instant case where the board substituted its judgment for that of the panel.

While not inconsistent with the powers granted in GCR 1963, 967.4, an abuse of discretion standard would operate to prevent the board from

effectively carrying out its overview function of continuity and consistency in discipline imposed. *State Bar Grievance Administrator v Williams, supra,* p 15. Hearing panels meet infrequently and are exposed to a relatively small number of discipline situations. The board suffers from no such disadvantage.

We hold that the board acted properly in this case. The board found imposition of a two-year suspension too severe in light of the misconduct proved. It exercised its overview function and reduced the length of the suspension. Our review of the whole record convinces us the action of the board was principled and reasoned. We therefore affirm the board's reduction of respondent's suspension to one year.

V

The order of discipline of Oakland County Hearing Panel No. 7, as modified by the Attorney Discipline Board, is affirmed.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, RYAN, and BLAIR MOODY, JR., JJ., concurred with FITZGERALD, J.

PEOPLE v MILLER

PEOPLE v EWING

PEOPLE v DAVIS

Docket Nos. 62902, 62903, 62906, 62935. Decided June 19, 1981. On application by the defendants for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded the case to Recorder's Court of Detroit for a new trial.

Dwjuan Miller, Kevin Ewing, and Michael Davis were jointly tried for first-degree murder and three counts of armed robbery in the Recorder's Court of Detroit, Joseph A. Gillis, J.; Miller and Davis were convicted on all counts and Ewing was convicted of second-degree murder and one count of armed robbery. Before the trial, the judge entered an order that the jury would be selected by a system similar to the "struck" jury system sometimes used in Federal courts and courts of other states, in which a large number of jurors are seated and examined together, and after all challenges for cause are exercised, peremptory challenges are exercised in rotation, and the top 14 of the remaining jurors in order of seating are the jury for trial. Defense counsel objected to the procedure on the ground that calling so many jurors at once would make it difficult to keep track of the answers given by individual jurors to voir dire questions, but the objection was overruled. The Court of Appeals, Allen, P.J., and Townsend, J. (Maher, J., dissenting in part), found a violation of the jury selection procedure required by the court rules, but declined to reverse in the circumstances of the case (Docket Nos. 77-824, 77-825, 77-939, and 77-945). The defendants apply for leave to appeal.

In a per curiam opinion signed by Justices Kavanagh, Williams, Levin, and Fitzgerald, the Supreme Court *held:*

A defendant is entitled to have the jury selected as provided by the rule. Where a selection procedure is challenged before selection begins, failure to follow the procedure prescribed in the rule requires reversal. The "struck jury method" or any system patterned after it is disapproved and may not be used in the future.

1. The court rule contemplates the seating and examination

of a panel of potential jurors equal in size to the jury that will hear the case. As a juror is challenged, either peremptorily or for cause, another will be seated before further challenges are exercised. The procedure used in this case was not in compliance with the rule.

2. Given the fundamental nature of the right to trial by an impartial jury, and the inherent difficulty of evaluating a claim of prejudice from the selection process, a requirement that a defendant demonstrate prejudice would impose an often impossible burden.

Reversed and remanded for a new trial.

Justice Moody, joined by Chief Justice Coleman and Justice Ryan, dissented. They would hold that in the circumstances of this case the method of jury selection does not mandate reversal, but agree that it may not be used hereafter.

88 Mich App 210; 276 NW2d 558 (1979) reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy Scallen,* Assistant Prosecuting Attorney, for the people in *Miller* and *Davis;* and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people in *Ewing.*

Lawrence R. Greene for defendant Miller.

Gerald S. Surowiec for defendant Ewing.

Thomas A. Law for defendant Davis.

PER CURIAM. The defendants were charged with one count of first-degree murder and three counts of armed robbery as the result of a holdup of a restaurant in which the owner was shot to death. Defendants Miller and Davis were convicted on all counts, and defendant Ewing was found guilty of second-degree murder and one count of armed robbery. The Court of Appeals affirmed the convic-

tions. *People v Miller,* 88 Mich App 210; 276 NW2d 558 (1979).

Each defendant filed a request for review under Administrative Order 1977-4, 400 Mich lxvii (1977). We ordered the trial court to appoint counsel for the defendants to prepare and file applications for leave to appeal, directing that certain issues be briefed. The applications have been filed, raising several issues. We reach only one, and reverse because of the use of an improper jury selection procedure.

I

More than five weeks before the scheduled start of the trial, the trial judge entered an order describing the manner in which jury selection would be conducted. It said in part:

> "It is further ordered that the *struck* jury method will be used to select the jury of 14. This method is described in *Pointer v United States,* 151 US 396; 14 S Ct 410; 38 L Ed 208 (1894), and *Swain v Alabama,* 380 US 202; 85 S Ct 824; 13 L Ed 2d 759 (1965).
>
> "It is proposed that 80 prospective jurors will be seated and examined. After all challenges for cause (GCR [1963,] 511.4) are exercised, peremptory challenges will be exercised (GCR 511.5) in rotation. The top 14 jurors in order of seating will be sworn as the jury for the trial."

Before the jury selection began, defense counsel objected to this procedure on the ground that calling so many jurors at once would make it difficult to keep track of the answers given by individual jurors to voir dire questions. The trial judge rejected this argument, noting that he had used the procedure a number of times and that it is used in other jurisdictions.

Seventy-three jurors were initially called and questioned as a group by the trial judge. None was excused for cause. The prosecutor and three defense attorneys then exercised peremptory challenges in rotation until only 11 jurors remained, at which point an additional 37 jurors were called and questioned. The peremptory challenge process continued until there were no further challenges, and the 14[1] remaining jurors with the lowest numbers were selected to hear the case.

II

The Court of Appeals affirmed the defendants' convictions.[2] The Court found a violation of the jury selection procedure provided by GCR 1963, 511. In particular, the jury selection did not comply with Rule 511.6:

> "After a challenge for cause is sustained or a peremptory challenge exercised, another juror shall be selected and examined before further challenges are made. Such jurors shall be subject to challenge as are other jurors."

However, the Court declined to reverse. It found the evidence against the defendants overwhelming, and noted the failure of the defendants to raise the issue until just before the selection process began, despite the substantial notice given by the trial judge's order. The defendants' claim of prejudice was premised on the difficulty of remembering the responses of the various jurors, but the Court of Appeals found the use of similar selection systems in other jurisdictions sufficient to establish the practicability of the procedure. Finally, the

[1] Including provision for two alternate jurors. GCR 1963, 511.2.

[2] Judge MAHER dissented as to a number of points, but did not disagree with the majority as to this issue.

Court said that while there was a violation of Rule 511.6, the method used here did not violate the purpose of the rule. The Court interpreted that provision in the light of the usual practice of starting with a panel of 12 potential jurors. In that circumstance, subrule .6 ensures that the parties will not be required to exercise peremptory challenges against a panel of fewer than 12, protecting against dilution of the right to exercise peremptory challenges. In this case, the parties were always faced with a panel of at least 12, and for most of the selection process with a far larger one. This permitted them to identify all of the jurors they wished to challenge before exercising any challenges.

The Court concluded with the following caution to trial judges:

"Although the use of the struck jury method did not warrant reversal in this case, our opinion should not be read as an endorsement of the method. Our Supreme Court has provided for a method of impaneling a jury, and the surest way of avoiding error, particularly in the sensitive area of a defendant's right to a jury trial, is to follow the accepted method."[3] 88 Mich App 218-219.

III

As the Court of Appeals noted, GCR 1963, 511 contemplates the seating and examination of a panel of potential jurors equal in size to the jury

[3] In a more recent case involving the same issue, the Court of Appeals again declined to reverse because of this jury selection procedure, but said:

"We would, however, caution trial courts against reading our decision as an indorsement for the struck jury method. Indeed, in the interest of order and efficiency, we would prohibit its use and the confusion it tends to create in the trial of any future cases." *People v Stein,* 90 Mich App 159, 165; 282 NW2d 269 (1979).

that will hear the case. As a juror is challenged, either peremptorily or for cause, another will be seated before further challenges are exercised. Obviously, the procedure used in this case was not in compliance with the rule.

Although the defendants' claims of confusion in the jury selection process are not implausible, we agree with the Court of Appeals that there is nothing in this record from which one could affirmatively find prejudice to the defendants from the selection process. However, given the fundamental nature of the right to trial by an impartial jury, and the inherent difficulty of evaluating such claims, a requirement that a defendant demonstrate prejudice would impose an often impossible burden. See *People v Gratz,* 35 Mich App 42; 192 NW2d 304 (1971). A defendant is entitled to have the jury selected as provided by the rule. Where, as here, a selection procedure is challenged before the process begins, the failure to follow the procedure prescribed in the rule requires reversal. The "struck jury method" or any system patterned thereafter is disapproved and may not be used in the future.

In view of the disposition of this issue, we find it unnecessary to reach the other questions presented in these applications.

Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case remanded to the Recorder's Court for the City of Detroit for a new trial.

KAVANAGH, WILLIAMS, LEVIN, and FITZGERALD, JJ., concurred.

BLAIR MOODY, JR., J. *(dissenting).* We would

affirm the result reached by the Court of Appeals that the method of jury selection applied under the circumstances of this case does not mandate reversal.

We agree such a procedure of jury selection, however, may not be used hereafter.

COLEMAN, C.J., and RYAN, J., concurred with BLAIR MOODY, JR., J.

PEOPLE v WILDER

Docket No. 61305. Argued March 6, 1979 (Calendar No. 7).—Decided July 13, 1981. Rehearing denied *post,* 1157.

Ronald T. Wilder and a codefendant were convicted by a jury in Recorder's Court of Detroit, Henry L. Heading, J., of first-degree murder in the perpetration of a robbery and of the armed robbery from which the felony-murder charge arose. The trial court instructed the jury that premeditation and deliberation are supplied by law if a person is killed in the perpetration of a robbery. The Court of Appeals, Beasley, P.J., and Bashara, J. (D. C. Riley, J., dissenting in part), affirmed the defendant's conviction of first-degree murder, but reversed his conviction of armed robbery on the ground that it was a necessary element of the first-degree murder rather than a separate crime (Docket No. 77-1305). The parties appeal on the questions whether a specific instruction on malice must be given in a trial for murder in the perpetration of a felony listed in the statute and whether convicting the defendant of both first-degree murder and the underlying felony violates the prohibition on double jeopardy. *Held:*

Conviction both of the murder in the perpetration of the felony and of the underlying felony violates the state constitu-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur 2d, Homicide § 41 *et seq.*
[2, 3] 40 Am Jur 2d, Homicide, §§ 72, 499, 500.
[3] 40 Am Jur 2d, Homicide §§ 72, 509.
67 Am Jur 2d, Robbery § 90.
[4, 15] 21 Am Jur 2d, Criminal Law § 579.
40 Am Jur 2d, Homicide §§ 72, 513
67 Am Jur 2d, Robbery § 90.
73 Am Jur 2d, Statutes § 300.
[5] 21 Am Jur 2d, Criminal Law § 189.
[6, 7, 10, 11, 15, 16] 21 Am Jur 2d, Criminal Law § 182 *et seq.*
[7] 40 Am Jur 2d, Homicide § 72.
[8] 21 Am Jur 2d, Criminal Law § 187.
[9] 40 Am Jur 2d, Homicide § 72.
[10, 12-14] 21 Am Jur 2d, Criminal Law § 579.
73 Am Jur 2d, Statutes § 300.

tional prohibition against double jeopardy. The defendant's conviction of first-degree murder is reversed because the instruction to the jury on malice was erroneous. The defendant's conviction of armed robbery is reinstated. If the prosecuting attorney is persuaded that the ends of justice would be better served by retrial for first-degree murder, a new trial on both charges may be conducted on remand.

1. The common-law "felony-murder rule", which allowed the element of malice to be supplied from the intent to commit the underlying felony so as to make the killing murder, has now been abolished in Michigan to the extent that it was in force. In a trial for felony murder, the trial court must instruct the jury on the element of malice necessary for murder because the underlying felony itself will not provide that element; the conclusion must be left to the jury to infer from all of the evidence, including the facts and circumstances of the perpetration of the felony. The instructions given to the jury in this case assumed that a killing perpetrated during the commission of armed robbery constitutes first-degree felony murder. The instruction was erroneous and the defendant's conviction of first-degree murder must be reversed.

2. The second issue deals with the imposition of multiple punishment. The statutes in this case are devoid of any ascertainable legislative intent to create more than a single crime or punishment. To the extent that legislative intent is not entirely free of doubt, the doubt must be resolved in favor of lenity. The question thus involves the traditional application of double jeopardy protection as a restraint on imposing double punishment for a single criminal act. The standard of review in such cases focuses upon the proof of facts necessary to conviction rather than upon the theoretical elements of the offense alone. Where the proof adduced at trial indicates that one offense is a necessarily included offense or a cognate included offense of the other, conviction of both offenses is precluded by the Double Jeopardy Clause of the state constitution.

3. The underlying felony is a necessary element of every prosecution for first-degree felony murder. As a matter of state constitutional law, the question is not whether the challenged lesser offense is by definition necessarily included within the greater offense also charged but whether, on the facts of the case at issue, it is. In this case, the greater offense of felony murder could not have been committed without necessarily committing the underlying felony element of the armed robbery. The defendant must necessarily have been found guilty of armed robbery or attempted armed robbery before any convic-

tion of first-degree felony murder could arise incident to the robbery.

4. A defendant may be charged with and tried for each act that constitutes a separate crime. However, when trial is for an act which includes lesser offenses, if the jury finds guilt of the greater, the defendant may not also be convicted separately of the lesser included offense; the prohibition against multiple punishment cannot be avoided by the form of the charge. Consequently, the defendant's conviction of both first-degree felony murder and of the underlying felony of armed robbery constitutes reversible error as a matter of state constitutional law. The requirement of proof of malice to find murder in a felony-murder case does not change the analysis. Proof of the underlying felony is necessary to raise second-degree murder to first-degree murder. The felony still remains as a necessary element to the statutory offense and its proof is required for conviction. The double jeopardy analysis is thus unaffected by the adoption of the new requirement. This result is fundamentally consistent with federal law.

5. In this case, the improper instructions to the jury on the felony-murder charge cast no doubt upon the validity of the conviction of armed robbery. Because the conviction of the greater offense of felony murder is vacated, it is no longer a violation of the prohibition of double jeopardy to allow the conviction of the lesser offense, armed robbery, to stand. Accordingly, the conviction of the lesser offense of armed robbery is reinstated. If the prosecuting attorney is persuaded that the ends of justice would be better served by retrial for first-degree felony murder, he may so advise the trial court and the conviction of armed robbery shall also be vacated and a new trial on both charges may be conducted.

The decision of the Court of Appeals is reversed.

Justice Ryan concurred in the result but he disagreed with the reasoning of the Court as to the double jeopardy issue.

1. The constitutional injunction against being twice put in jeopardy comprises three separate protections, each meant to safeguard different interests. They are: protection against a second prosecution for the same offense after acquittal, protection against a second prosecution for the same offense after conviction, and protection against multiple punishments for the same offense. The question in this case concerns only the protection against multiple punishment. The rule which has emerged is that if the punishment imposed on a defendant, however onerous, is punishment which the Legislature clearly intended to be imposed, the defendant has no recourse under

the Double Jeopardy Clause, because where the Legislature intended to impose multiple punishment, the imposition of such punishment does not violate the constitution.

2. The rule that conviction of both the greater and lesser included offenses, and thus multiple punishment, on proof of a single criminal act is precluded is a rule of statutory construction to be applied only when it is probative of legislative intent. In this case, it is not.

3. The offense of first-degree felony murder is defined by reference to a class of other offenses which includes armed robbery, and therefore proof of the latter is a prerequisite, a predicate, of proof of the former. That a predicate-based offense requires proof of a predicate offense does not mean that the two offenses are greater and lesser included offenses in the traditional sense. The lesser included offense test implicitly assumes that, for committing a single act, the Legislature would not intend a person to be convicted of and punished for two or more offenses that lie on a single continuum of culpability because each continuum comprises those offenses that serve to vindicate the same social norm. The same assumption cannot be made when the Legislature defines an offense by reference to another offense or class of offenses, and an inference of a legislative intent against multiple punishment should not then arise.

4. In this case, the underlying felony does not merge into the felony murder because the statute proscribing armed robbery is designed to protect a wholly different societal interest from the first-degree murder statute, which is intended to protect against homicide. When the Legislature chooses to define an offense in terms of another independently defined offense or set of offenses, it is not expressing the judgment that the defendant should not be multiply punished. The analysis based on lesser included offenses is misplaced in the context of predicate-based offenses because it bears no logical relationship to the legislative intent regarding punishment.

5. The language of the first-degree murder statute does not speak to the issue of multiple punishment. A clear legislative intent to impose multiple punishment is required to overcome what is in effect the rebuttable presumption against multiple punishment contained in the Double Jeopardy Clause, which is a particularized version of the rule of lenity. The rule of lenity means that the Court will not interpret a criminal statute so as to increase the penalty that it places on a defendant when such an interpretation can be based on no more than a guess as to what the Legislature intended. For this reason, and not because

proof of armed robbery was required to establish felony murder, the defendant in this case cannot be subjected to multiple punishment.

6. The guarantee of the Due Process Clause operates differently in cases of multiple prosecution and multiple punishment because different interests are implicated. Thus, the meaning of the "same offense" depends on the context in which the double jeopardy question arises: the cases cited by the Court to support the use of the lesser included offense analysis in this case all arose in the context of multiple prosecutions, a problem not presented here.

82 Mich App 358; 266 NW2d 847 (1978) reversed.

OPINION OF THE COURT

1. HOMICIDE — FIRST-DEGREE MURDER — STATUTES.

The use of the common-law term "murder" in the first-degree murder statute requires that a murder, as defined at the common law, must first be established before the statute is applied to elevate the degree (MCL 750.316; MSA 28.548).

2. HOMICIDE — FELONY MURDER — MALICE — INSTRUCTIONS TO JURY.

The instructions to the jury in a trial for murder in the perpetration or attempted perpetration of one of the felonies enumerated in the first-degree murder statute must include the element of malice necessary to prove murder because the common-law felony murder doctrine, which supplies the element of malice from the intent to commit the underlying felony, has been abolished in Michigan to the extent that it was in force; the conclusion must be left to the jury to infer from all of the evidence, including the facts and circumstances of the perpetration of the felony (MCL 750.316; MSA 28.548).

3. HOMICIDE — FELONY MURDER — MALICE — INSTRUCTIONS TO JURY.

A conviction of first-degree murder must be reversed where the trial court instructed the jury only that the fact that the killing was in the perpetration of a robbery supplied the elements of premeditation and deliberation, because the instruction assumed that a killing during the commission of an armed robbery constitutes first-degree felony murder and failed to instruct on the element of malice (MCL 750.316; MSA 28.548).

4. HOMICIDE — FELONY MURDER — ARMED ROBBERY — STATUTES — MULTIPLE PUNISHMENT — LEGISLATIVE INTENT.

The first-degree murder statute and the armed robbery statute are devoid of any express or reasonably ascertainable legisla-

tive intent to create more than a single crime or punishment for a murder which is committed in the perpetration or attempted perpetration of armed robbery; to the extent that legislative intent is not entirely free of doubt, the doubt must be resolved in favor of lenity (MCL 750.316, 750.529; MSA 28.548, 28.797).

5. CRIMINAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENT.

The guarantee against double jeopardy applies as a restraint on imposing multiple punishment for a single criminal act (US Const, Am V; Const 1963, art 1, § 15).

6. CRIMINAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENT.

Review, as a matter of state law, of a double jeopardy claim based upon multiple punishment imposed for a single criminal act focuses upon the proof necessary to conviction; where the proof adduced at trial indicates that one offense is an included offense of the other, conviction of both offenses is precluded (Const 1963, art 1, § 15).

7. HOMICIDE — FELONY MURDER — ARMED ROBBERY — DOUBLE JEOPARDY — MULTIPLE PUNISHMENT.

Conviction of first-degree murder in the perpetration of armed robbery and of the same armed robbery violates the defendant's state constitutional right against double jeopardy because the underlying felony is a necessary element of murder in the perpetration or attempt to perpetrate the felonies listed in the first-degree murder statute, and, on the facts of such a case, the greater offense of first-degree murder could not have been committed without the armed robbery (Const 1963, art 1, § 15; MCL 750.316, 750.529; MSA 28.548, 28.797).

8. CRIMINAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENT.

A defendant may be charged and tried for each act that constitutes a separate crime; however, when trial is for an act which includes lesser offenses, if the jury finds guilt of the greater, the defendant may not also be convicted separately of the lesser included offense because the prohibition against multiple punishment for the same crime cannot be avoided by the form of the charge (Const 1963, art 1, § 15).

9. HOMICIDE — FELONY MURDER — MALICE — INTENT.

Proof of the underlying felony is a necessary element to establish first-degree murder in the perpetration or attempted perpetration of a felony, although malice may no longer be supplied by the intent to commit the underlying felony (MCL 750.316; MSA 28.548).

OPINION CONCURRING IN RESULT BY RYAN, J.

10. CRIMINAL LAW — MULTIPLE PUNISHMENT — DOUBLE JEOPARDY.

A defendant has no recourse under the Double Jeopardy Clause for a claim of multiple punishment imposed for a single criminal act where the punishment imposed, however onerous, is a punishment which the Legislature clearly intended to be imposed (US Const, Am V; Const 1963, art 1, § 15).

11. CRIMINAL LAW — MULTIPLE PUNISHMENT — DOUBLE JEOPARDY.

Where multiple sentences are imposed at a single criminal trial the role of the constitutional guarantee of the Due Process Clause is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense (US Const, Am V; Const 1963, art 1, § 15).

12. CRIMINAL LAW — MULTIPLE PUNISHMENT — LESSER INCLUDED OFFENSES — STATUTES — LEGISLATIVE INTENT.

The rule that conviction of both the greater and lesser included offense on proof of a single criminal act is precluded is a rule of statutory construction to be applied only when it is probative of legislative intent; the implicit assumption of the rule is that the Legislature would not intend a person to be convicted of and punished for two or more offenses that lie on a single continuum of culpability because each continuum comprises those offenses that serve to vindicate the same social norm.

13. CRIMINAL LAW — MULTIPLE PUNISHMENT — STATUTES — LEGISLATIVE INTENT.

An inference of legislative intent against multiple punishment should not arise where the Legislature defines an offense by reference to another independently defined offense or class of offenses so that proof of the latter is a prerequisite for proof of the former.

14. CRIMINAL LAW — MULTIPLE PUNISHMENT — DOUBLE JEOPARDY — LEGISLATIVE INTENT.

A clear legislative intent to impose multiple punishment is required to overcome what is in effect the rebuttable presumption against multiple punishment contained in the Double Jeopardy Clause, a particularized version of the rule of lenity that the Court will not interpret a criminal statute so as to increase the penalty that it places on a defendant when such an interpretation can be based on no more than a guess as to what the Legislature intended (US Const, Am V; Const 1963, art 1, § 15).

15. HOMICIDE — FELONY MURDER — ARMED ROBBERY — DOUBLE JEOPARDY — MULTIPLE PUNISHMENT.

A defendant cannot be subjected to multiple punishment for first-degree murder in the perpetration of armed robbery and for the same armed robbery because the language of the first-degree murder statute does not show the clear legislative intent to impose multiple punishment which is required to overcome the presumption against multiple punishment contained in the Double Jeopardy Clause (US Const, Am V; Const 1963, art 1, § 15; MCL 750.316, 750.529; MSA 28.548, 28.797).

16. CRIMINAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENT — MULTIPLE PROSECUTION.

The guarantee of the Double Jeopardy Clause operates differently in cases of multiple prosecution and multiple punishment because different interests are implicated; thus, the meaning of the "same offense" depends on the context in which the double jeopardy question arises (US Const, Am V; Const 1963, art 1, § 15).

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, and *Michael R. Mueller* and *Larry L. Roberts,* Assistants Prosecuting Attorney, for the people.

Carl Ziemba for defendant.

BLAIR MOODY, JR., J. Ronald Tyrone Wilder and codefendant Lee Chester Butts were charged with first-degree murder committed in the perpetration or attempted perpetration of a robbery (first-degree felony murder), MCL 750.316; MSA 28.548,[1] and

[1] The first-degree murder statute provided, before it was amended by 1980 PA 28:

"All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life." MCL 750.316; MSA 28.548.

armed robbery, MCL 750.529; MSA 28.797.[2] Following a jury trial, defendant Wilder and codefendant Butts were found guilty of both offenses. The court sentenced defendant to life imprisonment for the first-degree felony-murder conviction and 15 to 30 years for the armed robbery conviction.

Defendant appealed to the Court of Appeals on several grounds. A majority of the Court affirmed the conviction of first-degree felony murder. The Court found that no specific instruction on malice was required. Judge RILEY dissented from this portion of the opinion. However, the Court unanimously agreed that defendant's armed robbery conviction must be vacated on the basis that defendant could not properly be convicted of both first-degree felony murder and the underlying felony of armed robbery without violating the prohibition against double jeopardy. 82 Mich App 358; 266 NW2d 847 (1978).

Defendant applied to us, and we granted leave to appeal, on the question whether Michigan recognizes a felony-murder rule permitting malice to be supplied from the intent to commit the felony underlying the murder. The prosecutor filed a cross-appeal, and we granted leave to appeal on the question whether defendant was placed twice in jeopardy by being convicted and sentenced both for first-degree felony murder and the underlying felony of armed robbery.[3] 403 Mich 816 (1978).

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[2] The armed robbery statute provides:

"Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years." MCL 750.529; MSA 28.797.

[3] We concurrently granted leave in another case involving the same basic question. *People v Jankowski,* 408 Mich 79; 289 NW2d 674 (1980). The cases were argued consecutively before the Court.

With respect to the first issue, we hold that defendant's conviction of first-degree felony murder must be vacated on the authority of the Court's decision in *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980). Although the instant case was not argued and submitted together with *Aaron* and its companion cases, leave to appeal was granted on the same day leave was granted in *Aaron,* the question presented was essentially identical to the question in *Aaron* and its companions, and the cases were argued at the same session of this Court. Therefore, we treat this case as a companion to *People v Aaron* for purposes of applying the rule stated therein.

The trial court's first-degree felony-murder instruction erroneously defined the element of malice. Thus, if charged again with first-degree felony murder, defendant must be retried under proper instruction.

I

The evidence in this case indicated that the victim, Roosevelt Reaves, was killed by a single gunshot wound of the head inflicted by codefendant Butts during a scuffle in the hallway of the victim's apartment building. Defendant and codefendant Butts were apparently bent on obtaining money from the victim when the shooting occurred. A female acquaintance of the victim was present in the apartment when he responded to a ringing of the doorbell. She testified that she saw the victim, the defendant, and codefendant Butts in the apartment hallway. She stated that Butts had a gun and ordered her and the victim to lie on the floor. The victim struggled with the assailants and made his way to the door. At that point, the witness said, she heard a shot and saw the victim

fall. The police arrived shortly afterward. Defendant was arrested four days later.

II

The felony-murder rule has traditionally allowed courts to supply the element of malice in felony-murder prosecutions from the intent to commit the underlying felony.[4] In *People v Aaron,* this Court resolved the status of the felony-murder rule in Michigan jurisprudence. We first determined that Michigan has never enacted a felony-murder statute which incorporated the rule:

"Michigan does not have a statutory felony-murder doctrine which designates as murder any *death* occurring in the course of a felony without regard to whether it was the result of accident, negligence, recklessness or willfulness. Rather, Michigan has a statute which makes a *murder* occurring in the course of one of the enumerated felonies a first-degree murder:

" 'Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life.' MCL 750.316; MSA 28.548.

* * *

"Thus, we conclude that Michigan has not codified the common-law felony-murder rule. The use of the term 'murder' in the first-degree statute requires that a murder must first be established before the statute is

[4] See generally Moreland, Law of Homicide (Indianapolis: Bobbs-Merrill, 1952), pp 42-50; LaFave & Scott, Criminal Law, § 71, pp 545-561; Perkins, Criminal Law (2d ed), pp 37-45; 1 Anderson, Wharton's Criminal Law and Procedure (1957 ed), § 251, pp 539-543.

applied to elevate the degree." *People v Aaron,* 717-718, 721.

We then decided that in the absence of a statutory felony-murder rule the common law must be consulted. Const 1963, art 3, § 7. Under the direct challenge to the rule, we held that the common-law doctrine should be abolished in Michigan to the extent previously in force:

"Our review of Michigan case law persuades us that we should abolish the rule which defines malice as the intent to commit the underlying felony. Abrogation of the felony-murder rule is not a drastic move in light of the significant restrictions this Court has already imposed. Further, it is a logical extension of our decisions * * *.

"We believe that it is no longer acceptable to equate the intent to commit a felony with the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm. * * * In a charge of felony murder, it is the murder which is the harm which is being punished. A defendant who only intends to commit the felony does not intend to commit the harm that results and may or may not be guilty of perpetrating an act done in wanton or willful disregard of the plain and strong likelihood that such harm will result. Although the circumstances surrounding the commission of the felony may evidence a greater intent beyond the intent to commit the felony, or a wanton and willful act in disregard of the possible consequence of death or serious injury, the intent to commit the felony, of itself, does not connote a 'man-endangering-state-of-mind'. Hence, we do not believe that it constitutes a sufficient *mens rea* to establish the crime of murder.

"Accordingly, we hold today that malice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause

death or great bodily harm. We further hold that malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise. The facts and circumstances involved in the perpetration of a felony may evidence an intent to kill, an intent to cause great bodily harm, or a wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm; however, the conclusion must be left to the jury to infer from all the evidence." *People v Aaron,* 727-729.

What is henceforth required in all first-degree murder prosecutions in this state is that the trial court include within its instruction to the jury the element of malice as defined in *Aaron.* The underlying felony itself will no longer per se provide the element of malice in such prosecutions.

In the instant case, the trial court gave the following instructions as to murder:

"Now as to the first count in the information, that is murder first-degree, felony, that means this: was there a robbery or attempt[ed] robbery, and while the robbery or the attempt[ed] robbery was going on was Mr. Roosevelt Reaves killed and murdered?

"Now if the prosecution has shown you that these two men were acting in concert, that is together, and that they aided and assisted each other in the perpetration or the commission of a robbery, or the commission of attempt[ed] robbery, and Mr. Reaves was killed as a result of that, they have proven to you beyond a reasonable doubt that this is first-degree murder, felony. The felony being the robbery.

"Now I know you have heard of a premeditated killing. We are not concerned with that in this case, because the law supplies the premeditation and the deliberation if a person is killed in the perpetration of a robbery, or the attempt[ed] perpetration of a robbery. The prosecution does not have to prove premeditation and deliberation, it is automatically supplied because

the law says that, if a person is killed in the perpetration or attempt[ed] perpetration of a robbery that is first-degree murder, felony. But you must be satisfied beyond a reasonable doubt that there was a robbery or the attempt[ed] perpetration of a robbery committed by these defendants, not by somebody else. And that's important. The prosecution must prove that they committed that act or attempted to commit that act of robbery and during that Mr. Reaves was killed."

It is apparent that the trial court's instruction violates the dictates of *Aaron.* The trial court assumed that a killing perpetrated during the commission of an armed robbery constitutes first-degree felony murder. This approach is erroneous. Therefore, the decision of the Court of Appeals is reversed.

III

The instant case presents a second question which is similar to the one resolved in this Court's decision of *People v Jankowski,* 408 Mich 79; 289 NW2d 674 (1980). What we must determine here on similar principles is whether defendant Wilder was deprived of his constitutional right not to be placed twice in jeopardy for the same act when he was convicted and sentenced both for first-degree felony murder and the underlying felony of armed robbery. See US Const, Ams V, XIV; Const 1963, art 1, § 15.[5]

[5] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." US Const, Am V.

"No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15.

See generally, Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life For a Moribund Twice In Jeopardy,* 75 Yale LJ 262 (1965); Sigler, *A History of Double Jeopardy,* 7 Am J Legal Hist 283 (1963); Recent Developments, *Criminal Law—Multiple Punishment Under the Crime Control Act—A Need for Reexamination of Wharton's Rule and Double Jeopardy,* 52 Wash L Rev 142 (1976).

We hold that conviction and sentence for both first-degree felony murder and the underlying felony violates the state constitutional prohibition against double jeopardy, as the evidence needed to prove first-degree felony murder requires proof of the underlying lesser included felony.[6]

A

The guarantee against twice being put in jeopardy under the United States Constitution was first made applicable to the states in the relatively recent case of *Benton v Maryland,* 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969). At the same time, in an allied case, the Supreme Court enunciated the proper scope of Federal protection:

"The Court has held today, in *Benton v Maryland,* that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it*

[6] My colleague suggests that there is an analytical distinction between logically included offenses and legislatively determined included offenses. Whether an offense is a logically included or legislatively included offense, the offense is the "same" offense for double jeopardy purposes under *Blockburger v United States,* 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). See *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374, 406-407; 280 NW2d 793 (1979) (KAVANAGH, J., dissenting), *app dis sub nom Brintley v Michigan,* 444 US 948; 100 S Ct 418; 62 L Ed 2d 317 (1979). First-degree felony murder requires proof of the underlying felony. See *Whalen v United States,* 445 US 684; 100 S Ct 1432; 63 L Ed 2d 715 (1980). Nor does this suggested approach alter the analysis under our state constitutional prohibition against double jeopardy. The legislatively determined lesser included offense, the underlying felony, is a necessary prerequisite to a first-degree felony-murder conviction and, on the facts of this case, renders them the "same" offense.

protects against multiple punishments for the same offense." North Carolina v Pearce, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

In the instant case, we deal with imposition of multiple punishment.[7]

At the outset, we recognize that the statutes with which we deal are devoid of any express or reasonably ascertainable legislative intent to create more than a single crime or punishment. To the extent that legislative intent is not entirely free of doubt, the doubt must be resolved in favor of lenity. See *Whalen v United States,* 445 US 684, 694; 100 S Ct 1432; 63 L Ed 2d 715 (1980); *Simpson v United States,* 435 US 6, 14-15; 98 S Ct 909; 55 L Ed 2d 70 (1978); *United States v Bass,* 404 US 336, 347; 92 S Ct 515; 30 L Ed 2d 488 (1971). We are therefore confronted with a different constitutional concern than that addressed in *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374; 280 NW2d 793 (1979), *app dis sub nom Brintley v Michigan,* 444 US 948; 100 S Ct 418; 62 L Ed 2d 317 (1979). The question presently before this Court involves "the traditional application of double jeopardy protection as a restraint on courts and prosecutors imposing double punishment for a single criminal act". *People v Jankowski,* 86.

B

In such instances, Michigan has adopted a standard of review which focuses upon the proof of facts necessary to conviction. Where the proof adduced at trial indicates that one offense is a

[7] See Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem,* 25 Wayne L Rev 825 (1979).

necessarily or cognate lesser included offense[8] of the other, then conviction of both the offenses will be precluded.[9] *People v Cook,* 236 Mich 333; 210

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[8] See *People v Ora Jones,* 395 Mich 379, 387; 236 NW2d 461 (1975); 4 Anderson, Wharton's Criminal Law and Procedure (1957 ed), § 1799, pp 631-632.

[9] In some jurisdictions, the same general conclusion has been reached, though under slightly different legal tests. See, *e.g., Newton v State,* 280 Md 260; 373 A2d 262 (1977); *State ex rel Wikberg v Henderson,* 292 So 2d 505 (La, 1974); *State v Thompson,* 280 NC 202; 185 SE2d 666 (1972); *State v Thomas,* 114 NJ Super 360; 276 A2d 391 (1971), *modified* 61 NJ 314; 294 A2d 57 (1972); *Ex Parte Jewel,* 535 SW2d 362 (Tex Crim App, 1976); *Ronzani v State,* 24 Wis 2d 512; 129 NW2d 143 (1964).

Other states have reached the opposite conclusion. See, *e.g., State v Clayton,* 109 Ariz 587; 514 P2d 720 (1973); *Turner v State,* 248 Ark 367; 452 SW2d 317 (1970), *rev'd on other grounds sub nom Turner v Arkansas,* 407 US 366; 92 S Ct 2096; 32 L Ed 2d 798 (1972); *Slater v State,* 316 So 2d 539 (Fla, 1975); *State v Briggs,* 533 SW2d 290 (Tenn, 1976).

In resolving the question before us, some courts have referred to the doctrine of "merger". See, *e.g., State v Woods,* 286 NC 612; 213 SE2d 214 (1975), *vacated on other grounds sub nom Woods v North Carolina,* 428 US 903; 96 S Ct 3207; 49 L Ed 2d 1208 (1976); *State v Hubbard,* 123 NJ Super 345; 303 A2d 87 (1973); *State v Carlson,* 5 Wis 2d 595; 93 NW2d 354 (1958).

At common law, the doctrine of merger was a specialized rule which applied when the same criminal act was both a felony and a misdemeanor. In such a case, the misdemeanor merged in the felony and only the felony was punishable. See 22 CJS, Criminal Law, § 10, pp 42-46. Michigan has abolished the doctrine of merger by statute. See MCL 768.4; MSA 28.1027. See also *People v Causley,* 299 Mich 340, 347; 300 NW 111 (1941).

More recently, however, some jurisdictions have adopted the once specialized common-law merger to a more general application in double jeopardy analysis. See, *e.g., Chittum v State,* 1 Md App 205, 210-211; 228 A2d 628, 631 (1967); *Lievers v State,* 4 Md App 219, 221; 242 A2d 178, 179 (1968). Under this modern interpretation, the term "merger" now refers to cases where "one crime necessarily involves another". *Commonwealth ex rel Moszczynski v Ashe,* 343 Pa 102, 104; 21 A2d 920, 921 (1941), quoted in *Commonwealth v Sparrow,* 471 Pa 490, 504; 370 A2d 712, 719 (1977), *overruled Commonwealth v Tarver,* 493 Pa 320; 426 A2d 569 (1981) (robbery is the same offense as first-degree felony murder); *State v Honie,* 310 A2d 872, 873 (Del, 1973). The purpose of this doctrine is to preclude multiple convictions and punishments. *People v Cassidy,* 40 NY2d 763, 767; 358 NE2d 870, 873; 390 NYS2d 45 (1976); *State v DeSanto,* 157 NJ Super 452, 464; 384 A2d 1169, 1176 (1978).

In Michigan, it is clear that the Court has adopted what is fundamentally a similar test. See *People v Cook,* 236 Mich 333, 335-336,

NW 296 (1926); *People v Martin,* 398 Mich 303; 247 NW2d 303 (1976); *People v Stewart (On Rehearing),* 400 Mich 540; 256 NW2d 31 (1977); *People v Jankowski,* 86.

According to the evidence produced at trial in this matter, the felony of armed robbery was an underlying offense of the murder committed by these defendants. The underlying felony has been found by this Court to be a necessary element of every prosecution for first-degree felony murder:

"We hold that there are lesser included offenses to first-degree felony-murder. Second-degree murder is always a lesser included offense of first-degree murder. First-degree murder is second-degree (common-law) murder *plus* an element, *viz.,* either premeditation or the perpetration or attempt to perpetrate an enumerated felony. *People v Allen,* 390 Mich 383; 212 NW2d 21 (1973)." *People v Carter,* 395 Mich 434, 437-438; 236 NW2d 500 (1975).

Under Michigan authority, the fact that the elements of first-degree felony murder do not in every instance require or include the elements of armed robbery does not mean the offense of armed robbery is not necessarily included in the felony murder here. It is recognized that the underlying felony might be characterized as a cognate lesser included offense, not a necessarily included offense. See *State v Thompson,* 280 NC 202, 215-216; 185 SE2d 666, 675 (1972). Though theoretically arguable, such a position is irrelevant when the legal

338; 210 NW 296 (1926); *People v Martin,* 398 Mich 303, 307-310; 247 NW2d 303 (1976); *People v Stewart (On Rehearing),* 400 Mich 540, 547-549; 256 NW2d 31 (1977); *People v Jankowski,* 86. However, we focus upon the technical concept of necessarily and cognate lesser included offenses and the proof of facts presented at trial. See *People v Ora Jones,* 387. Thus, Michigan employs the same basic concept known as merger in some other jurisdictions; yet we do not denominate the principle as such.

analysis depends not upon the theoretical elements of the offense but upon proof of facts actually adduced. We stated in *People v Jankowski,* 91:

> "For purposes of the double jeopardy analysis, as a matter of state constitutional law, the question is not whether the challenged lesser offense is by definition necessarily included within the greater offense also charged, but whether, on the facts of the case at issue, it is."

In this case, proof required to convict of first-degree felony murder necessarily included first proving culpability as to the underlying felony. In this regard, the trial court correctly instructed the jury:

> "[Y]ou must be satisfied beyond a reasonable doubt that there was a robbery or the attempt[ed] perpetration of a robbery committed by these defendants, not by somebody else. And that's important. The prosecution must prove that they committed that act or attempted to commit that act of robbery and during that Mr. Reaves was killed."

The fact implicit in the double-jeopardy lesser included offense analysis is that the greater crime of first-degree felony murder cannot have been committed without necessarily committing the underlying felony element of armed robbery. Defendant Wilder and codefendant Butts must necessarily have been found guilty of armed robbery or attempted armed robbery before any conviction of first-degree felony murder could arise incident to the robbery.

Confronted with a similar situation in *People v Martin,* this Court stated:

"A defendant may be charged and tried for each act that constitutes a separate crime. However, when tried for an act which includes lesser offenses, if the jury finds guilt of the greater, the defendant may not also be convicted separately of the lesser included offense. The prohibition against multiple punishment for the same crime cannot be avoided by the form of the charge. 'The form of pleading cannot assume such importance that it will permit defendant to be convicted of both the included and greater offense.' *People v Greer,* 30 Cal 2d 589, 599; 184 P2d 512, 518 (1947). Accord, *United States v Belt,* 516 F2d 873 (CA 8, 1975), *cert den* 423 US 1056; 96 S Ct 790; 46 L Ed 2d 646 (1976).

"The guarantee against double jeopardy protects against not only a second *prosecution* for the same offense, but it also 'protects against multiple punishments for the same offense'. *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

" '[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.' *Ex Parte Lange,* 85 US (18 Wall) 163, 173; 21 L Ed 872 (1874).

"Accord, *State v Waldenburg,* 9 Wash App 529; 513 P2d 577 (1973); *Gallinaro v Commonwealth,* 362 Mass 728; 291 NE2d 420 (1973). See also *People v Anderson,* 62 Mich App 475; 233 NW2d 620 (1975), *[remanded* 406 Mich 987 (1979)]." 398 Mich 309-310.

Consequently, defendant's conviction of both first-degree felony murder and the underlying felony of armed robbery constitutes reversible error under existing Michigan authority.

Question may arise as to the effect, if any, of our decision in *People v Aaron* on the analysis of double jeopardy in cases involving first-degree felony murder. In *Aaron,* we have determined that conviction of first-degree felony murder in Michigan requires proof of every element of murder, including malice. Though the trial court did not properly instruct on malice in this case, it did

properly instruct that proof of armed robbery was a necessary element of first-degree felony murder.

Pursuant to *Aaron,* proof of malice is necessary to constitute murder under the first-degree murder statute. However, proof of the underlying felony is also necessary to raise second-degree murder to first-degree murder. Consequently, the felony still remains as a necessary element to the statutory offense and its proof is required for conviction. The double jeopardy analysis is thus left unaffected by the *Aaron* decision.

C

The decision we reach in this case is fundamentally[10] consistent with existing authority of the

[10] Some confusion may exist over the use of various tests to establish a double jeopardy violation in Federal and state courts. Basically, there are few significant variances between the Federal test and our own. However, some differences do exist and should be noted.

For instance, Michigan has adopted a distinct constitutional position from the Federal courts as pertains to questions of multiple prosecution. See *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). In this regard, Michigan has implemented the minority position espoused in Justice Brennan's "same transaction" analysis in *Ashe v Swenson,* 397 US 436, 453-454; 90 S Ct 1189; 25 L Ed 2d 469 (1970) (Brennan, J., concurring). The rule in Michigan as to multiple prosecution is that all crimes arising from the same transaction must be prosecuted in a single proceeding, except under closely circumscribed conditions. See *People v White,* 390 Mich 245; 212 NW2d 222 (1973). The test we employ in this instance is slightly more protective of defendant's double jeopardy right than the collateral estoppel analysis used by a majority of the Federal Court in *Ashe.*

Similarly, the test concerning multiple punishment under our constitution has developed into a broader protective rule than that employed in the Federal courts. Under Federal authority, the Supreme Court established the "required evidence" test enunciated in *Blockburger v United States,* 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). See also its original expression in *Morey v Commonwealth,* 108 Mass 433 (1871). In *Blockburger,* the Court outlined their test:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 US 304.

United States Supreme Court. A lesser included offense principle[11] was employed recently to invalidate an Ohio defendant's conviction in successive proceedings for joyriding and auto theft arising from the same criminal incident. *Brown v Ohio,* 432 US 161, 168; 97 S Ct 2221; 53 L Ed 2d 187 (1977).

Further, the Supreme Court confronted essentially the same question we face now in the context of successive prosecution in *Harris v Oklahoma,* 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977). The defendant in *Harris* was convicted of felony murder for killing a grocery store clerk during a robbery and then prosecuted for robbery

This approach isolates the elements of the offense as opposed to the actual proof of facts adduced at trial. See *Harris v United States,* 359 US 19, 23; 79 S Ct 560; 3 L Ed 2d 597 (1959); *United States v Kramer,* 289 F2d 909, 913 (CA 2, 1961). Under this test, convictions of two criminal offenses arising from the same act are prohibited only when the greater offense necessarily includes all elements of the lesser offense. Accordingly, conviction of both offenses is precluded only where it is impossible to commit the greater offense without first having committed the lesser offense. From the perspective of lesser included offenses, the Supreme Court in cases concerning double jeopardy has thus adhered to the common-law definition of such offenses. See *People v Ora Jones,* 387.

The Federal test in *Blockburger* can thus be distinguished from this Court's approach in two principal ways. First, we find the proper focus of double jeopardy inquiry in this area to be the proof of facts adduced at trial rather than the theoretical elements of the offense alone. Proof of facts includes the elements of the offense as an object of proof. Yet, the actual evidence presented may also determine the propriety of finding a double jeopardy violation in any particular case. See *People v Martin,* 309; *People v Stewart,* 548; *People v Jankowski,* 91.

Second, we have held that double jeopardy claims under our constitution may prohibit multiple convictions involving cognate as well as necessarily included offenses. *People v Jankowski,* 91.

[11] Use of this principle by the Supreme Court can be traced back to one of the earliest decisions of the Court in this area. *In re Hans Nielsen,* 131 US 176; 9 S Ct 672; 33 L Ed 118 (1889). Relying upon the original test discussed in *Morey,* the Court determined that a prior conviction of unlawful cohabitation precluded a subsequent conviction of adultery because the former offense was an "essential and principal ingredient of adultery" and conviction of the greater offense barred conviction of the lesser included offense.

with firearms. In reversing the subsequent conviction of the lesser included offense, the Court made the following statement:

"When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. *In re Hans Nielsen,* 131 US 176; 9 S Ct 672; 33 L Ed 118 (1889); *cf. Brown v Ohio, supra,* 432 US 161. '[A] person [who] has been tried and convicted for a crime which has various incidents included in it, * * * cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.' *In re Nielsen, supra,* 131 US 188. See also *Waller v Florida,* 397 US 387; 90 S Ct 1184; 25 L Ed 2d 435 (1970); *Grafton v United States,* 206 US 333, 352; 27 S Ct 749; 51 L Ed 1084 (1907)." *Harris v Oklahoma,* 682-683.

We recognize that *In re Hans Nielsen, Brown,* and *Harris* involved successive prosecutions. Nevertheless, the underlying logic and analysis which focuses upon lesser included offense principles is a valuable tool in determining whether there has been multiple punishment, *i.e.,* whether two offenses are the "same" offense, in a particular case. If a defendant should not be required to defend against successive prosecutions for the "same" offense, and thereby not suffer double punishment, neither should he be subjected to multiple punishment at a single trial for the "same" offense.[12]

[12] In a recent multiple prosecution case the Pennsylvania Supreme Court held that aggravated robbery is a lesser included offense of first-degree felony murder. An earlier decision involving convictions for both murder and robbery at a single trial holding that robbery was a separate offense for double jeopardy purposes was expressly overruled. *Commonwealth v Tarver,* fn 9 *supra.* For a discussion of the similarity between the first-degree murder statutes of Michigan and Pennsylvania, see *People v Aaron,* 409 Mich 672, 718; 299 NW2d 304 (1980).

Most recently, the Supreme Court has confronted the felony-murder double jeopardy problem within the framework of multiple punishment in the same prosecution. *Whalen v United States, supra.* Whalen was convicted in the District of Columbia of rape and of killing the same victim in the perpetration of rape. He was sentenced consecutively to terms of imprisonment of 20 years to life for first-degree murder and 15 years to life for rape. The District of Columbia Court of Appeals affirmed. 379 A2d 1152 (DC App, 1977).

The Supreme Court reversed the Court of Appeals primarily on grounds that, within the context of the District of Columbia Code, Congress had not authorized consecutive sentences both for felony murder and the underlying offense of rape. *Whalen v United States,* 445 US 684, 690.[13]

In addition, as an interrelated basis of decision, the Court addressed the double jeopardy implications in *Whalen* by applying a provision of the District of Columbia Code which embodied the double jeopardy rule earlier enunciated in *Blockburger v United States,* 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). The *Whalen* Court concluded that the law did not authorize consecutive sentences for both felony murder and the underlying felony of rape since it was not the case that each provision requires proof of a fact which the other did not. *Blockburger v United States,* 304. To the contrary, conviction of felony murder required proof of all the elements of the offense of rape. See

[13] The Supreme Court recently applied the *Blockburger* rule in a case involving a single prosecution and conviction of both conspiracy to import marijuana and conspiracy to distribute marijuana. *Albernaz v United States,* 450 US 333; 101 S Ct 1137; 67 L Ed 2d 275 (1981). These two offenses are different offenses, not the "same" offense—each requires proof of a fact that the other does not. *Albernaz,* 345 (Stewart, J., concurring). This is not the situation in the instant case, nor in *Whalen v United States,* fn 6 *supra.*

United States v Greene, 160 US App DC 21, 34; 489 F2d 1145, 1158 (1973). *Cf. Harris v Oklahoma,* 682-683.

As the two offenses were determined to be basically the "same" offense for purposes of double jeopardy, the Court found the multiple punishment impermissible. Any ambiguity in congressional intent concerning the necessary elements of proof under the particular facts was resolved in favor of lenity. See *Simpson v United States,* 14-15.

IV

Thus, we find a constitutional basis to prohibit conviction of both first-degree felony murder and the underlying necessarily included felony of armed robbery in this case. Conviction of both first-degree felony murder and the underlying felony violates defendant's state constitutional right against double jeopardy.

The trial court's first-degree felony-murder instruction failed to include a proper instruction on the element of malice. We therefore reverse the decision of the Court of Appeals and vacate defendant's first-degree felony-murder conviction.

In this context, the improper instructions relating to the felony-murder charge cast no doubt upon the validity of the armed robbery conviction. As the conviction of the greater offense of first-degree felony murder is vacated, it is no longer a double jeopardy violation to allow the conviction of the lesser offense, armed robbery, to stand.

Accordingly, we reinstate the conviction of the lesser offense of armed robbery and remand to the trial court. If the prosecuting attorney is persuaded that the ends of justice would be better

served by retrial for first-degree felony murder, he may so advise the trial court and the conviction of armed robbery shall also be vacated and a new trial on both charges may be conducted in conformity with this opinion. See *People v Martin,* 398 Mich 303, 307, 313-314; 247 NW2d 303 (1976).

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, and FITZGERALD, JJ., concurred with BLAIR MOODY, JR., J.

RYAN, J. *(concurring in the result).* Defendant, Ronald Tyrone Wilder, was convicted by a jury of first-degree (felony) murder, MCL 750.316; MSA 28.548, and armed robbery, MCL 750.529; MSA 28.797.

The Court of Appeals affirmed defendant's conviction of murder but vacated his conviction of armed robbery on double jeopardy grounds.[1]

I

This case presents two questions of importance to the criminal jurisprudence of Michigan. The first is whether, in the words of our first-degree murder statute, MCL 750.316; MSA 28.548, "murder * * * committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping"[2] requires a *mens rea* apart from the intent to commit one of the enumerated offenses. We answered this question in the affirmative in *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980),

[1] *People v Wilder,* 82 Mich App 358; 266 NW2d 847 (1978).

[2] The first-degree murder statute was amended by 1980 PA 28. The portion of the statute quoted now reads, "[m]urder * * * committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping".

however, and we need not consider it further. The holding of *Aaron*[3] controls defendant's challenge to the instructions on first-degree (felony) murder given in this case.[4] The instructions clearly failed to satisfy the requirements of *Aaron.* Defendant's conviction of first-degree (felony) murder must therefore be reversed.

II

The second question, which will arise if the prosecutor chooses to retry defendant for murder, is whether the constitutional guarantee against double jeopardy, US Const, Ams V, XIV; Const 1963, art 1, § 15, prohibits conviction of both first-

[3] "[W]e hold today that malice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. We further hold that malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise." *People v Aaron, supra,* 728.

[4] "Now as to the first count in the information, that is murder first-degree, felony, that means this: was there a robbery or attempt[ed] robbery, and while the robbery or the attempt[ed] robbery was going on was Mr. Roosevelt Reaves killed and murdered?

"Now if the prosecution has shown you that these two men were acting in concert, that is together, and that they aided and assisted each other in the perpetration or the commission of a robbery, or the commission of attempt[ed] robbery, and Mr. Reaves was killed as a result of that, they have proven to you beyond a reasonable doubt that this is first-degree murder, felony. The felony being the robbery.

"Now I know you have heard of a premeditated killing. We are not concerned with that in this case, because the law supplies the premeditation and the deliberation if a person is killed in the perpetration of a robbery, or the attempt[ed] perpetration of a robbery. The prosecution does not have to prove premeditation and deliberation, it is automatically supplied because the law says that, if a person is killed in the perpetration or attempt[ed] perpetration of a robbery that is first-degree murder, felony. But you must be satisfied beyond a reasonable doubt that there was a robbery or the attempt[ed] perpetration of a robbery committed by these defendants, not by somebody else. And that's important. The prosecution must prove that they committed that act or attempted to commit that act of robbery and during that Mr. Reaves was killed."

degree (felony) murder and the underlying felony. I agree with the majority that convictions of both offenses cannot stand together, but I disagree with their reasoning and thus feel compelled to express my own views on an important and frequently contested area of constitutional law.

A

It is important at the outset to observe that the constitutional injunction against being "twice put in jeopardy" comprises three separate protections, each meant to safeguard different interests.[5] In a now oft-quoted passage, the United States Supreme Court explained:

"The Court has held today, in *Benton v Maryland* [395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969)], that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

The first two protections pertain to the issue of multiple prosecution. The double jeopardy question in this case, however, concerns only the third protection, the protection against multiple punishment.

[5] See Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences,* 78 Mich L Rev 1001 (1980); Westen & Drubel, *Toward a General Theory of Double Jeopardy,* 1978 Sup Ct Rev 81; Note, *Twice in Jeopardy,* 75 Yale LJ 262 (1965).

B

The jurisprudence of the Double Jeopardy Clause has been described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator".[6] Nonetheless, a "polestar"[7] has emerged to guide courts faced with the question of multiple punishment: legislative intent controls.[8] That is, if the punishment imposed on a defendant, however onerous, is punishment the Legislature clearly intended to be imposed, the defendant has no recourse under the Double Jeopardy Clause.[9]

This principle was implicit in our two most recent cases on the subject, *People v Jankowski,* 408 Mich 79; 289 NW2d 674 (1980), and *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374; 280 NW2d 793 (1979), *app dis sub nom Brintley v Michigan,* 444 US 948; 100 S Ct 418; 62 L Ed 2d 317 (1979). In *Jankowski* we said:

"We note at the outset that the defendant's double jeopardy challenge is not addressed to a legislative scheme of criminal punishment where a clear legislative intent to create more than a single crime exists." *Jankowski, supra,* 85.

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[6] *Albernaz v United States,* 450 US 333, 343; 101 S Ct 1137; 67 L Ed 2d 275 (1981).

[7] *Whalen v United States,* 445 US 684, 712; 100 S Ct 1432; 63 L Ed 2d 715 (1980) (Rehnquist, J., dissenting).

[8] *Albernaz v United States, supra,* 344; see *Whalen v United States, supra,* 688-689; *Brown v Ohio,* 432 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977); *People v Jankowski,* 408 Mich 79, 85; 289 NW2d 674 (1980); *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374, 392, 402; 280 NW2d 793 (1979), *app dis sub nom Brintley v Michigan,* 444 US 948; 100 S Ct 418; 62 L Ed 2d 317 (1979).

[9] Restrictions of a substantive nature on the Legislature's prerogative to define offenses and fix punishments are contained elsewhere. See US Const, Ams VIII, XIV; Const 1963, art 1, §§ 16-17; *Whalen v United States, supra,* 689, fn 3; *People v Gary Hughes,* 85 Mich App 674, 685, fn 5; 272 NW2d 567 (1978) (opinion of BRONSON, J.).

In *Wayne County Prosecutor,* we chose to disregard a line of authority that used a lesser included offense approach to resolve questions of multiple punishment.[10] We found the authority

"inapposite because the Legislature ha[d] clearly expressed in the felony-firearm statute an intent to authorize multiple convictions and cumulative punishments." *Wayne County Prosecutor, supra,* 402.

The implicit holding of *Jankowski* and *Wayne County Prosecutor* that legislative intent, and not the lesser included offense test, governs the question of double jeopardy in the context of multiple punishment has been confirmed by the most recent rulings of the United States Supreme Court. In *Whalen v United States,* 445 US 684; 100 S Ct 1432; 63 L Ed 2d 715 (1980), the Court was asked to decide whether the Double Jeopardy Clause forbade the imposition of consecutive sentences for felony murder and the underlying felony. In a passage relevant to this case, the Court said:

"In the present case * * * if Congress has not authorized cumulative punishments for rape and for an unintentional killing committed in the course of the rape * * * the petitioner has been impermissibly sentenced. The dispositive question, therefore, is whether Congress did so provide." *Id.,* 688-689.

Even more explicit is the following passage from *Albernaz v United States,* 450 US 333; 101 S Ct 1137; 67 L Ed 2d 275 (1981):

"[T]he 'power to define criminal offenses and to pre-

[10] *People v Stewart (On Rehearing),* 400 Mich 540; 256 NW2d 31 (1977); *People v Martin,* 398 Mich 303; 247 NW2d 303 (1976); *People v Cook,* 236 Mich 333; 210 NW 296 (1926). The same approach was used in *People v Jankowski, supra.*

scribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' *[Whalen v United States,* 445 US 684, 689; 100 S Ct 1432; 63 L Ed 2d 715 (1980).] As we previously noted in *Brown v Ohio* [432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977),] 'where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.' 432 US at 165. Thus, *the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.* Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution." *Id.,* 344 (emphasis added).

C

To decide multiple punishment double jeopardy questions this Court has, as a general rule, applied a lesser included offense analysis.[11] This was the case in *People v Jankowski, supra,* where we remarked,

"Because the prohibition embodied in the double jeopardy clause prevents multiple punishment for the same offense, this Court has repeatedly stated that a defendant may not be convicted of both the greater and lesser included offenses." 408 Mich 79, 90-91.

The lesser included offense test is a derivative of the *Blockburger* rule, which states:

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of

[11] See cases cited in fn 10 *supra.*

a fact which the other does not." *Blockburger v United States,* 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).[12]

In the context of multiple punishment, the United States Supreme Court has unambiguously expressed the view that the *Blockburger* test is not a constitutional rule but merely a rule of statutory construction:

"The *Blockburger* test is a 'rule of statutory construction', and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz v United States, supra,* 340. Accord, *Whalen v United States, supra,* 691-692.

This is simply a corollary of the principle that legislative intent is the decisive criterion in multiple punishment cases.

For the same reason our lesser included offense test should be considered a rule of statutory construction to be applied only when it is probative of legislative intent.[13] In this case, it is not.

D

Defendant was convicted of first-degree (felony) murder and armed robbery. The former offense is defined by reference to the latter offense (or, more

[12] Our test differs from the federal rule by looking to the evidence presented at trial rather than the statutory elements of the offenses in the abstract. As we held in *People v Jankowski, supra:*

"For purposes of the double jeopardy analysis, as a matter of state constitutional law, the question is not whether the challenged lesser offense is by definition necessarily included within the greater offense also charged, but whether, on the facts of the case at issue, it is." 408 Mich 79, 91.

[13] See *Whalen v United States, supra,* 712 (Rehnquist, J., dissenting) ("If the polestar in this case is to be legislative intent, I see no reason to apply *Blockburger* unless it advances that inquiry.").

precisely, to a class of offenses that includes the latter offense), and therefore proof of the latter is a prerequisite for proof of the former. In this regard the latter offense is a predicate for the former, which may be thought of as a predicate-based offense.[14]

The point that needs to be made is this: that a predicate-based offense requires proof of a predicate offense does not mean that the two offenses are greater and lesser included offenses in the traditional sense. "[T]he concept of included offenses reflects a continuum of culpability."[15] Offenses lie on the same continuum, and are therefore greater and lesser included offenses, when "the elements shared by the two offenses coincide in the harm to the societal interest to be protected". *People v Ora Jones,* 395 Mich 379, 390; 236 NW2d 461 (1975). These offenses then are tied together by logic. In contrast, predicate-based offenses and their predicates are tied together by the Legislature.[16]

In our cases that have used the lesser included offense test,[17] the implicit assumption has been that, for committing a single criminal act, the Legislature did not intend a person to be convicted of and punished for two or more offenses lying on a single continuum of culpability. This is because each continuum comprises those offenses that

[14] Other examples of predicate-based offenses include felony-firearm, MCL 750.227b; MSA 28.424(2), and first- and second-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) (first degree); MCL 750.520c(1)(c); MSA 28.788(3)(1)(c) (second degree).

[15] Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties,* 67 Yale LJ 916, 925 (1958) (hereinafter cited as *Consecutive Sentences).*

[16] For a recognition of the distinction between a " 'logically' included offense" and a " 'legislatively determined' included offense", see *Wayne County Prosecutor v Recorder's Court Judge, supra,* 406-407 (KAVANAGH, J., dissenting).

[17] See cases cited in fn 10 *supra.*

serve to vindicate the same social norm.[18] Thus, if one commits a criminal act that violates a single social norm, conviction of and punishment for a single offense would seem to vindicate the interests infringed by that act.

The same assumption cannot be made when the Legislature defines an offense by reference to another offense or class of offenses. As illustrated by our first-degree murder statute, predicate offenses need not be on the same logical continuum of culpability as the predicate-based offense:

> "[I]t strains credulity to hold that the underlying felony merges into the felony murder. The statute proscribing the underlying felony—robbery, for example—is designed to protect a wholly different societal interest from the felony murder statute, which is intended to protect against homicide." *United States v Greene,* 160 US App DC 21, 44; 489 F2d 1145, 1168 (1973) (Bazelon, C.J., dissenting).

Consequently, an inference of a legislative intent against multiple punishment should not arise from the fact that the predicate-based offense requires proof of a predicate offense.

Our Court of Appeals has, on at least two occasions, analyzed a predicate-based offense statute and discerned a legislative intent to prescribe multiple punishment, although the reasoning underlying the findings is not clear. In *People v*

[18] "Vindication of a single social norm should, consistent with the concept of lesser included offenses * * *, be suggestive of an intent not to allow cumulative punishment." *Consecutive Sentences,* fn 15 *supra,* 929-930 (footnotes omitted).

And, as another writer put it,

> "If several statutes are not only usually violated together but also seem designed to protect the same social interest, the inference becomes very strong that the function of the multiple statutes is only to allow alternative means of prosecution." *Twice in Jeopardy,* fn 5 *supra,* 319.

Densmore, 87 Mich App 434; 274 NW2d 811 (1978), the Court considered the first-degree murder statute, see fn 2, *supra,* and accompanying text, and concluded,

"Since the Legislature has seen fit to clearly enumerate the exclusive felonies which can underlie a felony-murder conviction, it would not comport with the legislative intent if we were to adopt defendant's theory of merger." *Id.,* 440.

In *People v Robideau,* 94 Mich App 663; 289 NW2d 846 (1980), the defendant brought a double jeopardy challenge against his convictions of armed robbery and first-degree criminal sexual conduct. The latter conviction was obtained under the section of the statute that reads,

"A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if

* * *

"[s]exual penetration occurs under circumstances involving the commission of any other felony." MCL 750.520b(1)(c); MSA 28.788(2)(1)(c).

(The predicate offense was, of course, armed robbery.) The Court rejected the challenge and, referring to the statutory language just quoted, said:

"Nor is there any constitutional infirmity under the standard in *People v Martin* [398 Mich 303; 247 NW2d 303 (1976)] and *People v Stewart [(On Rehearing),* 400 Mich 540; 256 NW2d 31 (1977)]. As explicated in *Wayne Prosecutor, supra,* 399-402, the evil sought to be prevented in those cases was multiple convictions and cumulative punishments based on only one occurrence when the statutes involved failed to evidence a clear legislative intent to authorize the same. Such is not the

case here. *We find a clear expression of a legislative intent to authorize multiple convictions and cumulative punishments in the language of MCL 750.520b,* just as the Court in *Wayne Prosecutor, supra,* 402, found similar legislative intent expressed in the felony-firearm statute." 94 Mich App 663, 670-671 (emphasis added).

Although I would not go so far as to say that either the first-degree murder statute or the first-degree criminal sexual conduct statute manifests "a *clear* expression of a legislative intent to authorize multiple convictions and cumulative punishments", the statements made in *Densmore* and *Robideau* do recognize that the relationship between a predicate-based offense and a predicate offense is different from the relationship between traditionally recognized greater and lesser included offenses. Moreover, the unarticulated premise of those decisions, with which I agree, is the determination that when the Legislature chooses to define an offense in terms of another independently defined offense or set of offenses, it is not expressing the judgment that the defendant should not be multiply punished.

Put differently, lesser included offense analysis is misplaced in the context of predicate-based offenses because it bears no logical relationship to legislative intent regarding punishment.[19] Hence the lessons of the line of authority represented by

[19] In a dissenting opinion in *Whalen v United States, supra,* Justice Rehnquist examined the nature of the difference between "greater and lesser offenses in the traditional sense" on one hand and " 'compound' ["predicate-based" in my idiom] and 'predicate' offenses" on the other. 445 US 684, 708-709. After considering the application of the *Blockburger* test to a compound offense and its various predicate offenses, he concluded:

"[W]hen applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties. * * * If the polestar in this case is to be legislative intent, I see no reason to apply *Blockburger* unless it advances that inquiry." *Id.,* 712.

People v Stewart (On Rehearing), 400 Mich 540; 256 NW2d 31 (1977),[20] are not instructive here.

E

There still remains the question whether the Legislature intended that a person be convicted of and punished for both first-degree (felony) murder and the underlying felony. The language of the first-degree murder statute does not speak to the issue of multiple punishment.[21] As noted above, however, a first-degree (felony) murder transaction involves violations of distinct social norms: the norm against homicide and the norm against the harm proscribed by the underlying felony. This raises an inference, at least, that the Legislature intended to impose multiple punishment.

However, this is not enough to conclude that "a clear legislative intent"[22] to impose multiple punishment exists, and a clear legislative intent is required to overcome what is in effect the rebuttable presumption against multiple punishment contained in the Double Jeopardy Clause,[23] which works as a particularized version of the rule of lenity:

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as

[20] See fn 10 *supra*.

[21] But see *People v Densmore, supra*, 440. Compare MCL 750.227b; MSA 28.424(2) (felony-firearm statute), construed in *Wayne County Prosecutor v Recorder's Court Judge, supra*.

[22] *People v Jankowski, supra*, 85.

[23] See *Westen*, fn 5 *supra*, 1026-1030; *Twice in Jeopardy*, fn 5 *supra*, 313-317.

to what Congress intended." *Ladner v United States,* 358 US 169, 178; 79 S Ct 209; 3 L Ed 2d 199 (1958), quoted in *Whalen v United States, supra,* 695, fn 10.

For this reason, and not because proof of armed robbery was required to establish first-degree (felony) murder in this case, defendant cannot be subjected to multiple punishment.

F

Finally, I wish to express my disagreement with the majority's position that *Brown v Ohio,* 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977); *Harris v Oklahoma,* 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977), and *In re Hans Nielsen,* 131 US 176; 9 S Ct 672; 33 L Ed 118 (1889), support the use of lesser included offense analysis in this case. Although each of these cases used that analysis, all three arose in the context of multiple prosecutions. Not one addressed the question of multiple punishment at a single trial. The guarantee against double jeopardy operates differently in the areas of multiple prosecution and multiple punishment because different interests are implicated.[24] Thus, the meaning of "same offense" depends on the context in which the double jeopardy question arises;[25] the cases cited by the majority speak to a problem not presented here.

[24] See authorities cited in fn 5 *supra.*

[25] See *Whalen v United States, supra,* 698-699 (Blackmun, J., concurring); 700-701 (Rehnquist, J., dissenting); *Brown v Ohio, supra,* 166, fn 6; 170 (Brennan, J., concurring); Westen, fn 5 *supra,* 1002-1004 and fns 8-9, 11-12; Westen & Drubel, fn 5 *supra;* 121-122, fn 188; 156-163, fn 346; *Twice in Jeopardy,* fn 5 *supra,* 267 and fn 19; 272, fn 50; 275, fn 59; 301-302. Compare *People v White,* 390 Mich 245; 212 NW2d 222 (1973) (same transaction test for multiple prosecution), with *People v Jankowski, supra* (lesser included offense test for multiple punishment).

PEOPLE v WHITE

Docket No. 62677. Argued December 3, 1979 (Calendar No. 7).—Decided July 13, 1981.

John L. White, Jr., was charged with delivery of heroin to an undercover narcotics officer who drove him from Oscoda to Detroit and back to buy the heroin. During the preliminary examination in 81st District Court, J. Richard Ernst, J., he denied having "any business dealings" with the officer. White was later charged with perjury in the preliminary examination, and convicted, on his plea of guilty, in Iosco Circuit Court, Allan C. Miller, J., of perjury and attempted delivery of heroin. The Court of Appeals, D. E. Holbrook, Jr., P.J., and D. E. Holbrook and Cynar, JJ., reversed as to the conviction of perjury in a memorandum opinion, holding that the perjured statement concerned an issue of ultimate fact and thus could

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REFERENCES FOR POINTS IN HEADNOTES

[1] 60 Am Jur 2d, Perjury § 66.
81 Am Jur 2d, Witnesses §§ 463, 518, 597, 657.

[2] 60 Am Jur 2d, Perjury §§ 13, 34, 36.

[3] 60 Am Jur 2d, Perjury § 4 *et seq.*

[4, 5] 60 Am Jur 2d, Perjury § 71.

[6] 21 Am Jur 2d, Criminal Law §§ 184, 165 *et seq.*, 473 *et seq.*

[7] 46 Am Jur 2d, Judgments §§ 394, 401, 402, 415.

[8] 60 Am Jur 2d, Perjury § 38.

[9, 10] 21 Am Jur 2d, Criminal Law §§ 487-491.

[11] 46 Am Jur 2d, Judges § 180.

[12-14, 20-22] 21 Am Jur 2d, Criminal Law § 143 *et seq.*
Availability in state court of defense of entrapment where accused denies committing offenses charged. 5 ALR4th 1128.

[14, 15, 23] 25 Am Jur 2d, Drugs, Narcotics, and Poisons § 43.

[16] 21 Am Jur 2d, Criminal Law §§ 313, 315.
Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

[17] 5 Am Jur 2d, Appeal and Error §§ 624-627.
21 Am Jur 2d, Criminal Law § 315.

[18, 19] 21 Am Jur 2d, Criminal Law § 495.

not be the subject of a charge of perjury (Docket Nos. 77-3614, 78-168). The parties appeal.

In an opinion by Justice Kavanagh, joined by Justices Levin, Fitzgerald, and Ryan, the Supreme Court *held:*

Whether or not there is a rule that a charge of perjury cannot be grounded on lies about the ultimate fact in issue, the defendant in this case lied about what were clearly adjudicative facts as well as the ultimate fact of participation in the drug transaction, and his conviction of perjury is reinstated. The defendant was entrapped in the narcotics transaction as a matter of law, and his conviction of attempted delivery of heroin is reversed. The defendant may seek post-conviction relief on the ground of ineffective assistance of counsel.

1. The evils that might result from permitting the prosecutor to retry ultimate facts by charging the defendant with perjury are not present in this case. White elected to testify at the preliminary examination on a charge of delivery of heroin. There was no prior determination that his story was the truthful version, and, there having been no trial, the prosecutor cannot be said to be seeking a more satisfactory result in the drug matter by presenting the same issues in a trial for perjury. The defendant's argument that no perjury charge should be based on perjured statements of the accused even as to adjudicative facts, because the threat of prosecution might coerce defendants into silence and because other evidentiary safeguards at trial are generally sufficient so that the jury would not be misled, is of no force here. White testified falsely at the preliminary examination where the focus is on the prosecution's evidence. The defendant has less interest in testifying at the preliminary examination, and the prosecutor is substantially less likely to be prepared to test his credibility effectively at the preliminary examination than at trial should he unexpectedly testify.

2. A review of the record shows that White lied about what were clearly material adjudicative facts, as well as about the assertedly ultimate fact of participation in the drug transaction. He denied knowing the undercover police officer, denied having "any business dealings" with him, and denied riding with him in an automobile from Oscoda to Detroit and back to make the transaction. The defendant asserts that there is an insufficient factual basis for his plea of guilty of perjury. Even if the defendant is correct in saying that his statement was an admission as to the ultimate fact only, the proper remedy would be to remand the matter to give the prosecutor an opportunity to adduce facts supporting the plea. Since the

evidence on remand would only consist of the transcript of the preliminary examination, the accuracy of which has not been challenged, there is no reason for a *pro forma* remand in this case. The transcript and the defendant's statement at the guilty-plea proceeding that he had falsely denied any participation adequately establishes a factual basis for his plea.

3. The defendant also seeks to have his perjury conviction vacated on the grounds of double jeopardy and collateral estoppel. The constitutional protection against double jeopardy does not ordinarily bar the defendant's prosecution for and conviction of perjury committed at a criminal proceeding against him because the perjury is not the same offense as the substantive one charged in that proceeding. Similarly, the conviction of perjury is not barred by the doctrine of collateral estoppel, for which an issue of ultimate fact must have once been determined by a valid and final judgment in previous litigation between the same parties. The result of the preliminary examination in this case was only to bind the defendant over for trial.

4. The defendant contends that the information for perjury was defective because it failed to give him notice of the specific statements alleged to be false or to assert the materiality of the false statements. The information was sufficient under the Code of Criminal Procedure, which does not require that the specific statements alleged to be false be set forth. If the defendant was uncertain as to the exact statements alleged to be false, his remedy was to have requested a bill of particulars. The addendum to the information specifically stated that the defendant "stated falsely a material fact."

5. The defendant also contends that his plea to the charge of perjury was unknowing and involuntary because he was not informed of the requisite element of intent, and because the court did not name all the witnesses against him. The court complied with the requirement that the court tell the defendant the name of the offense to which he is pleading. The court is not required to explain the elements of the offense. The judge also adequately complied with the requirement that the court inform the defendant that he is giving up the rights he would have at trial to have witnesses against him appear and the right to question witnesses against him.

6. The district judge who conducted the preliminary examination on the charge of perjury was the same judge who had conducted the defendant's preliminary examination on the charge of delivery of heroin. The defendant alleges that it was reversible error for the judge not to have disqualified himself

because of bias. Merely proving that a judge conducted a prior proceeding against the defendant does not amount to proof of bias for purposes of disqualification.

7. The trial judge's finding that the defendant was not entrapped is clearly erroneous. A claim of entrapment is distinct from other defenses such as insanity, self-defense, and lack of specific intent, which involve an assessment of guilt or innocence. A claim of entrapment does not involve an assessment of guilt or innocence, but rather expresses a policy that there should be no prosecution at all. In that respect, it is like a jurisdictional defect which is not waived by a plea of guilty. Michigan has adopted the objective test of entrapment. The question is whether, regardless of the predisposition to crime of the particular defendant involved, the governmental agents have acted in a way that is likely to instigate or create a criminal offense. The trial judge in this case did not properly apply the objective test. While he considered the conduct of the police officers, he also attached undue significance to the propensities of the defendant, finding that the defendant's "only hesitancy was in accumulating enough business to make it worthwhile". The police officer in this case sought out the defendant and asked to purchase narcotics from him. The officer gave the defendant some money, and they agreed to meet several days later. When the defendant did not show up at the meeting place, the officer twice sought him out again. When the defendant said he had not purchased the narcotics because he did not have a ride, the officer offered him one. A week later two undercover police officers drove the defendant from Oscoda to Detroit, gave him money to purchase more narcotics than previously requested, waited while he purchased the narcotics, and drove him back to Oscoda. The defendant was entrapped as a matter of law. The police officers impermissibly manufactured or instigated a crime. That is exactly the governmental activity that is sought to be prevented by the policy against entrapment.

8. White argues that he was denied effective assistance of counsel because his trial lawyer had him testify at the preliminary examination and told him the judge would dismiss the charge if presented with any evidence that White did not commit the offense. White claims he provided the judge with such evidence on his lawyer's instruction to "deviate" from the truth. He further asserts that all lawyers who handle criminal cases know that a defendant should never testify at his own preliminary examination. White's supporting affidavit sufficiently establishes his right to an evidentiary hearing on

whether he was denied the effective assistance of counsel. A claim of ineffective assistance which depends on facts not of record may not, however, be raised for the first time on appeal.

Reversed.

Justice Williams, joined by Chief Justice Coleman, concurred with Justice Kavanagh except for the holding on entrapment. He believed there was no entrapment.

Justice Moody, dissenting in part, agreed with Justice Kavanagh as to the reinstatement of the conviction of perjury. He also agreed with the conclusion that the defendant has not waived his defense of entrapment by pleading guilty but he wrote separately on that issue. He dissented as to the conclusion that the defendant was entrapped as a matter of law, and would affirm the defendant's conviction of attempted delivery of heroin.

1. The general rule is that a plea of guilty waives all nonjurisdictional defects in the proceedings. However, those rights which might provide a complete defense to a criminal prosecution, and those which undercut the state's interest in punishing the defendant or the state's authority or ability to proceed with the trial, may never be waived by a plea of guilty. Where it is found that the result of the right asserted is similar to that of the jurisdictional defenses in that, if proven, the right asserted would prevent the trial from taking place, a plea of guilty does not waive the right. The defense of entrapment fits within the category of protected rights because, if successfully raised, it provides a complete defense to a criminal prosecution and undercuts the state's interest in punishing the defendant and authority or ability to proceed with the trial.

2. The spirit of the cases decided by the Supreme Court of the United States, respect for the state's interest in the finality of conviction and the judicial economy of the guilty-plea procedure, would not allow a defendant to preserve a wide variety of defenses in spite of his plea of guilty. Underlying the rationale of the plea of guilty in many cases is the bargain and exchange; the defendant gives up important rights and in exchange he may be convicted of a lesser crime or receive a shorter sentence. Courts should be hesitant to allow a defendant to upset a bargain by which he knowingly and intelligently admitted his guilt. Therefore, only those rights and defenses which reach beyond the factual determination of the defendant's guilt and implicate the very authority of the state to bring a defendant to trial are preserved. Such rights may never be waived.

3. Those rights of the defendant which are subsumed in a plea of guilty necessarily relate to all the rights and challenges

associated with the conduct of trial. Thus, important safeguards relating to the capacity of the state to prove the defendant's factual guilt and those regulating the prosecution's conduct at trial are among the ones the defendant waives when he pleads guilty. The rights which essentially relate to the gathering and presentation of evidence are lost even if a successful challenge would prevent the continuation of the prosecution. For example, the right to challenge the legality of a search which produced the evidence against the defendant would not survive a plea of guilty.

4. The defense of entrapment, in essence, claims entitlement to the benefit of a judicial policy that, even if culpable, the defendant should be insulated from prosecution because of the impropriety of the government's conduct. In Michigan, the objective test of entrapment focuses on the illegal use of the power of government to gain convictions, and on whether the actions of the police were so reprehensible under the circumstances that the defendant should not have been brought to trial in the first place. The defendant should be able, in spite of his plea of guilty, to preserve a claim that without governmental involvement the crime would not have taken place.

5. Where the conduct of the police is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it entrapment has occurred. The trial judge in this case did not properly apply the test because he appeared to place undue emphasis upon the defendant's propensity to commit the crime. However, the defendant bears the burden of proving entrapment. In this case, the police officer testified that before arrangements were made for the ride to Detroit to buy narcotics, he gave the defendant an opportunity to cancel the proposed drug transaction and return the money advanced, but White refused, stating that he would still like to obtain the heroin for the officer. The actions of the police officer in attempting several times to arrange the heroin sale and in providing the necessary transportation were not so reprehensible under the circumstances as to amount to entrapment as a matter of law.

Justice Ryan wrote that, while he concurred fully with Justice Kavanagh's opinion, he also concurred with parts I and II of Justice Moody's opinion, summarized in paragraphs 1 through 4 immediately preceding.

OPINION OF THE COURT

1. PERJURY — WITNESSES — CREDIBILITY.

Nothing should impede legitimate efforts to punish perjury; how-

ever, the trial is the primary safeguard against inaccurate testimony, through cross-examination, rebuttal, and impeachment (MCL 705.422; MSA 28.664).

2. PERJURY — DEFENDANT TESTIFYING — PRELIMINARY EXAMINATION.

The evils that might result from permitting the prosecutor to retry ultimate facts by charging a defendant with perjury are not present where an accused elected to testify at the preliminary examination on a charge of delivery of heroin and falsely testified that he had not participated in the transaction; there was no prior determination that the accused's story was the truthful version, and, there having been no trial, the prosecutor cannot be said to be seeking a more satisfactory result in the drug matter by presenting the same issues in a trial for perjury (MCL 750.422; MSA 28.664).

3. PERJURY — DEFENDANT TESTIFYING — ADJUDICATIVE FACTS.

A defendant charged with delivery of heroin lied about what were clearly material adjudicative facts, lies which will support a charge and conviction of perjury, as well as about the assertedly ultimate fact of participation in the drug transaction, where he falsely denied knowing the undercover police officer who was the complaining witness, denied having "any business dealings" with the officer, and denied riding with him in an automobile from Oscoda to Detroit and back to make the transaction (MCL 750.422; MSA 28.664).

4. PERJURY — PLEA OF GUILTY — FACTUAL BASIS.

The proper remedy for a defendant convicted, on his plea of guilty, of perjury on the inadequate factual basis that he falsely denied only an ultimate fact would be a remand to the trial court to give the prosecutor an opportunity to adduce facts supporting the plea; however, there is no reason for a *pro forma* remand where the evidence would only consist of the transcript of the defendant's false testimony, and the accuracy of the transcript is not questioned (MCL 750.422; MSA 28.664).

5. PERJURY — PLEA OF GUILTY — FACTUAL BASIS.

The transcript of the defendant's false testimony in a preliminary examination on a charge of delivery of heroin and the defendant's statement at a guilty-plea proceeding that he had falsely denied any participation in the heroin transaction adequately establishes a factual basis for his plea of guilty of perjury where the defendant, in the same plea-taking proceeding, admitted he participated and pled guilty of attempted delivery of heroin (MCL 750.422; MSA 28.664).

6. PERJURY — CONSTITUTIONAL LAW — DOUBLE JEOPARDY — DEFENDANT TESTIFYING.

The constitutional protection against double jeopardy does not ordinarily bar the defendant's prosecution for and conviction of perjury committed at a criminal proceeding against him because the perjury is not the same offense as the substantive offense charged at the proceeding (US Const, Am V; Const 1963, art 1, § 15; MCL 750.422; MSA 28.664).

7. PERJURY — COLLATERAL ESTOPPEL — DEFENDANT TESTIFYING — PRELIMINARY EXAMINATION.

A defendant's prosecution for and conviction of perjury committed at preliminary examination on another charge against him is not barred by the doctrine of collateral estoppel where the defendant was bound over for trial on the other charge; in order to apply collateral estoppel, an issue of ultimate fact must have once been determined by a valid and final judgment in previous litigation between the same parties (MCL 750.422; MSA 28.664).

8. INDICTMENT AND INFORMATION — PERJURY — SUFFICIENCY — NOTICE.

An information for perjury is not defective because it fails to give notice of the specific statements alleged to be false where it specifically charges that the defendant "stated falsely a material fact" at a preliminary examination on another charge; if the defendant is uncertain as to the exact statements alleged to be false, his remedy is to request a bill of particulars (MCL 750.422, 767.44, 767.73; MSA 28.664, 28.984, 28.1013).

9. CRIMINAL LAW — PLEA OF GUILTY — PERJURY — NATURE OF CHARGE — ELEMENTS OF OFFENSE.

A trial court is not required to explain the elements of the offense in accepting a plea of guilty of the offense; therefore, a plea of guilty of perjury is not unknowing and involuntary on the ground that the defendant was not informed by the trial court of the requisite element of intent (GCR 1963, 785.7).

10. CRIMINAL LAW — PLEA OF GUILTY — ADVICE OF RIGHTS — TRIAL — WITNESSES.

Failure of a judge conducting a plea-taking proceeding on a charge of perjury to advise the defendant that the witnesses who were present during alleged perjured testimony given by the defendant in another criminal matter included the judge, prosecuting attorney, and defense attorney is not erroneous where the plea-taking judge adequately complied with the requirement that he inform the defendant that he is giving up

the rights he would have at trial to have witnesses against him appear and the right to question witnesses against him (GCR 1963, 785.7).

11. JUDGES — DISQUALIFICATION — BIAS.

Merely proving that the district judge who conducted a preliminary examination on a charge of perjury was the same judge who conducted the prior proceeding against the defendant at which the perjured testimony was given does not amount to proof of bias for purposes of disqualification of the examining judge (GCR 1963, 912.2).

12. CRIMINAL LAW — PLEA OF GUILTY — ENTRAPMENT.

A claim of entrapment does not involve an assessment of guilt or innocence, but rather expresses a policy that there should be no prosecution at all; in that respect, it is like a jurisdictional defect which is not waived by a plea of guilty.

13. CRIMINAL LAW — ENTRAPMENT — OBJECTIVE TEST.

The defense of entrapment, in Michigan, is based on the belief that the method employed by the government to bring about conviction cannot be countenanced; the question is whether, regardless of the predisposition to crime of the particular defendant involved, the governmental agents have acted in a way that is likely to instigate or create a criminal offense.

14. CRIMINAL LAW — ENTRAPMENT — OBJECTIVE TEST — CONTROLLED SUBSTANCES — DELIVERY OF HEROIN.

A trial judge did not properly apply the objective test of entrapment in accepting a plea of guilty of attempted delivery of heroin where, although the judge considered the conduct of the police officers in the case, he attached undue significance to the propensities of the defendant to commit the crime, finding that the defendant's "only hesitancy was in accumulating enough business to make it worthwhile" (MCL 333.7401; MSA 14.15[7401]).

15. CRIMINAL LAW — ENTRAPMENT — OBJECTIVE TEST — CONTROLLED SUBSTANCES — DELIVERY OF HEROIN.

A defendant charged with delivery of heroin was entrapped as a matter of law where an undercover police officer sought out the defendant and asked to purchase narcotics, gave the defendant some money and agreed to meet him several days later, twice again sought out the defendant after he failed to meet the officer as agreed, offered and provided the defendant transportation by automobile from Oscoda to Detroit to make the

transaction, gave him money to purchase more narcotics than previously requested, waited while the defendant purchased the heroin, and drove him back to Oscoda (MCL 333.7401; MSA 14.15[7401]).

16. CRIMINAL LAW — ASSISTANCE OF COUNSEL — EVIDENTIARY HEARING.

A defendant sufficiently establishes his right to a post-conviction evidentiary hearing on whether he was denied the effective assistance of counsel where he claims that his lawyer had him testify at the preliminary examination and told him the judge would dismiss the charge if presented with any evidence that the defendant did not commit the offense, that he provided the judge with such evidence on his lawyer's instruction to "deviate" from the truth, and that all lawyers who handle criminal cases know that a defendant should never testify at his own preliminary examination.

17. CRIMINAL LAW — ASSISTANCE OF COUNSEL — PRESERVING QUESTION.

A claim of ineffective assistance of counsel which depends on facts not of record may not be raised for the first time on appeal.

OPINION CONCURRING IN PART AND DISSENTING IN PART BY BLAIR MOODY, JR., J.

See headnotes 1-11, 13, 14.

18. CRIMINAL LAW — PLEA OF GUILTY — DEFENSES — PRESERVING QUESTION.

The general rule is that a plea of guilty waives all non-jurisdictional defects in the proceedings; however, those rights which might provide a complete defense to a criminal prosecution, and those which undercut the state's interest in punishing the defendant or the state's authority or ability to proceed with the trial, may never be waived by a plea of guilty.

19. CRIMINAL LAW — PLEA OF GUILTY — DEFENSES — PRESERVING QUESTION.

Rights which are not subsumed by a plea of guilty include strictly jurisdictional defenses and those defenses which, if proven, would prevent the trial from taking place; only those rights and defenses which reach beyond the factual determination of the defendant's guilt and implicate the very authority of the state to bring a defendant to trial are preserved.

20. CRIMINAL LAW — ENTRAPMENT.

The defense of entrapment, if successfully raised, provides a complete defense to a criminal prosecution by claiming the benefit of a judicial policy that, even if culpable, the defendant should be insulated from prosecution because of the impropriety of the government's conduct.

21. CRIMINAL LAW — PLEA OF GUILTY — DEFENSES — ENTRAPMENT.

A defendant does not waive his claim of the defense of entrapment by a plea of guilty of the substantive offense because that defense assumes that without improper involvement by the police the crime would not have taken place.

22. CRIMINAL LAW — ENTRAPMENT — BURDEN OF PROOF.

The defendant bears the burden of proving a defense of entrapment.

23. CRIMINAL LAW — ENTRAPMENT — OBJECTIVE TEST — CONTROLLED SUBSTANCES — DELIVERY OF HEROIN.

A defendant charged with delivery of heroin was not entrapped as a matter of law where an undercover police officer, who sought him out to buy narcotics several times and provided the transportation to make the sale, gave the defendant an opportunity to cancel the proposed drug transaction and return the money advanced, and the defendant refused, stating that he would still like to obtain the heroin for the officer (MCL 333.7401; MSA 14.15[7401]).

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Stephen H. Naegle,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General, for the people.

State Appellate Defender (by *Derrick A. Carter)* for defendant.

KAVANAGH, J. John L. White, Jr., was convicted on his plea of guilty of the offenses of attempted delivery of heroin and of perjury. MCL 335.341(1)(a); MSA 18.1070(41)(1)(a); MCL 750.92; MSA 28.287; MCL 750.422; MSA 28.664.

On appeal, the Court of Appeals in an unpublished opinion affirmed the defendant's conviction

of attempted delivery of heroin and reversed his perjury conviction, relying on *People v Longuemire,* 87 Mich App 395; 275 NW2d 12 (1978). The people assert that the Court of Appeals erred in setting aside the defendant's conviction of perjury. On cross-appeal, the defendant asserts that the Court of Appeals erred in affirming his conviction of attempted delivery of heroin.

We reverse the decision of the Court of Appeals and reinstate the conviction of perjury. We reverse the conviction of attempted delivery of heroin.

A

White was an airman stationed at Wurtsmith Air Force Base near Oscoda, nearly 200 miles north of Detroit. Curtis Chambers, an undercover narcotics officer, testified at preliminary examination that he approached White on January 5, 1977, and asked to purchase narcotics from him. White stated that it wasn't very profitable for him to make the trip downstate to make a single purchase but "possibly in a couple of days" he would have received other requests for narcotics and would be able to make the trip. Chambers gave White $70 to purchase narcotics for him and arranged to meet White three days later.

When White missed the rendezvous, Chambers sought him out. White said he had not yet made the trip but might go down the following week.

On January 16, 1977, Chambers again contacted White, who said that he had not yet purchased the narcotics because he did not have a ride. Chambers offered to drive White down, and the two agreed to make the trip on January 19.

On January 19, Chambers and another undercover officer drove White from Oscoda to Detroit,

gave him an additional $130 to purchase narcotics, waited outside an apartment building while he made the purchase, and drove him back to Oscoda, where he transferred the narcotics to them. The officers dropped White off at his residence, contacted their backup crew, and returned to arrest White a few minutes later.

White was charged with delivery of heroin. After Chambers and another officer testified at his preliminary examination, he took the stand. On direct examination he admitted knowing Chambers by an alias but denied having "any business dealings" with him on the relevant dates or riding with him from Oscoda to Detroit and back. On cross-examination he expressly denied taking money from Chambers or delivering heroin to him.

White was subsequently charged with committing perjury at his preliminary examination and ultimately entered guilty pleas to the perjury charge and a reduced charge of attempted delivery of heroin. At the plea proceeding, after White recounted the events leading to the delivery of heroin charge, the following colloquy ensued:

"*The Court:* [N]ow, with reference to false swearing, as I understand it, you made two different versions of the—of this incident?

"*The Defendant:* No, sir, only one. My statement was made falsely.

"*The Court:* I see, and what was that?

"*The Defendant:* Denial of any participation in the drug transactions."

We granted leave in this case to speak to the following issues:

(A) Whether a defendant who allegedly lies about the ultimate fact at issue during proceedings

on the criminal charge against him may subsequently be prosecuted for and convicted of perjury.

(B) Whether the trial court failed to elicit a sufficient factual basis for the defendant's perjury plea.

Whenever a charge of perjury arises out of a defendant's testimony during his prosecution for another crime, we should be alert to all the dangers which may be involved in the charge.

On the one hand we should be mindful of the menace to our trial system which a perjurious witness imports. It is difficult to imagine a more potent threat to the adjudicative process than perjury. Nothing should impede legitimate efforts to punish it.

On the other hand, the trial process itself is the primary safeguard against inaccurate testimony. Cross-examination, rebuttal and impeachment are elements of the trial process intended to expose untruthful testimony. It is the function of the trier of fact to assess credibility as well as to determine the facts.

An overzealous prosecutor might bring a subsequent charge of perjury simply to ask a second jury or judge to determine fact and credibility issues already decided in the defendant's favor by the first fact finder or in an attempt to ask a second judge to augment a sentence the prosecutor found disappointing. The very chance of a spiteful perjury prosecution might dissuade a truthful but timid defendant from testifying at all.

In this case, however, no such evils are present. White elected, atypically, to testify at his preliminary examination on a drug charge. There was no prior determination that White's story was the truthful version and, there having been no trial, the prosecutor cannot be said to be seeking a more

satisfactory result by presenting the same issues to a second jury or judge.

With this in mind we consider the errors asserted.

B

The Court of Appeals, in *People v Longuemire, supra,* p 398, held that adjudicative facts can form the basis for a perjury charge, but ultimate facts cannot, and provided a definition for distinguishing the two.[1] In the instant case, the Court of Appeals applied the rule of *Longuemire* and reversed the defendant's conviction of perjury, concluding that the defendant lied about ultimate facts.

When we granted leave to appeal, we directed the parties to brief the issues as stated above. This was unfortunate, for as the people properly point out, the error assertedly made by the Court of Appeals did not implicate the correctness of the *Longuemire* rationale, but rather its application.

We need not here decide whether *Longuemire* is correct in its holding that ultimate facts cannot form the basis of a perjury charge or in its standard for distinguishing ultimate from adjudicative facts. A review of the record shows White lied about what were clearly adjudicative facts as well as about the assertedly ultimate fact of participation in the drug transaction. He denied knowing

[1] *People v Longuemire,* 87 Mich App 395; 275 NW2d 12 (1978), defined ultimate facts as those concerning "the legal definitions and effects ascribed to the basic facts or combination of basic facts as found". "Ultimate facts encompass statements as to noncommission of the crime charged or a legal element of the crime." Examples given were "I didn't bribe Mr. X" or "I didn't break into that house".

Adjudicative facts were defined as facts pertaining to "who did what, where, when, how and with what motive or intent". The examples given were "I didn't give Mr. X $50,000" or "I didn't force the door open".

Officer Chambers, denied having any business dealings with him, and denied riding in an automobile with him from Oscoda to Detroit and back. These are material adjudicative facts, lies as to which will support a perjury charge and conviction.

White argues that no perjury charge should be based on an accused's perjurious statements even as to adjudicative facts. This is not because a defendant has a right to testify untruthfully but because the threat of liberal perjury prosecutions and potential prosecutorial abuse might coerce accuseds into silence, and other safeguards, such as cross-examination, impeachment and rebuttal, are generally sufficient to insure that a defendant does not mislead the jury with his testimony. *Bronston v United States,* 409 US 352; 93 S Ct 595; 34 L Ed 2d 568 (1973).

Whatever merit this argument might have when applied to the facts of a different case, it is of no force here because White testified falsely not at trial but rather at a preliminary examination where the focus is on the prosecution's evidence. The defendant has less interest in testifying at the preliminary examination and the prosecutor is substantially less likely to be prepared to effectively test the accused's credibility at the preliminary examination than at trial should the accused unexpectedly testify.

C

In *Guilty Plea Cases,* 395 Mich 96, 128-132; 235 NW2d 132 (1975), and *People v Haack,* 396 Mich 367, 376-377; 240 NW2d 704 (1976), our Court considered the question of factual bases for guilty pleas. We said that "on appellate review the standard to be applied in determining the adequacy of

the factual basis is whether the trier of fact could properly convict on the facts as stated by the defendant".

The defendant asserts that the only factual basis elicited by the court during his guilty plea to perjury was that he had falsely denied any participation in drug transactions. The defendant contends that, because this testimony concerned an ultimate fact, there were no facts upon which the trier of fact could properly convict.

The defendant pled guilty of attempted delivery of heroin and perjury in the same proceeding. The defendant first testified that he took money from Officer Chambers, rode to Detroit with Officers Chambers and McCarty, picked up heroin from a heroin dealer in Detroit, and gave the heroin to the officers when they returned to Oscoda. The defendant then stated that his prior statement, denying any participation in the drug transactions, was made falsely.

Even if the defendant is correct that his statement that he had falsely "deni[ed] * * * any participation in the drug transactions" was an admission as to an ultimate fact only, the proper remedy under *Guilty Plea Cases, supra,* p 129, would be a remand to give the prosecutor an opportunity to adduce facts supporting the plea. Since the perjury occurred at the preliminary examination on the delivery of heroin charge, this evidence would consist entirely of the transcript of that preliminary examination, which is part of the record on appeal. The defendant has not challenged the accuracy of the transcript. We see no reason for a *pro forma* remand so that the prosecutor can summon a stenographer to certify the accuracy of a transcript the verity of which has been so con-

ceded.[2] The transcript, taken together with the defendant's conclusory statement at the time his guilty plea to the perjury charge was offered that he had falsely "deni[ed] * * * any participation in the drug transactions", adequately establishes a factual basis for his plea.

D

The defendant raises many other issues, several of which merit only brief discussion. He seeks to have his perjury conviction vacated on the grounds of double jeopardy and collateral estoppel.[3] The perjury charge was based on statements made by the defendant during his preliminary examination for the offense of delivery of heroin.

Double jeopardy bars reprosecution for the same offense. US Const, Am V; Const 1963, art 1, § 15. Perjury committed at a judicial proceeding is not the same offense as the substantive offense charged in that proceeding. *United States v Williams,* 341 US 58, 61; 71 S Ct 595; 95 L Ed 747 (1951); see, also, *People v Albers,* 137 Mich 678, 681-684; 100 NW 908 (1904). Therefore, the constitutional protection against double jeopardy does not ordinarily bar the defendant's prosecution for and conviction of perjury.

Similarly, the defendant's prosecution for and conviction of perjury is not barred by the doctrine of collateral estoppel. In order to apply collateral estoppel, an issue of ultimate fact must have once been determined by a valid and final judgment in

[2] We do not wish to be understood as authorizing the use of preliminary examination transcripts by a reviewing court to establish a factual basis for a guilty plea where the crime did not consist solely of the testimony at the preliminary examination.

[3] The defendant's guilty plea did not waive his right to assert a double jeopardy defense. *People v Alvin Johnson,* 396 Mich 424; 240 NW2d 729 (1976).

a previous litigation between the same parties. *Ashe v Swenson,* 397 US 436, 443; 90 S Ct 1189; 25 L Ed 2d 469 (1970).

The purpose of a preliminary examination is to determine whether a felony was committed and whether probable cause exists to believe that the defendant committed it. We need not decide whether a finding respecting the defendant's credibility rendered at a preliminary examination could ever be accorded collateral estoppel effect, for in the instant case the defendant was bound over for trial.

The defendant contends that the information for perjury was defective because it failed to give him notice of the specific statements alleged to be false or to assert the materiality of the false statements. The information was sufficient under MCL 767.73; MSA 28.1013,[4] which does not require that the specific statements alleged to be false be set forth. If the defendant was uncertain as to the exact statements alleged to be false, his remedy was to have requested a bill of particulars under MCL 767.44; MSA 28.984.

The information and addendum comply with the materiality requirements of *People v Cash.*[5] The addendum specifically stated that the defendant "stated falsely a material fact".

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[4] "An indictment for perjury or for subornation of, solicitation, or conspiracy to commit perjury, is sufficient which indicates the offense for which the accused is prosecuted, the nature of the controversy in respect of which the offense was committed and before what court or officer the oath was taken or was to have been taken, without setting forth any part of the records or proceedings with which the oath was connected, and without stating the commission or authority of the court or other authority before whom the perjury was committed or was to have been committed or the form of the oath or affirmation or the manner of administering the same." MCL 767.73; MSA 28.1013.

[5] *People v Cash,* 388 Mich 153, 159; 200 NW2d 83 (1972), restates the rule in Michigan that "materiality of the false swearing to the matter in question must be alleged or it must clearly appear so from the statements alleged to be false".

Citing *Bronston v United States, supra,* as authority, the defendant argues that because his statements were literally correct, they did not constitute perjury. At the defendant's first preliminary examination the following colloquy occurred:

"*Q.* Are you acquainted with a Curtis Chambers who you saw testify on the stand just a few minutes before this?

"*A.* No, sir, I know him by an alias.

"*Q.* What is his alias?

"*A.* His alias was Ken.

"*Q.* Did you have any business dealings with Mr. Chambers on or about January 5, 1977?

"*A.* No, sir.

"*Q.* Did you have any business dealings with him on or about the 16th of January, 1977?

"*A.* No, sir.

"*Q.* Or the 19th of January, 1977?

"*A.* No, sir.

"*Q.* He has testified you rode with him in an automobile from the Oscoda area to Detroit and back to Oscoda?

"*A.* No, sir."

The defendant's theory is that his denial of associating with Curtis Chambers was literally correct because he did not associate with Officer Chambers in his capacity as a police officer; he knew him only by an alias. This argument has no merit. The defendant denied having any business dealings with the witness after admitting he knew him by an alias. The officer's contrary testimony could support a verdict of perjury.

The defendant contends that his guilty plea to perjury was unknowing and involuntary because he was not informed of the requisite element of intent. The court complied with GCR 1963, 785.7(1)(a) which requires that the court tell the

defendant the name of the offense to which he is pleading. The court is not required to explain the elements of the offense. See *Guilty Plea Cases, supra,* p 116.

At the plea taking, the judge informed the defendant that he had a right to confront witnesses against him. The judge read a list of specifically named witnesses against him. The defendant alleges error because the judge did not include the names of the judge, prosecuting attorney and defense attorney who were present during the alleged perjurious testimony.

The plea-taking judge adequately complied with GCR 1963, 785.7(1)(g), subds (v) and (vi), which requires that the court inform the defendant that he is giving up the rights he would have at trial to have witnesses against him appear and the right to question witnesses against him. See *Guilty Plea Cases, supra,* pp 119-125.

The district judge who conducted the preliminary examination on the charge of perjury was the same judge who conducted the defendant's preliminary examination on the charge of delivery of heroin. The defendant alleges that it was reversible error for the judge not to have disqualified himself because of bias. Merely proving that a judge conducted a prior proceeding against the same defendant does not amount to proof of bias for purposes of disqualification under GCR 1963, 912.2.

E

The defendant asserts that his conviction of attempted delivery of heroin should be vacated because of entrapment. The people assert that the defendant has waived this defense by his plea of guilty. We disagree.

We put the claim of entrapment in proper perspective in *People v D'Angelo,* 401 Mich 167, 179; 257 NW2d 655 (1977), when we said:

"When an accused claims entrapment he is asserting, in essence, entitlement to the benefit of a judicial policy that his claim, if true, is a bar to the prosecution of the case. His claim does not involve an assessment of guilt or innocence and, in fact, is irrelevant to it."

A claim of entrapment is distinct from other defenses such as insanity, self-defense, and lack of specific intent, which involve an assessment of guilt or innocence. *Id.* A claim of entrapment does not involve an assessment of guilt or innocence, but rather expresses a policy that there should be no prosecution at all. In this respect, it is like a jurisdictional defect which is not waived by a plea of guilty. See *People v Alvin Johnson,* 396 Mich 424, 439-445; 240 NW2d 729 (1976).

Turning to the merits of the asserted claim, we hold that the trial judge's finding that the defendant was not entrapped is clearly erroneous.

Michigan has been at the forefront in protecting persons from being convicted of a crime which was instigated, induced or manufactured by a government agent. Over a hundred years ago, Justices MARSTON and CAMPBELL deplored such governmental action. Justice MARSTON forcefully wrote:

"The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance and to take such steps as would be likely to prevent the

commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his farther debasement." *Saunders v People,* 38 Mich 218, 221-222 (1878).

Justice CAMPBELL concurred:

"[T]he encouragement of criminals to induce them to commit crimes in order to get up a prosecution against them, is scandalous and reprehensible." *Id.,* 223.

More recently, we renounced the subjective view of entrapment espoused by the United States Supreme Court and adopted the objective test defined in Mr. Justice Stewart's dissent in *United States v Russell,* 411 US 423; 93 S Ct 1637; 36 L Ed 2d 366 (1973), Mr. Justice Frankfurter's concurring opinion in *Sherman v United States,* 356 US 369; 78 S Ct 819; 2 L Ed 2d 848 (1958), and the concurring opinion of Mr. Justice Roberts in *Sorrells v United States,* 287 US 435; 53 S Ct 210; 77 L Ed 413 (1932). *People v Turner,* 390 Mich 7, 22; 210 NW2d 336 (1973); *People v D'Angelo, supra,* p 172.

Justice Stewart's dissenting opinion in *Russell, supra,* pp 440-441, succinctly distinguishes the subjective test from the objective test as follows:

"In *Sorrells v United States, supra,* and *Sherman v United States, supra,* the Court took what might be called a 'subjective' approach to the defense of entrapment. In that view, the defense is predicated on an unexpressed intent of Congress to exclude from its criminal statutes the prosecution and conviction of persons, 'otherwise innocent,' who have been lured to the commission of the prohibited act through the Government's instigation. *Sorrells v United States, supra,* at 448. The key phrase in this formulation is 'otherwise innocent,' for the entrapment defense is available under this approach only to those who would not have com-

mitted the crime but for the Government's inducements. Thus, the subjective approach focuses on the conduct and propensities of the particular defendant in each individual case: if he is 'otherwise innocent,' he may avail himself of the defense; but if he had the 'predisposition' to commit the crime, or if the 'criminal design' originated with him, then—regardless of the nature and extent of the Government's participation—there has been no entrapment. *Id.,* at 451. And, in the absence of a conclusive showing one way or the other, the question of the defendant's 'predisposition' to the crime is a question of fact for the jury. The Court today adheres to this approach.

"The concurring opinion of Mr. Justice Roberts, joined by Justices Brandeis and Stone, in the *Sorrells* case, and that of Mr. Justice Frankfurter, joined by Justices Douglas, Harlan and Brennan, in the *Sherman* case, took a different view of the entrapment defense. In their concept, the defense is not grounded on some unexpressed intent of Congress to exclude from punishment under its statutes those otherwise innocent persons tempted into crime by the Government, but rather on the belief that 'the methods employed on behalf of the Government to bring about conviction cannot be countenanced.' *Sherman v United States, supra,* at 380. Thus, the focus of this approach is not on the propensities and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.' *Id.,* at 382. Phrased another way, the question is whether—regardless of the predisposition to crime of the particular defendant involved—the governmental agents have acted in such a way as is likely to instigate or create a criminal offense."

The trial judge in the instant case did not properly apply the objective test of entrapment. While he considered the conduct of the police officers, he also attached undue significance to the propensities of the defendant: "They did not need to encourage him. His only hesitancy was in accumulat-

ing enough business to make it worthwhile." This was error, for in the words of Mr. Justice Roberts:

"The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy." *Sorrells, supra,* p 459.

The police officer in the instant case sought out the defendant and asked to purchase narcotics from him. The officer gave the defendant some money, and they agreed to meet several days later. When the defendant did not show up at the meeting place, the officer again sought him out, not once but twice. When the defendant said he had not purchased the narcotics because he did not have a ride, the officer offered him transportation. A week later two undercover police officers drove the defendant from Oscoda to Detroit, gave him money to purchase more narcotics than previously requested, waited while he purchased the narcotics, and drove him back to Oscoda. After arriving in Oscoda and transferring the narcotics to the police officers, the defendant was arrested.

We hold that the defendant was entrapped as a matter of law. The police officers impermissibly manufactured or instigated a crime. This is exactly the governmental activity that is sought to be prevented by the policy against entrapment.

F

White argues that he was denied effective assistance of counsel because his trial lawyer had him testify at his preliminary examination and told

him the judge would dismiss the charge if presented with any evidence that White did not commit the offense. White claims he provided the judge with such evidence on his lawyer's instruction to "deviate" from the truth. He further asserts that all lawyers who handle criminal cases know that a defendant should never testify at his own preliminary examination because if the prosecutor's evidence is sufficient to establish probable cause it is unlikely that the charge will be dismissed based on the defendant's testimony. White's supporting affidavit sufficiently establishes his right to an evidentiary hearing on whether he was denied the effective assistance of counsel. A claim of ineffective assistance which depends on facts not of record may not, however, be raised for the first time on appeal. *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

We reverse the defendant's conviction of attempted delivery of heroin. We reverse the decision of the Court of Appeals and reinstate the defendant's conviction of perjury without prejudice to his filing a motion seeking post-conviction relief on the ground of ineffective assistance of counsel.

LEVIN, FITZGERALD, and RYAN, JJ., concurred with KAVANAGH, J.

WILLIAMS, J. *(concurring except for Part E).* My brother KAVANAGH has written an exemplary opinion with which I wholly concur except for Part E. With my brother MOODY and the trial judge, I believe there was no entrapment.

COLEMAN, C.J., concurred with WILLIAMS, J.

BLAIR MOODY, JR., J. *(concurring in part and dissenting in part).* I concur with parts A through

D of Justice KAVANAGH'S opinion reinstating defendant's perjury conviction. I also agree with his holding that, with reference to *People v Alvin Johnson,* 396 Mich 424; 240 NW2d 729 (1976), *cert den* 429 US 951 (1976), defendant has not waived his entrapment defense by pleading guilty. In view of the jurisprudential significance of this question, I write separately to record my analysis of this issue.

Furthermore, I cannot agree that under the facts of this case, defendant was entrapped as a matter of law. Therefore, I would affirm the judgment of the Court of Appeals insofar as it affirmed defendant's conviction of attempted delivery of heroin.

I

The general rule in Michigan is that a plea of guilty waives all non-jurisdictional defects in the proceedings. *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

However, in *People v Alvin Johnson,* our most recent detailed discussion of the issue, this Court limited the broad scope of this plea-waiver rule. Holding that pleading guilty did not foreclose defendant from raising a double jeopardy defense, we delineated a more specific test to distinguish between those rights which are waived by the entry of a guilty plea and those which a defendant may assert in spite of an admission of factual guilt:

"Certainly it is true that those rights which might provide a complete defense to a criminal prosecution, those which undercut the state's interest in punishing the defendant, or the state's authority or ability to proceed with the trial may never be waived by guilty

plea. These rights are *similar to the jurisdictional defenses* in that their effect is that there should have been no trial at all. The test, although grounded in the constitution, is therefore a practical one. * * * Wherever it is found that the result of the right asserted would be to prevent the trial from taking place, we follow the lead of the United States Supreme Court and hold a guilty plea does not waive that right." (Emphasis added.) (Footnotes omitted.) *Alvin Johnson,* 444.

Thus, the list of rights which are not subsumed by a guilty plea encompasses not only strictly jurisdictional defenses, but also those that *resemble* jurisdictional defenses in that, if proven, they would bar the prosecution from bringing defendants to trial in the first place.

The entrapment defense fits logically within the category of protected rights as specified by the language of the *Alvin Johnson* test. If successfully raised, entrapment provides "a complete defense to a criminal prosecution" and undercuts "the state's interest in punishing the defendant" and "authority or ability to proceed with the trial".[1] More importantly, holding that the entrapment claim does not merge into the guilty plea is consistent with not only the underlying rationale of *Alvin Johnson,* but also the exceptions to the plea-waiver doctrine recognized by the United States Supreme Court which provide the foundation for that rationale.

[1] Entrapment arguably also is one of those defenses "grounded in the due process clause" that is protected under the *Alvin Johnson* test. While the entrapment defense is not specifically mentioned in the state or federal constitution, it can be said to be "grounded in the due process clause" in that it is " 'indistinguishable from other law enforcement practices which the courts have held to violate due process. Entrapment is an affront to the basic concepts of justice. Where it exists, law enforcement techniques become contrary to the established law of the land as an impairment to due process' ". *People v Turner,* 390 Mich 7, 19; 210 NW2d 336 (1973), quoting *United States v Chisum,* 312 F Supp 1307, 1312 (CD Cal, 1970).

A guilty plea conclusively resolves the question of a defendant's factual guilt. It relieves the state of the burden of producing sufficient evidence to prove defendant's criminal activity beyond a reasonable doubt. See Shwartz, Note: *The Guilty Plea as a Waiver of "Present but Unknowable" Constitutional Rights: The Aftermath of the Brady Trilogy,* 74 Colum L Rev 1435 (1974).

In a series of cases, including the guilty-plea trilogy of *Brady v United States,* 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970), *McMann v Richardson,* 397 US 759; 90 S Ct 1441; 25 L Ed 2d 763 (1970), and *Parker v North Carolina,* 397 US 790; 90 S Ct 1458; 25 L Ed 2d 785 (1970), and later *Tollett v Henderson,* 411 US 258; 93 S Ct 1602; 36 L Ed 2d 235 (1973), the Supreme Court recognized that a guilty plea has an additional effect: once a defendant admits guilt, he is precluded from challenging any constitutional violations that may have occurred before the plea was entered.[2] As the Court said in *Tollett:*

"We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter

[2] In *Brady* and *Parker* defendants pled guilty to avoid the possibility of a death sentence that could, according to statute, only be imposed after a jury trial. Though the Supreme Court had subsequently declared such statutory schemes unconstitutional, it held that Brady's and Parker's right to challenge their convictions on this basis had been waived by their guilty plea. In *McMann,* the Court held that the defendant had similarly waived his right to challenge a procedure whereby the same jury that determined the voluntariness of his confession also decided his guilt. In *Tollett,* defendant alleged that the indictment against him had been returned by a grand jury from which blacks had been unconstitutionally excluded. Again, the Supreme Court held that his right to question such a defect in the proceedings against him had been waived by his guilty plea.

raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea * * *." 411 US 267.

However, even in the face of this broad statement, the Supreme Court has not construed the rule to constitute an absolute bar to the assertion of all claims. Depending on the nature of the right, the Court will look beyond "the voluntary and intelligent character of the guilty plea" to examine the underlying substantive violation.

In *Blackledge v Perry,* 417 US 21, 30; 94 S Ct 2098; 40 L Ed 2d 628 (1974), the Court held that a challenge based on "the very power of the State to bring the defendant into court to answer the charge brought against him" may survive a guilty plea.[3] In contrast to the coerced confession and "curable" tainted indictment alleged in *McMann* and *Tollett* respectively, the due process right raised in *Blackledge* is "markedly different" in that " 'its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial' ". *Blackledge,* 31, quoting *Robinson v Neil,* 409 US 505, 509; 93 S Ct 876; 35 L Ed 2d 29 (1973).

The *Blackledge* distinction was further explained in *Menna v New York,* 423 US 61; 96 S Ct 241; 46 L Ed 2d 195 (1975), where the defendant pled guilty to a charge brought allegedly in violation of the Double Jeopardy Clause. The New York

[3] In *Blackledge,* defendant pled guilty to a felony charge brought while he was awaiting an appeal of a misdemeanor conviction based on exactly the same conduct. The Court held that the "very initiation of the [felony] proceedings against [defendant] * * * operated to deny him due process of law". 417 US 30-31. Once the state chose to charge the defendant with a misdemeanor, it was precluded from charging him with a more serious crime based on the same behavior.

Court of Appeals, relying on *Tollett,* held that defendant's right to bring his double jeopardy claim was "waived" by his plea. In a per curiam opinion, the Supreme Court rejected the lower court's analysis, citing *Blackledge* for the proposition that:

"Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna,* 62.

The Court went on to clarify the holdings of the earlier guilty plea cases:

"Neither *Tollett v Henderson,* 411 US 258 (1973), nor our earlier cases on which it relied, *e.g., Brady v United States,* 397 US 742 (1970), and *McMann v Richardson,* 397 US 759 (1970), stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations. If they did so hold, the New York Court of Appeals might be correct. However, in *Tollett* we emphasized that waiver was not the basic ingredient of this line of cases, 411 US 266. The point of these cases is that a counseled plea of guilty is an admission of *factual* guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, *the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim." Menna,* 62-63, fn 2. (Emphasis changed.)

Thus, where the claim is one that the state may

not prosecute regardless of defendant's factual guilt, a guilty plea does not waive the right to subsequently raise that claim.

A literal interpretation of the language of *Menna* and *Blackledge* might allow a defendant to preserve a wide variety of defenses in spite of his guilty plea.[4] However, the spirit of those cases, and respect for the state's interest in the finality of conviction and judicial economy as reflected in the guilty-plea procedure, undercuts the wisdom of such a construction. Further, the underlying rationale of the guilty plea in many cases is the notion of bargain and exchange.[5] When a defendant pleads guilty he gives up a series of important rights, including the right to a jury trial, the right to confront accusers and present witnesses, and the right to remain silent. In exchange, he may be convicted of a lesser crime or receive a shorter sentence. Courts should be hesitant to allow a defendant to upset a bargain by which he knowingly and intelligently admitted his guilt.

In light of these functions of the guilty plea in the criminal justice system, the distinction implicit in *Menna* and *Blackledge* and that underlying the

[4] For example, reversal of a conviction on the grounds of an invalid search and seizure is "perfectly consistent with a recognition that the defendant is, in fact, guilty. Thus, it may be argued that, unlike some other claims, Fourth Amendment claims are not undercut by a guilty plea in which guilt is solemnly admitted". *Lefkowitz v Newsome,* 420 US 283, 296, fn 3; 95 S Ct 886; 43 L Ed 2d 196 (1975) (White, J,, dissenting). Further, if the only evidence against defendant is that which has been invalidly seized, "the charge is one which the State may not constitutionally prosecute". *Menna,* 63, fn 2. Yet a number of courts, including the Michigan Court of Appeals, have held that a plea of guilty bars a subsequent Fourth Amendment challenge. See, *e.g., United States v Cox,* 464 F2d 937 (CA 6, 1972); *People v Riley,* 88 Mich App 727; 279 NW2d 303 (1979) *(nolo* plea); *People v Hill,* 86 Mich App 706; 273 NW2d 532 (1978) *(nolo* plea). Under the test enunciated in this opinion, those decisions would be approved.

[5] In the instant case, defendant pled guilty of perjury and attempted delivery of heroin. In exchange, the prosecutor moved to dismiss the charge of delivery of heroin.

"complete defense" language of *Alvin Johnson* would insulate only a narrow class of rights against a waiver by plea. Only those rights and defenses which reach beyond the factual determination of defendant's guilt and implicate the very *authority* of the state to bring a defendant to trial are preserved.[6] Examples include: the prohibition against double jeopardy, *Menna;* the right to challenge the constitutionality of the statute under which one is charged, *Journigan v Duffy,* 552 F2d 283 (CA 9, 1977); the challenge that a charge is brought under an inapplicable statute, *People v Beckner,* 92 Mich App 166; 285 NW2d 52 (1979).[7] These defenses are "similar to the jurisdictional defenses", *Alvin Johnson,* 444, in that they involve the right of the government to prosecute the defendant in the first place. Such rights may never be waived.

In contrast, those rights which are subsumed in a guilty plea relate to a different aspect of government conduct in the criminal process. When a defendant pleads guilty, he waives his right to a trial. Therefore, he necessarily gives up all the rights and challenges associated with that trial. Thus, important safeguards relating to the *capacity* of the state to prove defendant's factual guilt, and those regulating the prosecution's conduct at trial are among those defendant waives when he pleads guilty. These rights, which essentially relate to the gathering and presentation of evidence, are lost even if a successful challenge would pro-

[6] See *People v Hall,* 97 Mich App 143; 293 NW2d 742 (1980).

[7] See also *People v Webb,* 89 Mich App 50; 279 NW2d 573 (1979), where the Court of Appeals held that defendant's plea of guilty did not waive his right to object to the failure to hold a revocation hearing before his youthful trainee status was revoked. The court seemed to apply a quasi-jurisdictional test to reach its result; it noted that without a hearing, criminal charges could not be reinstated against the defendant.

vide a "complete defense" by in effect rendering the state unable to continue with the prosecution. For example, under this test, the right to challenge the legality of a search which produced the evidence against the defendant[8] would not survive a guilty plea.[9]

II

Under the test outlined, White's claim of entrapment is not waived by his plea of guilty.

In *People v D'Angelo,* 401 Mich 167, 179, 182; 257 NW2d 655 (1977), we stressed the fact that entrapment is a conceptually unique defense:

"When an accused claims entrapment he is asserting, in essence, entitlement to the benefit of a judicial policy that his claim, if true, *is a bar to the prosecution of the case.* His claim does not *involve an assessment of guilt or innocence and, in fact, is irrelevant to it.* It is in that respect that the entrapment claim is unique and distinguishable from the more common defenses in criminal cases such as alibi, insanity, self-defense, lack of specific intent and the like, which assert the absence of one or more elements of the crime charged and involve therefore the assessment of guilt or innocence. The defense of entrapment is not interjected to establish the absence of an essential element of the crime but to present facts

[8] Therefore, we disagree with the conclusion in *Alvin Johnson* that defenses relating to "failure to suppress illegally obtained evidence without which the people could not proceed" are not waived by a guilty plea. See, however, *People v Riley, supra,* 732, where Judge RILEY, dissenting in part, argues convincingly that forcing a defendant to go to trial merely to preserve such a Fourth Amendment challenge undercuts the goal of judicial economy.

This analysis intimates no opinion regarding the propriety of the qualified (conditional) plea procedure in which the defendant and prosecutor agree that certain specified issues may be preserved for appeal as part of the plea agreement.

[9] See also *People v Hall, supra,* where the Court of Appeals held that defendant's failure to object to a lack of a preliminary examination before he pled guilty barred him from raising the issue on appeal.

collateral or incidental to the criminal act which justify acquittal on the ground of an overriding public policy to deter instigation of crime by enforcement officers in order to get a conviction.

* * *

"Essentially, a hard analysis of each entrapment case invariably leads to the conclusion that *the accused is affirmatively alleging that, even if culpable, he should be insulated from prosecution due to the impropriety of the government conduct.* The challenge focuses exclusively upon the nature of the police conduct which, if improper, will not be mitigated, justified or excused in any fashion by the disposition of the accused." (Emphasis added.)

At the heart of this judicially created defense is the policy that

"law enforcement conduct which essentially manufactures crime is a corruptive use of governmental authority which, when used to obtain a conviction, taints the judiciary which tolerates its use. It is a practice which relies for its success upon judicial indifference, if not approval, and it must be deterred. Its deterrence is a duty which transcends the determination of guilt or innocence in a given case and stands ultimately as the responsibility of an incorruptible judiciary." *D'Angelo,* 174.

In Michigan, these policy considerations are emphasized by the adoption of the objective test of entrapment, which focuses upon the propriety of government conduct with respect to the criminal activity rather than upon defendant's "predisposition" to commit the crime.[10]

Thus, like the protected class of rights defined in *Menna,* the question of factual guilt is irrelevant

[10] Under the objective test as defined in Michigan, defendant need not admit guilt to raise an entrapment claim. *People v D'Angelo,* 401 Mich 167; 257 NW2d 655 (1977).

to the entrapment defense. The accused asserting the entrapment claim does not dispute participation in the criminal act, but rather challenges the authority of the state to punish that activity. Also, like the double jeopardy claim in *Menna,* entrapment "stand[s] in the way of conviction, [even] if factual guilt is validly established". 423 US 63, fn 2. Further, in that it focuses the attention of the court upon the illegal use of the power of government to gain convictions, and tests "whether the actions of the police were so reprehensible under the circumstances", *People v Turner,* 390 Mich 7, 22; 210 NW2d 336 (1973), that defendant should not have been brought to trial in the first place, the entrapment claim is distinguishable from those defenses which relate solely to the state's ability to prove its case.

Equally important conceptually, entrapment in essence precedes the jurisdictional defenses in the criminal process. Whereas the jurisdictional defenses operate to prevent a *trial* from taking place, entrapment assumes that, without police involvement, the *crime* itself would not have taken place.[11] If a defendant may preserve, in the face of a guilty plea, the right to challenge the government's authority to bring him to trial, he should be able to similarly preserve a claim based on government involvement in the creation of the crime which eventually leads to the trial. Thus, especially as it is defined in Michigan, entrapment

[11] In this sense, entrapment falls between a challenge based on the unconstitutionality of the statute under which defendant is charged and one based on double jeopardy. When the unconstitutionality of the statute is questioned, defendant is alleging that the act he committed is not a crime. *Journigan v Duffy,* 552 F2d 283 (CA 9, 1977). When defendant raises a double jeopardy claim, he does not dispute the commission of a crime but protests the state's ability to charge him for the act. In the case of entrapment, defendant agrees that there has been criminal activity but alleges that but for impermissible police involvement, there would have been no crime.

is a defense that should not be barred under this Court's interpretation of the plea-waiver doctrine.

For all the foregoing reasons, I concur with Justice KAVANAGH'S holding that defendant White may appeal the denial of his entrapment claim in spite of the fact that he pled guilty to the substantive offense of attempted delivery of heroin.[12]

III

For purposes of judging whether, under the circumstances of a particular case, a defendant was entrapped, Michigan courts have applied the objective test as stated by Justice Stewart in his dissent in *United States v Russell,* 411 US 423, 445; 93 S Ct 1637; 36 L Ed 2d 366 (1973):

"But when the agents' involvement in criminal activities goes *beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it,* then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice." (Emphasis added.)

[12] Thus, the reasoning of *People v Bonner,* 102 Mich App 514; 302 NW2d 253 (1980), which held that the right to raise an entrapment claim is waived by a guilty plea, is specifically disapproved.

See also *Eaton v United States,* 458 F2d 704 (CA 7, 1972), and *Williams v State,* 437 SW2d 82 (Mo, 1969), where both courts, essentially without analysis, also held that a plea of guilty precludes appeal on the entrapment issue. In these cases, the courts used the subjective test for entrapment, which focuses on defendant's "predisposition" to engage in criminal activity. Even if the difference in the test used would not lead to a different result, we disagree with the holdings of these cases.

As determined by my colleague, the trial judge in the instant case did not properly apply this entrapment test because he appeared to place undue emphasis upon defendant's propensity to commit the crime. I agree. However, I cannot agree that the facts of this case compel the conclusion that defendant was entrapped as a matter of law.

Under the objective test, the defendant bears the burden of proving entrapment. *D'Angelo.* In the instant case, the proofs showed that on three separate occasions, the undercover police officer sought out defendant White in an effort to buy narcotics from him. The officer also provided the transportation which enabled defendant to obtain the drugs for the sale.[13] However, according to the police officer's testimony, before arrangements were made for this ride to Detroit, he gave the defendant an opportunity to cancel the proposed drug transaction and return the money advanced, and White refused, stating that he would still like to obtain the heroin for the officer.

This is not a case where the police induced defendant to commit the crime by means of such impermissible activities as pleas of desperate illness, appeals based on sympathy, pity or friendship, *Turner,* offers of exorbitant amounts of money,[14] or the use of sexual favors, *People v Wisneski,* 96 Mich App 299; 292 NW2d 196 (1980). See *Grossman v State,* 457 P2d 226 (Alas, 1969), modified in *Pascu v State,* 577 P2d 1064 (Alas, 1978). Based on the record before us, the police conduct did not go beyond the mere offering of an opportunity to engage in criminal activity. The

[13] Apparently this ride was obtained at the defendant's request.

[14] The price paid to defendant for the heroin was $65 per gram. White was given a total of $200 to cover the cost of three grams and gasoline for the trip to Detroit.

actions of the undercover agent in attempting several times to arrange the heroin sale and in providing the necessary transportation were not "so reprehensible under the circumstances", *Turner,* as to amount to entrapment as a matter of law.

Accordingly, in addition to reinstating defendant's conviction of perjury without prejudice to his filing a motion seeking post-conviction relief on the ground of ineffective assistance of counsel, I would affirm defendant's conviction of attempted delivery of heroin.

RYAN, J. Although I have signed the opinion prepared by Justice KAVANAGH and concur fully in its reasoning and result, I concur as well with Parts I and II only of Justice MOODY's opinion.

SAM v BALARDO

Docket No. 61954. Argued March 6, 1980 (Calendar No. 3).—Decided July 13, 1981.

Willie J. Sam brought an action for legal malpractice against Marilynn J. Balardo. The Wayne Circuit Court, William Leo Cahalan, J., instructed the jury to apply the two-year statute of limitations for malpractice after deciding when the plaintiff knew of or should have discovered the asserted malpractice. The jury returned a verdict of no cause of action. The Court of Appeals, T. M. Burns, P.J., and D. C. Riley, J. (M. F. Cavanagh, J., dissenting), affirmed (Docket No. 30138). The plaintiff appeals, asserting that the two-year statute of limitations applies only to actions for medical malpractice and that the general three-year statute of limitations for actions to recover damages for injuries to persons and property should be applied in this case.

In an opinion by Justice Ryan, joined by Chief Justice Coleman and Justices Williams and Fitzgerald, the Supreme Court *held:*

The statutory two-year limitation period applies to actions for malpractice against attorneys as well as those against physicians. The Court did not decide whether actions against other state-licensed professional persons are subject to the two-year limitation.

1. The language of the statute is clear and unambiguous on

REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 8, 9, 11, 15] 7 Am Jur 2d (Rev), Attorneys at Law § 219 *et seq.*
When statute of limitations begins to run upon action against attorney for malpractice. 18 ALR3d 978.
[2, 13] 73 Am Jur 2d, Statutes § 194.
[3] 73 Am Jur 2d, Statutes §§ 223-227.
[4] 73 Am Jur 2d, Statutes § 11.
[5] 7 Am Jur 2d (Rev), Attorneys at Law § 197 *et seq.*
[6] 73 Am Jur 2d, Statutes § 198.
[7] 73 Am Jur 2d, Statutes § 203.
[10] 73 Am Jur 2d, Statutes §§ 223-227.
[12, 15] 61 Am Jur 2d (Rev), Physicians, Surgeons, and Other Healers § 316 *et seq.*
[14] 73 Am Jur 2d, Statutes §§ 236, 237

its face. Once a statute has been declared to be unambiguous on its face, there is no room for further construction of it; the legislative intent must be gleaned from the clear and explicit words of the statute. The word malpractice, although it is clear and explicit, is nowhere defined in the Revised Judicature Act. The Court decided in 1973 that the Legislature intended that malpractice would be defined according to the common-law definition and thus that only those professions traditionally liable for malpractice would be benefited by the two-year statute of limitations.

2. The Revised Judicature Act does not define malpractice, and reliance on other provisions of the statute which use the term is erroneous. The amendment of the act in 1975 to provide that an action for malpractice may be commenced against certain state-licensed persons in the health professions pertains to the time for accrual of the action and does not define malpractice for purposes of the two-year statute of limitations. Another provision of the Revised Judicature Act cited by the plaintiff concerns the legislative decision that an impostor and a state-licensed professional person should be held to the same standard of care; it does not create a new cause of action against impostors. The Revised Judicature Act is remedial legislation which was designed to set forth laws and a system of procedure for the courts. Because it was addressed to procedural reform, substantive rights and liabilities are not defined by the Revised Judicature Act; the definition of malpractice and liability for it are to be determined by resort to the common law.

3. The Court long ago implicitly recognized a common-law action for legal malpractice. Because actions for legal malpractice were recognized when the Judicature Act of 1915 and the Revised Judicature Act of 1961 were enacted, legal malpractice is included within the two-year definition of malpractice as the word is used in the two-year statute of limitations for malpractice actions. The provisions of the Revised Judicature Act do not purport to create or limit the cause of action for malpractice to something other than was recognized at common law.

4. The plaintiff argues that an earlier decision that nurses, who could not be sued for malpractice at common law, were subject to a three-year statute of limitations for negligence shows that the benefit of the two-year limitation is extended only to those professions listed in the Judicature Act of 1915, physicians, surgeons, and dentists. However, the prior decision applied only to nurses and might well have used less sweeping

language had the Court considered the history of actions for legal malpractice and their place in the revised statutory scheme. The analysis which produced the conclusion that nurses are not subject to the short limitation for malpractice yields different results when applied to attorneys. Unlike nurses, attorneys were and continue to be liable at common law for their malpractice. Like physicians, attorneys are required to exercise independent judgment as to what course of action will best serve their client's interests.

5. The deletion from the two-year statute of limitations of the words "physicians, surgeons or dentists" used in the Judicature Act of 1915 was not merely a change of phrase but was the purposeful removal of language of limitation, and is a clear and specific indication of legislative intent to change substantively the meaning of the statutory provision. The omission of words in the amendment of a statute is presumed to have been intentional; any material change in the language of the act is presumed to reflect a change in legal rights. The statutory period of limitation for malpractice was first enacted in 1905, with language making it applicable to malpractice of physicians, surgeons or dentists which remained through eight subsequent amendments until passage of the Revised Judicature Act in 1961. In the early 1900's, when the provision was first enacted, there were very few actions for malpractice brought against attorneys; medical malpractice actions were far more prevalent. By the middle of the century malpractice actions against attorneys had become more frequent, and their increase logically explains the 1961 legislative action in deleting the limiting language of the former statute. Thus, history supports the presumption that the deletion of the language was intended to effect a change in legal rights.

6. The plaintiff also argues that the provision in the Revised Judicature Act was intended to be simply a compilation of the existing periods of limitation on general tort remedies. The retention of the same periods of limitation for general tort remedies, mentioned in the comment of the committee that drafted the Revised Judicature Act, does not say that the existing periods have been retained for certain groups of persons who may be sued for these torts. Malpractice may be referred to for purposes of the statute of limitations without mention of the potential parties to the action. The plaintiff would have the Court interpret the statutory provision by relying on a comment of the State Bar Joint Committee on Michigan Procedural Revision concerning the source of the

provision to reach a result that is inconsistent with the plain wording of the statute.

7. One final and persuasive reason for holding that the two-year statute applies in this case is that it is consistent with considerations of public policy. An attorney is called upon to make decisions that involve the exercise of independent professional judgment of essentially the same serious quality as those made by a physician. They are deserving of the same protection afforded to physicians, surgeons, and dentists by the statutory two-year limitation period for malpractice actions.

Affirmed.

Justice Moody concurred with the conclusion that actions charging malpractice against attorneys fall within the two-year statute of limitations. The legislative history, particularly the excision of the limiting phrase "physicians, surgeons or dentists", lends substantial force to the conclusion that the Legislature intended to broaden the applicability of the provision. The comment of the committee which drafted the Revised Judicature Act that existing time periods have been used appears to mean only that the limitation period for malpractice remains the same. It does not reflect a legislative intention to define or restrict the type of action that may constitute "malpractice" for purposes of applying the statute of limitations. Because it is clear that attorneys were subject to liability for malpractice at common law, it is unnecessary in this case to construe other sections of the Revised Judicature Act and thus implicitly to decide whether the statute of limitations for malpractice actions applies to actions against members of all state-licensed professions.

Justice Levin, joined by Justice Kavanagh, dissenting, would hold that the Revised Judicature Act did not change the substantive application of the limitation period for malpractice and, therefore, it does not apply to professional persons other than physicians, surgeons, and dentists. The legislative history of the Revised Judicature Act indicates that the change in language from that of the Judicature Act of 1915 was an effort to simplify the statute, as a part of a general and comprehensive revision and consolidation of statutes pertaining to the judiciary, rather than to expand the application of the shorter limitation period for malpractice actions. By extending the benefit of the shorter limitation period to members of the legal profession the Court has departed from its prior construction of the statute, which held that it does not apply to nurses, and has, without an adequate or workable basis for the distinction, granted to lawyers what was withheld from nurses. The deci-

sion of the Court has the effect of rendering uncertain the period of limitation applicable to any given profession until the Court has concluded that an action for the negligent practice of that profession was considered an action for malpractice at common law. Until the Legislature clearly expresses an intent to expand the application of the period of limitation for actions for the negligent practice of other professions by specifying the ones to which it applies—and the ones to which it does not—the two-year period of limitation applies only to the malpractice of physicians, surgeons and dentists.

85 Mich App 20; 270 NW2d 522 (1978) affirmed.

OPINION OF THE COURT

1. LIMITATION OF ACTIONS — ATTORNEY AND CLIENT — MALPRACTICE.

The two-year limitation period for malpractice actions applies to actions against attorneys (MCL 600.5805; MSA 27A.5805).

2. STATUTES — CONSTRUCTION — LEGISLATIVE INTENT.

There is no room for further construction of a statute which has been declared to be unambiguous on its face; the legislative intent must be gleaned from the clear and explicit words of the statute.

3. LIMITATION OF ACTIONS — MALPRACTICE — WORDS AND PHRASES — COMMON LAW.

The word malpractice, as it is used in the statute of limitations, although it is clear and explicit, is nowhere defined in the Revised Judicature Act; the Legislature intended that malpractice would be defined according to the common-law usage at the time of the passage of the statute and that only those professions traditionally liable for malpractice would benefit from the two-year statute of limitations for malpractice actions (MCL 600.5805; MSA 27A.5805).

4. STATUTES — REVISED JUDICATURE ACT — MALPRACTICE.

The provisions of the Revised Judicature Act do not purport to create or limit the cause of action for malpractice to something other than was recognized at common law; the statute is remedial legislation which was addressed to procedural reform for the courts rather than to substantive rights and liabilities (MCL 600.101 *et seq.;* MSA 27A.101 *et seq.).*

5. ATTORNEY AND CLIENT — MALPRACTICE.

The common-law definition of malpractice is not limited to the negligent performance of professional duties by a physician or

surgeon; the Supreme Court long ago implicitly recognized a common-law action for legal malpractice.

6. STATUTES — REVISED JUDICATURE ACT — LIMITATION OF ACTIONS — MALPRACTICE.

The deletion in the Revised Judicature Act of the words "physicians, surgeons or dentists" used in the former statute of limitations for malpractice was not merely a change of phrase but was the purposeful removal of language of limitation, and is a clear and specific indication of legislative intent to change substantively the meaning of the statutory provision (MCL 600.5805; MSA 27A.5805).

7. STATUTES — CONSTRUCTION — AMENDMENTS.

The omission of words in the amendment of a statute is presumed to have been intentional; any material change in the language of the act is presumed to reflect a change in legal rights, and as a rule courts look to the circumstances surrounding the enactment to determine if the presumption can be fairly supported.

8. LIMITATION OF ACTIONS — MALPRACTICE — ATTORNEY AND CLIENT — PUBLIC POLICY.

An attorney is called upon to make decisions that involve the exercise of independent professional judgment of essentially the same serious quality as those made by a physician; considerations of public policy, therefore, support a decision that attorneys are deserving of the same protection afforded to physicians, surgeons, and dentists by the statutory two-year limitation period for malpractice actions (MCL 600.5805; MSA 27A.5805).

CONCURRING OPINION BY BLAIR MOODY, JR., J.

See headnotes 1, 5, 6.

9. LIMITATION OF ACTIONS — MALPRACTICE — COMMON LAW — REVISED JUDICATURE ACT.

Because it is clear that attorneys were subject to liability for malpractice at common law, it is unnecessary in a case for legal malpractice to construe other sections of the Revised Judicature Act and thus implicitly to decide whether the two-year statute of limitations for malpractice actions applies to actions against members of all state-licensed professions (MCL 600.5805; MSA 27A.5805).

DISSENTING OPINION BY LEVIN, J.

10. WORDS AND PHRASES — MALPRACTICE — COMMON LAW — STATUTES.

The common law has not developed a clear definition of which actions for the negligent practice of a profession are "malpractice" actions, and no substantive distinction among actions for negligence in the practice of different professions is implied by the use or nonuse of the term in reported decisions and statutes, because nothing has heretofore hinged on whether an action was characterized as a "malpractice" action.

11. LIMITATION OF ACTIONS — MALPRACTICE — REVISED JUDICATURE ACT — CONSTRUCTION.

The Supreme Court should not adopt a construction of the two-year statute of limitations for malpractice actions which has the effect of rendering uncertain the period of limitation applicable to any given profession until the Court has concluded that an action for the negligent practice of that profession was considered an action for malpractice at common law because the purpose of the revision of the statutes pertaining to the judiciary and the court rules by the enactment of the Revised Judicature Act was to consolidate, simplify and clarify the jurisprudence of the state, not to create uncertainty (MCL 600.5805; MSA 27A.5805).

12. LIMITATION OF ACTIONS — MALPRACTICE — PHYSICIANS AND SURGEONS — REVISED JUDICATURE ACT.

The two-year statute of limitations for malpractice actions applies only to the malpractice of physicians, surgeons and dentists until the Legislature clearly expresses an intent to expand the application of the two-year limitation period by specifying the types of actions for the negligent practice of other professions to which it applies and the ones to which it does not (MCL 600.5805; MSA 27A.5805).

13. STATUTES — CONSTRUCTION — LEGISLATIVE INTENT.

The rationale underlying the rule of statutory construction that a court will enforce the plain and unambiguous meaning of a statute is that in doing so the court will be giving effect to the legislative intent.

14. STATUTES — CONSTRUCTION — AMENDMENTS.

Amendatory statutes, as a general rule, are presumed to intend a change in the law; but where the change in the language of a provision occurs as part of a general and comprehensive revision and consolidation of statutes into a code the revised language will be presumed to bear the same meaning as the

original provisions, unless the intent to make a substantive change has been clearly expressed.

15. STATUTES — REVISED JUDICATURE ACT — LIMITATION OF ACTIONS — MALPRACTICE.

The legislative history of the Revised Judicature Act indicates that the deletion of the words "physicians, surgeons or dentists" used in the former statute of limitations for malpractice was an effort to simplify the statute rather than to expand the application of the two-year statute of limitations to actions against attorneys for negligent practice of their profession (MCL 600.5805; MSA 27A.5805).

Myron F. Poe for plaintiff.

Marilynn J. Balardo, in propria persona.

Amicus Curiae:

Eugene D. Mossner for State Bar of Michigan.

RYAN, J. This Court granted leave to appeal to address the issue, "[W]hether the applicable statute of limitations in actions alleging legal malpractice is two years or three years".

We hold that a legal malpractice suit is subject to the two-year statute of limitations pursuant to MCL 600.5805(3); MSA 27A.5805(3).[1]

I

On July 18, 1973, Willie James Sam filed a complaint in the Third Judicial Circuit Court charging attorney Marilynn J. Balardo with legal malpractice. The complaint alleged that plaintiff had consulted the defendant during March or

[1] The subsections of MCL 600.5805; MSA 27A.5805 have been renumbered by 1978 PA 495. Since there have been no substantive changes made with respect to the subdivisions relevant to this opinion, we will refer to the subdivisions as numbered by 1961 PA 236, which were effective at the time the parties went to trial in this cause.

April, 1970 concerning a lawsuit which had been filed against him in the Detroit Common Pleas Court. Ms. Balardo agreed to represent the plaintiff and filed an answer in his behalf in the matter. Plaintiff claims the defendant then advised him of two adjournments of the date set for trial. On September 10, 1970, a default judgment was entered against plaintiff in Common Pleas Court. He contends that he was not notified of that proceeding.

Plaintiff acknowledged that some time after September, 1970 he contacted the defendant regarding his case and was advised by the defendant that he should pick up all his papers from her office since defendant would no longer represent plaintiff. Defendant contends that a written "release" was executed between the parties on October 13, 1970 which purported to absolve and release defendant from all responsibility with respect to this matter.

Plaintiff alleges that he did not learn of the judgment entered against him until December 23, 1972, at which time he was refused renewal of his motor vehicle operator's license because of the outstanding judgment. He was unsuccessful in attempting to have the default judgment set aside and thereafter instituted the present action.

Defendant filed a motion for accelerated judgment alleging that plaintiff's claim is barred by the running of the two-year statute of limitations. The motion was supported by an affidavit which alleged that the last service defendant rendered for plaintiff was on June 30, 1970 when she had the trial of the Common Pleas action adjourned and that, in any event, her last contact with plaintiff was on October 13, 1970 when plaintiff picked up his papers from defendant and signed a release.

The trial court denied the motion. It ruled that the question of whether plaintiff should have discovered the defendant's alleged malpractice between September 10, 1970 and December 23, 1972 was one of fact for the jury.[2] The jury returned a verdict of no cause of action. Plaintiff appealed, claiming that the three-year statute of limitations controlled.[3] A divided Court of Appeals affirmed, finding that the two-year limitation period contained in MCL 600.5805(3); MSA 27A.5805(3),[4] applies to legal, medical, and other recently created malpractice actions. Judge CAVANAGH dissented.[5] This Court granted plaintiff's application for leave to appeal by an order dated October 1, 1979.

II

The statutory provisions governing the periods of limitation for tort actions form part of the Revised Judicature Act of 1961. MCL 600.5805; MSA 27A.5805 provided in pertinent part:

[2] The trial judge instructed the jury as follows:

"So if you find that the defendant, Marilynn J. Balardo, discontinued serving the plaintiff as an attorney on or prior to October 13, 1970, then you must find in favor of the defendant and return a verdict of no cause for action.

"Or if you find that the plaintiff knew or discovered by the—or by the exercise of reasonable diligence should have known or discovered the asserted malpractice or negligence on or prior to October 13, 1970, then also you must find in favor of the defendant and return a verdict of no cause for action.

"However, if you find that plaintiff neither knew of the alleged negligence or malpractice of the defendant until December 23, 1972, nor in the exercise of reasonable diligence (pausing) should have known or discovered the alleged negligence or malpractice until December 23, 1972, then the two statutes that I've just read to you, in effect as pertaining to limitations of action, do not apply."

[3] MCL 600.5805(7); MSA 27A.5805(7). The relevant subdivision as amended by 1978 PA 495 is MCL 600.5805(8); MSA 27A.5805(8).

[4] The relevant subdivision as amended by 1978 PA 495 is MCL 600.5805(4); MSA 27A.5805(4).

[5] 85 Mich App 20; 270 NW2d 522 (1978).

"No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

* * *

"(3) The period of limitations is 2 years for actions charging malpractice.

* * *

"(7) The period of limitations is 3 years for all other actions to recover damages for injuries to persons and property."

Plaintiff argues that the two-year period of limitation applies only to actions charging malpractice against physicians, surgeons and dentists and that a malpractice action brought against an attorney falls within the general three-year period of limitation for recovery of damages for injuries to persons or property.[6]

Defendant, supported by amicus curiae, the State Bar of Michigan, counters that the two-year limitation applies to actions charging malpractice of any member of a state-licensed profession.

In concluding that the period of limitations

[6] Plaintiff makes an additional argument before this Court. He alleges that his complaint sets forth a cause of action for ordinary negligence as well as for professional malpractice by defendant attorney. Plaintiff contends it was error for the trial court to instruct the jury that the terms negligence and malpractice are interchangeable, thereby depriving plaintiff of a cause of action for ordinary negligence and the benefit of the three-year period of limitations pursuant to MCL 600.5805(7); MSA 27A.5805(7).

We need not decide this issue since it is clear from the record that plaintiff's counsel failed to object to the trial court's instructions equating the terms malpractice and negligence. We follow the well-recognized rule that when objections to instructions are not timely made by trial counsel, the matter is not properly before appellate courts. *Goodwin v S A Healy Co,* 383 Mich 300, 305-306; 174 NW2d 755 (1970); *Hunt v Deming,* 375 Mich 581, 584-585; 134 NW2d 662 (1965).

within which an action charging legal malpractice must be brought is two years, we need not and do not decide whether actions against any professional groups, other than attorneys, are subject to the two-year period of limitations.

Judge CAVANAGH, who wrote the dissenting opinion in the Court of Appeals in this case, presented a thorough analysis of the legislative history of MCL 600.5805; MSA 27A.5805:

"The legislative history of malpractice actions also lends some support to the conclusion that the two-year limitations period applies.

"The common law permitted actions for legal malpractice as well as for medical malpractice. The Legislature very early provided that these actions could be initiated by civil arrest on the writ of *capias ad respondendum. The statute of limitations on these actions was six years.*

"These limitation periods were modified by the Judicature Act of 1915. That act provided a three-year period for '[a]ctions to recover damages for injuries to person or property'. 1915 CL 12323(2). A shorter, two-year period was provided for malpractice, but it was limited to the 'malpractice of physicians, surgeons or dentists'. 1915 CL 12323(3).

"These provisions remained unchanged until passage of the Revised Judicature Act in 1961. That act, quoted at the outset of this opinion [see MCL 600.5805(3); MSA 27A.5805(3) quoted above] dropped the language limiting the malpractice statute to physicians, surgeons or dentists. The general three-year statute for injuries to persons or property remained unchanged.

"The act, and parallel court rule revisions, also rewrote the procedures for initiation of malpractice suits. The writ of *capias ad respondendum* was abolished, all suits were to be commenced by filing a complaint, and summons succeeded *capias* as the process to be served on the defendant. The statute authorizing use of *capias* for initiation of a malpractice suit was repealed with abolition of the writ, leaving the common law as the

exclusive source for rights of action for legal and medical malpractice.

"Viewing these several revisions as an interrelated whole, it might reasonably be inferred that the abolition of the special procedures for malpractice suits, and the apparent broadening of the medical malpractice statute of limitations, were parts of a general plan for simplification and consolidation of the laws relating to the malpractice of both professions. This interpretation is strengthened by the simultaneous revision of the statute authorizing malpractice actions against charlatans, which was extended to include actions 'against any person professing or holding himself out to be a member of a state licensed profession'." (Footnotes omitted.) 85 Mich App 20, 25-27; 270 NW2d 522 (1978).

We agree that the legislative history of the provision in question, particularly including the omission of the language of limitation "of physicians, surgeons or dentists" from the two-year limitation period for actions sounding in malpractice, is strong support for the proposition that the two-year limit of MCL 600.5805(3); MSA 27A.5805(3) applies to both medical and legal malpractice.

More importantly, however, settled rules of statutory construction unmistakably confirm the fact that actions charging attorney malpractice are subject to the two-year period of limitation.

In *Jones v Grand Ledge Public Schools,* 349 Mich 1, 9; 84 NW2d 327 (1957), this Court, in quoting Justice COOLEY from the early case of *People ex rel Twitchell v Blodgett,* 13 Mich 127 (1865), reiterated the foremost rule of statutory construction:

" 'There are certain well-settled rules for the construction of statutes, which no court can safely disregard. Where the statute is plain and unambiguous in its

terms, the courts have nothing to do but to obey it. They may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern.' "

It is clear that we are dealing with a statute whose language is plain and unambiguous on its face. MCL 600.5805(3); MSA 27A.5805(3) states that actions charging malpractice shall be brought within two years. Undoubtedly relying on that plain language, several Court of Appeals decisions[7] and a legal commentator[8] have concluded that the two-year statutory provision is applicable to actions charging legal malpractice. We reach the same conclusion. Once a statute has been declared unambiguous on its face, there is no room for further construction; legislative intent must be gleaned from the clear and explicit words of the statute.[9]

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[7] See *Corley v Logan,* 35 Mich App 199, 202; 192 NW2d 319 (1971); *Basic Food Industries, Inc v Travis, Warren, Nayer & Burgoyne,* 60 Mich App 492, 495; 231 NW2d 466 (1975); *Berry v Zisman,* 70 Mich App 376, 378; 245 NW2d 758 (1976). In *Biberstine v Woodworth,* 81 Mich App 705, 707; 265 NW2d 797 (1978), *aff'd* 406 Mich 275, 276; 278 NW2d 41 (1979), both parties agreed the applicable statute of limitations was two years for legal malpractice.

[8] See Peters, *Legal Malpractice—An Analysis of Michigan Appellate Cases,* 57 MSBJ 367, 369 (1978).

In 73 Am Jur 2d, Statutes, § 163, pp 367-368, it has been stated:

"A construction of a statute acted on generally by the bar of the state for many years is entitled to consideration. Indeed, there are cases in which the meaning publicly given a statute by long professional usage has been presumed to be the true one, and regarded as one which should not be lightly changed."

See *Biberstine v Woodworth, supra.*

[9] This is often referred to as the plain meaning rule. This Court, in *Lansing v Lansing Twp,* 356 Mich 641, 649; 97 NW2d 804 (1959), explained the rule as follows:

"The express wording of the statute in this case does not fall within the above provisions so as to justify judicial interpretation. Certainly

We observe, however, that the word malpractice, as it is used in MCL 600.5805(3); MSA 27A.5805(3), although clear and explicit, is nowhere defined in the Revised Judicature Act. Plaintiff urges this Court to adopt the definition of malpractice used in *Kambas v St Joseph's Mercy Hospital of Detroit,* 389 Mich 249; 205 NW2d 431 (1973). In *Kambas,* the Court held that the two-year period of limitation for malpractice actions did not apply to a suit charging negligence of registered nurses in the performance of their professional duties. Instead, nurses were subject to the three-year limitation period embodied in MCL 600.5805(7); MSA 27A.5805(7). In defining malpractice for purposes of the statute of limitations, this Court relied on an opinion of the Ohio Supreme Court[10] that interpreted a similar malpractice statute of limitations. This Court found that the Legislature intended that malpractice would be defined according to the common-law definition of the term and thus only those groups traditionally liable for malpractice would be benefited by the two-year statute of limitations. Plaintiff contends that the common-law definition of malpractice in this state is negligent performance of a physician or surgeon in his or her professional duties.

Relying on two other provisions of the Revised Judicature Act, MCL 600.5838; MSA 27A.5838, and MCL 600.2912; MSA 27A.2912, amicus submits that malpractice, as it is used in MCL 600.5805(3); MSA 27A.5805(3), applies to any member of a state-licensed profession.

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it is plain, unambiguous and not subject to different interpretations by 2 reasonable minds. It is clear, definite, and would be easily understood by even those not trained in the law. The language of this statute, therefore, leaves no room for judicial construction."

See, also, 73 Am Jur 2d, Statutes, § 194, p 392, and 2A Sutherland, Statutory Construction (4th ed), ch 46.

[10] *Richardson v Doe,* 176 Ohio St 370; 199 NE2d 878 (1964).

As indicated, we need not decide at this time whether the malpractice statute of limitations applies to all members of state-licensed professions. However, we agree that the Court was correct in *Kambas, supra,* in its observation that the Revised Judicature Act does not define malpractice.[11] Accordingly, we conclude that reliance on other sections of the Revised Judicature Act for a definition of malpractice for purposes of § 5805(3) is erroneous.

MCL 600.5838; MSA 27A.5838,[12] as it originally appeared in the Revised Judicature Act and at the time of trial in the instant case, was concerned with the time of accrual of malpractice actions brought against members of state-licensed professions. A cause of action for malpractice accrued at the time of the last treatment or service. 1975 PA 142 subsequently amended MCL 600.5838; MSA 27A.5838[13] to provide that a malpractice cause of

[11] *Kambas v St Joseph's Hospital of Detroit,* 389 Mich 249, 253; 205 NW2d 431 (1973).

[12] MCL 600.5838; MSA 27A.5838 provided:

"A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose."

[13] MCL 600.5838; MSA 27A.5838 as amended by 1975 PA 142 provides:

"(1) A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession, intern, resident, registered nurse, licensed practical nurse, registered physical therapist, clinical laboratory technologist, inhalation therapist, certified registered nurse anesthetist, X-ray technician, hospital, licensed health care facility, employee or agent of a hospital or licensed health care facility who is engaging in or otherwise assisting in medical care and treatment, or any other state licensed health professional, accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

"(2) An action involving a claim based on malpractice may be

action may be commenced against one of the enumerated state-licensed health professionals[14] at the time of last treatment or within six months of discovery of the alleged malpractice. We are convinced that this amendment still pertains to accrual periods and does not define malpractice for purposes of the two-year statute of limitations. This view is fortified by the statement of legislative intent as it is set forth in the Analysis of the Senate Bill by the House of Representatives Analysis Section.[15]

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commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred."

[14] The majority opinion in the Court of Appeals concluded that the amendment to this section, by providing a cause of action in malpractice against nurses, was a legislative response to this Court's decision in *Kambas, supra*. While that may be so, we are more inclined to the view that this amendment is some evidence of the legislative intent that health care providers subject to liability for malpractice actions be not limited to physicians, surgeons or dentists. More importantly, however, it is clear that the amendment to § 5838 does not address itself to defining malpractice for purposes of the statute of limitations. See fn 15, *infra*.

[15] Section 5838, as amended by 1975 PA 142, was addressed solely at shortening the judicially created period of discovery so as to better enable medical malpractice insurers to determine their potential losses in a given premium year.

Michigan House of Representatives Analysis, Analysis of Senate Bill 227 (June 25, 1975), states in pertinent part:

"Some persons feel that legislation is needed which will place stricter limits on the time during which a malpractice action can be initiated against health care personnel. These persons believe that the current statutes, combined with certain court rulings, have contributed significantly to the high rates currently charged for malpractice insurance.

"Michigan has a 2-year statutory limit for the initiation of malpractice actions, commencing at the time at which the defendant discontinues treating the plaintiff with respect to the matters out of which the claim arises. However, the courts have rules that an action may be commenced within 2 years of the date upon which the plaintiff

Similarly, MCL 600.2912; MSA 27A.2912,[16] does not address itself to a definition of malpractice or identification of who may be sued for malpractice for purposes of the two-year statute of limitation. Instead, it is concerned with legislative decision that the impostor and the duly licensed professional be held to the same standard of care. This was explained by this Court in *Kambas, supra,* 253:

"Section 2912 addresses itself exclusively to the problem of the empiric. This pseudo-professional is subject to suit in malpractice and is to be held to the same standard of care as the licensed professional he misrepresents himself to be.

"That this is the only purpose of § 2912 is clear from the Committee Comment:

" 'The source section pertained only to physicians and surgeons. *Note that the broadening of this section does*

discovers, or in the reasonable exercise of diligence should have discovered, the alleged malpractice, even though this may result in the initiation of an action after the 2-year period following the discontinuance of treatment has elapsed. This rule is sometimes known as the 'discovery rule'.

* * *

"The bill would place some restrictions upon the time period during which an action based on malpractice could be initiated. Currently, as a result of certain court rulings, the 2-year statute of limitations on such actions begins to run either at the time when the defendant discontinues treatment of the plaintiff or when the plaintiff discovers or should have discovered his/her injury. The bill, however, would provide that an action must be initiated either within the 2-year period following the discontinuance of treatment or within 6 months after the discovery of the injury, whichever is later. The bill would therefore make it easier for insurers to determine their potential losses for a given premium year without violating the rights of injured patients who do not discover their injuries until after the period prescribed by the statute of limitations has elapsed."

[16] MCL 600.2912; MSA 27A.2912 provides:

"(1) A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession."

not create a new cause of action. Members of state licensed professions are liable for malpractice at common law, as are unlicensed persons. What this section does is hold the unlicensed person to the standard of care to which a member of the state licensed profession would be held, instead of to the standard of care of a layman, to which unlicensed persons are held at present.' (Emphasis added.)"[17]

In our view, there is a reasoned explanation for the fact that the Revised Judicature Act does not define malpractice. The RJA is remedial legislation[18] designed to set forth laws and a system of procedure for our courts.[19] In his treatise, Sutherland explains that a common characteristic of remedial statutes is that they affect procedural rights:

"An examination of the decisions shows that the courts have assumed that the term 'remedial' has a limited meaning which is in two respects: (1) Usually 'remedial' is used in connection with legislation which is not penal or criminal in nature, in that such laws do not impose criminal or other harsh penalties. (2) The term 'remedial' is also often employed to describe legis-

[17] See, also, *Leslie v Mollica,* 236 Mich 610, 612-613; 211 NW 267 (1926).

[18] MCL 600.102; MSA 27A.102 provides:

"This act is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof."

[19] The title to 1961 PA 236 provides as follows:

"AN ACT to revise and consolidate the statutes, relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, *practice and procedure in civil actions and proceedings in said courts;* to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act." (Emphasis supplied.)

See, also, Needham, Revised Judicature Act: Special Proceedings and Appeals (Ann Arbor: Institute of Continuing Legal Education, 1962).

lation which is procedural in nature in that it does not affect substantive rights." 3 Sutherland, Statutory Construction (4th ed), § 60.02, p 31. Accord: *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480, 484-485; 124 NW2d 286 (1963).

Moreover, this Court has previously declared that the RJA is legislation that affects procedural rights:

"We cannot accept the defendants' view. However desirable the stated objectives might be, it is doubted that such was the legislative purpose. The statute in question is the Revised Judicature Act. It was drawn, as defendants point out, by a distinguished committee of lawyers, known as the Joint Committee on Michigan Procedural Revision. The purpose of the act was to effect procedural improvements, not advance social, industrial or commercial policy in substantive areas." *Connelly v Paul Ruddy's Equipment Repair & Service Co,* 388 Mich 146, 151; 200 NW2d 70 (1972).

It follows then that since the Revised Judicature Act was addressed to procedural reform, substantive rights, such as the definition of malpractice and who may be sued for malpractice, are not defined by the RJA. Instead, the definition of malpractice and liability therefor are to be determined by resort to the common law.

We disagree with plaintiff's contention that the common-law definition of malpractice in this state is limited to the negligent performance of professional duties by a physician or surgeon. There is authority to the contrary in this jurisdiction. Implicit recognition of a common-law cause of action for legal malpractice may be found in *Dean v Radford,* 141 Mich 36; 104 NW 329 (1905), and *In the Matter of Mills, an Attorney,* 1 Mich 392

(1850).[20] Thus, although legal malpractice actions were far less prevalent at common law than medical malpractice actions, this Court long ago recognized a common-law cause of action for legal malpractice. Following the rule that words employed by the Legislature derive their meaning from the common-law usage at the time of the passage of the act, *Allison v Smith,* 16 Mich 405, 433 (1868); *Equitable Trust Co v Milton Realty Co,* 261 Mich 571, 575; 246 NW2d 500 (1933), since actions alleging legal malpractice were recognized at the time of the enactment of the Judicature Act of 1915 and at the time of the Revised Judicature Act of 1961, it follows that a cause of action sounding in legal malpractice is encompassed within the definition of malpractice as used in MCL 600.5805(3); MSA 27A.5805(3). Stated syllogistically, since all malpractice actions are subject to a two-year statute of limitation and a legal malpractice action is a malpractice action, it follows that a legal malpractice action is subject to a two-year statute of limitation.

This conclusion is consistent with the committee comment to § 2912[21] which states that the liability

[20] As Judge CAVANAGH in his dissent below said:

"The word 'malpractice' has long been used to describe an attorney's misfeasance or nonfeasance of professional duty. This was ordinary usage at common law. See *National Savings Bank v Ward,* 100 US 195, 198; 25 L Ed 621, 622 (1879). Our statutes have likewise long employed this term (see, *e.g.,* 1857 CL 4016 ['Any Attorney, Solicitor or Counsellor, may be removed or suspended, who shall be guilty of any deceit, malpractice, crime or misdemeanor * * *'], as have the decisions of our Supreme Court. See *In the Matter of Mills, an Attorney,* 1 Mich 392, 393-394 (1850)." 85 Mich App 24, fn 1.

[21] See 33 MCLA, § 600.2912, Committee Comment, p 659, which states the following:

"The source section pertained only to physicians and surgeons. Note that *the broadening of this section does not create a new cause of action. Members of state licensed professions are liable for malpractice at common law,* as are unlicensed persons. What this section does is to hold the unlicensed person to the standard of care to which a member of the state licensed profession would be held, instead of to

for malpractice of members of state-licensed professions[22] is to be determined by resort to the common law. Accordingly, the provisions of the RJA do not purport to create or limit the cause of action of malpractice to something other than what was recognized at common law.

This Court followed the same analytical approach in *Kambas, supra,* by utilizing the common-law definition of malpractice to determine if nurses could be sued for malpractice and therefore be subject to a two-year period of limitation. The plaintiff argues, however, that since this Court found that nurses could not be sued for malpractice at common law and were thus subject to the three-year period of limitations, *Kambas*[23] is authority for the proposition that the Legislature intended to extend the benefit of the two-year malpractice period of limitation only to those professions encompassed in the Judicature Act of 1915, to wit, physicians, surgeons and dentists. We refer plaintiff to Judge CAVANAGH's response[24] to

the standard of care of a layman, to which unlicensed persons are held at present." (Emphasis supplied.)

[22] Attorneys may properly be considered members of a state-licensed profession. See MCL 600.901; MSA 27A.901 and State Bar Rule 2 and 3(a).

[23] Plaintiff relies on the following language from *Kambas:*

"The defendant's suggestion that the action of the Legislature in enacting §§ 2912 and 5838, using the words 'a member of a state licensed profession,' indicated an intent to extend the benefit of the short malpractice limitation of § 5805 to additional professions other than those originally encompassed by the Judicature Act of 1915 is unfounded." 389 Mich 254.

[24] "Plaintiff cites this language [see fn 23 *supra]* as establishing that legal malpractice, which was not within the purview of the 1915 malpractice statute, is likewise outside its successor. There are, however, several reasons to question plaintiff's reading of *Kambas.*

"First, the issue before the Court in *Kambas* was whether the statute applied to nurses, not whether it applied to attorneys. Therefore the quoted language cannot be taken as a holding that attorneys are without the statute. Although the Court did address itself to legislative history and the purpose behind the Judicature Act's revisions, it might well have used less sweeping language had it consid-

this argument in his opinion below to which response we subscribe. Moreover, the approach taken by the *Kambas* Court is entirely consistent with the approach taken herein. By looking to the common law, the Court found that nurses could not be sued for malpractice at common law and were thus subject to a three-year negligence period of limitation. In contrast, we find that attorneys were and continue to be liable for their malpractice at common law and thus are subject to the two-year malpractice period of limitation.

By examining the clear and explicit language of MCL 600.5805(3); MSA 27A.5805(3), to wit, "actions charging malpractice", to determine the legislative intent and meaning of those words, we conclude that legal malpractice is encompassed within the term malpractice as it is used in MCL 600.5805(3); MSA 27A.5805(3).

III

While we think there is no need to look beyond the plain meaning of the language of MCL 600.5805(3); MSA 27A.5805(3) to warrant the conclusion we reach,[25] because the plaintiff's argument

ered the history of legal malpractice actions and their place in the revised statutory scheme.

"Second, the *Kambas* analysis which produced the conclusion that nurses are not covered by the short malpractice statute yields a different result when applied to attorneys. *Unlike nurses, attorneys were and continue to be liable at common law for their malpractice.* Like physicians, attorneys are required to exercise independent judgment as to what course of action will best serve their clients' interests.

"Finally, Ohio, whose approach to the *Kambas* issue our Supreme Court found so 'persuasively appropriate', applies its short malpractice statute to actions against attorneys. *Galloway v Hood,* 69 Ohio App 278; 43 NE2d 631 (1941)." (Emphasis supplied.) 85 Mich App 28-29.

[25] In *Lansing v Lansing Twp, supra,* 649, this Court said:

"A statute is not open to construction as a matter of course, but

rests so heavily upon interpretation and construction of the statute in question and in view of the precedent-making character of our decision, we turn now to construe the statute in question, employing familiar extrinsic aids.

A

Plaintiff contends that since the Revised Judicature Act is merely a general revision of the Judicature Act of 1915, this Court should observe the rule of statutory construction that declares that where statutes are revised, a mere change in phraseology, or the addition or omission of words, does not operate to change the meaning of the revised statute unless there is a clear and unmistakable intent by the Legislature to make a change. Applying this rule, plaintiff argues that since there is no clear expression of intent to vary the meaning, § 5805(3) of the RJA should have the same meaning as its predecessor, the Judicature Act of 1915,[26] that provided that actions "for malpractice of physicians, surgeons or dentists" shall be brought within two years. He argues that although § 5805(3) states that "[t]he period of limitations is two years for actions charging malpractice", it should have the same meaning as the Judicature Act and therefore the two-year period only applies to malpractice actions brought against physicians, surgeons or dentists. Plaintiff submits

only where the language used in the statute requires interpretation—where it is ambiguous or where 2 or more constructions can be placed upon it, where it is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. 'A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity.' 50 Am Jur, Statutes, § 225, p 207."

[26] 1915 PA 314.

that in contrast to § 5805, two instances of specific legislative intent to broaden the definition of malpractice may be found in § 5838 and § 2912 which were amended to include language incorporating the term state-licensed professional.

Amicus counters that the 1961 legislative revision of the Judicature Act removing the words, "physicians, surgeons, or dentists" from the present statute manifested an intent to change and broaden the definition of malpractice. Amicus cites authority for the proposition that when the Legislature amends a statute, and particularly when it does so with a comprehensive amendment, there is a presumption of an intent to change the law.

We cannot agree with plaintiff's argument.[27] We

[27] Plaintiff relies on two cases that concern rules of construction with respect to revised statutes. Plaintiff cites *State ex rel Johnson v Broderick,* 75 ND 340, 368-369; 27 NW2d 849, 864 (1947), for the following rule of construction:

" 'A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. Usually a revision of statutes simply iterates the former declaration of legislative will. No presumption arises from changes of this character that the revisers or the legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears.' 59 CJ, pp 894, 895."

A comparison between the former statute and the later revision in *Broderick* reveals only minor phraseology and punctuation changes in the latter. The revision is thus consistent with the above cited rule of statutory construction.

Similarly, in *United States v Thompson,* 319 F2d 665 (CA 2, 1963), the court held the change in wording from "trial of any criminal action" to "criminal proceeding" did not effect a change in meaning where the reviser's notes expressly stated that any changes other than those specifically mentioned were only changes in phraseology.

We refer plaintiff to the title of 1961 PA 236, fn 19 *supra,* which includes an express repeal of all acts inconsistent with the RJA. See, also, *People v Gould,* 345 Ill 288, 312; 178 NE 133, 144 (1931), wherein the court stated the following:

"A revision of the law on any subject is a re-statement of the law on that subject in a correlated or improved form, which is intended as a substitute for the law as previously stated and displaces and repeals

find that the deletion of the words "physicians, surgeons or dentists" was the purposeful removal from the statute of language of limitation and is a clear and specific indication of legislative intent to change substantively the meaning of MCL 600.5805(3); MSA 27A.5805(3).[28]

73 Am Jur 2d, Statutes, § 237, p 418, states:

"The omission of a word in the amendment of a statute will be assumed to have been intentional. Where it is apparent that substantive portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, because that would in effect be the enactment of substantive law."[29]

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the former laws relating to the same subject and within the purview of the revising statute. It implies a re-examination of the law, and where a later statute covers the whole subject matter of a previous statute or previous statutes and embraces new provisions which plainly show that it was intended as a substitute for the first, the later statute will operate as a repeal of the former statute or statutes even though not in all respects repugnant to them."

[28] We view the omission of the words "physicians, surgeons or dentists" as removing words that would otherwise limit the scope of the common-law definition of malpractice. It is erroneous to assume that the omission of three nouns from the statute thereafter broadens the definition of malpractice to encompass every conceivable state-licensed profession. Instead, the actions of the Legislature in omitting the words "physicians, surgeons or dentists" evidences an intent to extend the benefit of the two-year malpractice statute of limitations to those groups that could otherwise be sued for malpractice at common law. This conclusion is supported by the fact that the RJA is a statute affecting procedural rights; substantive rights are determined by the common law. *Connelly v Paul Ruddy's Co, supra.* See, also, *Equitable Trust Co v Milton Realty Co, supra,* wherein the Court stated:

"In *People v Covelesky,* 217 Mich 90, 100 [185 NW 770 (1921)], it was said:

" 'A well-recognized rule for construction of statutes is that when words are adopted having a settled, definite, and well-known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown.' "

[29] Revisions are encompassed within the broad terms, amendatory acts or amendments. See 1A Sutherland, Statutory Construction (4th

This is consistent with the rule of statutory construction stated in 1A Sutherland, Statutory Construction (4th ed), § 22.30, p 178, that "any material change in the language of the original act is presumed to indicate a change in legal rights".[30] As a rule, courts look to the circumstances surrounding the enactment to determine if the presumption can be fairly supported. 1A Sutherland, *supra,* p 179. It is our view that the circumstances surrounding the enactment of § 5805(3) of the Revised Judicature Act further buttress the conclusion that the omission was intentional and reflects a change in legal rights.

The malpractice period of limitations was first enacted in a statute entitled "Of the limitations of

ed), § 22.01, p 105. Therefore, all references to amendments are equally applicable to revisions.

This Court has said the following with respect to omissions:

"The provision not re-enacted was the only one in the entire act which authorized and fixed a primary election of city officers in Grand Rapids. It is not the province of the court to inquire why the legislature struck such provision out of the law. It is the province of the court to construe the legislative enactment. There is now no provision in this law for holding such primaries." *Ellis v Boer,* 150 Mich 452, 455; 114 NW 239 (1907).

"The legislature has not seen fit to require the making of a report setting forth specifically the findings of fact on which the conclusion is based. *We may not read into the law a requirement that the law-making body has seen fit to omit."* (Emphasis supplied.) *In re Hurd-Marvin Drain,* 331 Mich 504, 509; 50 NW2d 143 (1951).

[30] In *Colonial Pipeline Co v Clayton,* 275 NC 215, 227; 166 SE2d 671, 679-680 (1969), the court said the following with respect to an amended statute that added two words:

"The fact that the legislature amended the definition of 'cost price' in 1967 to list cash discounts among the items not to be deducted when calculating actual cost is, nothing else appearing, a strong indication that the General Assembly considered such discounts deductible prior to the amendment. In case of an isolated, independent amendment to the tax law, as here, the presumption that a change in substance—not a clarification—was intended is fairly strong."

Similarly, the amendment omitting three words from the instant statutory provision fairly raises a presumption of a change in substance.

personal actions" in 1905.[31] As originally enacted, it provided that "all actions against physicians, surgeons and dentists for malpractice shall be commenced within two years". The language, "physicians, surgeons and dentists", which limited the class of defendants who were protected by the short two-year limitation period remained through eight subsequent amendments[32] until the passage of the Revised Judicature Act in 1961. At that time, the Legislature saw fit to omit this language, thereby making all actions that sound in malpractice subject to a two-year bar. In light of the long history during which this language remained unchanged,[33] we regard this deletion in the RJA as an intentional effort by the Legislature to effect a change in legal rights.

Moreover, there is a reasoned explanation for the 1961 omission of the language, "physicians, surgeons or dentists" from the malpractice statute of limitations that further supports the position that this change was intentional.

In the early 1900's, when the malpractice period of limitations was first enacted, there were some, albeit very few, malpractice actions brought against attorneys. Medical malpractice actions were far more prevalent, which explains the protection given to physicians, surgeons and dentists in the early statutes of limitations. In most recent times, however, attorneys have fared less well in eluding the net of malpractice liability. By the middle of this century, malpractice actions against attorneys became more frequent. The increased

[31] 1905 PA 168.

[32] See 34 MCLA, § 600.5805, Historical Note, p 822.

[33] A minor change was made in 1915. "[P]hysicians, surgeons and dentists" was amended to read "physicians, surgeons or dentists". 1915 PA 314, ch 9, § 13. We attach no significance to what was manifestly a stylistic, nonsubstantive amendment.

number of malpractice actions against attorneys and other groups in more recent times logically explains the 1961 legislative action in deleting the language, "physicians, surgeons or dentists" from the malpractice statute of limitations. Thus, the historic circumstances surrounding the enactment of MCL 600.5805(3); MSA 27A.5805(3) strongly support the presumption that the omission was a material change in the language reflecting the legislative intent to effect a change in legal rights.

B

Plaintiff, relying on the dissenting opinion in *Kambas v St Joseph's Mercy Hospital,* 33 Mich App 127; 189 NW2d 879 (1971), points to the committee note for § 5805, written by the Joint Committee on Michigan Procedural Revision which drafted the RJA, as expressing the true intent of the Legislature in drafting this section:

"Section 5805 is a compilation of the limitations on the *general tort remedies.* Existing time periods have been used."[34] (Emphasis supplied.)

Plaintiff argues that § 5805 was simply a compilation of the existing periods of limitation from the Judicature Act of 1915. Since the Judicature Act provided a two-year period of limitation for malpractice of "physicians, surgeons or dentists", and a three-year period for malpractice actions against others, malpractice as it is used in § 5805 of the RJA means malpractice of physicians, surgeons or dentists.

We do not agree with this interpretation of the committee comment. The committee comment fo-

[34] 34 MCLA, § 600.5805, Committee Comment, p 822.

cuses on the general tort remedies. Of the nine[35] torts enumerated in § 5805 of the RJA, all have retained the same period of limitation as may be found in the source sections.[36] Thus the limitation periods under the RJA for actions charging, for example, assault, battery or malpractice, have not changed from the former statute and continue to be two years. The committee comment is not directed at the status of the parties; it does not say that existing time periods have been retained for certain groups of persons who may be sued for these general tort remedies. The general tort remedy sounding in malpractice may be referred to categorically and apart from the potential parties for purposes of stating the applicable period of limitations.[37] Thus, we find the committee comment, as an expression of legislative intent, quite consistent with the position that the Legislature intended to alter the meaning of § 5805(3) by omitting the words "physicians, surgeons or dentists" from the malpractice statute of limitations.

We note in passing an excerpt from the Michigan State Bar Joint Committee on Michigan Procedural Revision—Final Report, Part I, Committee Report and Recommendations (1960), p 19:

"After the draft of each [statute] in this report is a

[35] We count the tort actions against sheriffs and constables as each being one cause of action.

[36] The source section is 1948 CL 609.13 for all actions except those which may be brought against constables, which is 1948 CL 41.81.

[37] See Needham, Revised Judicature Act: Special Proceedings and Appeals (ICLE, 1962), § 13.410, p 557, wherein the author lists periods of limitation for various remedies, including malpractice. We note no indication that members of the medical profession are to be subject to a different period of limitation than are members of the legal profession.

"Malpractice: 2 years, RJA § [5805(3)]; accrues on discontinuance of treatment or service as to matters out of which claim arose, RJA § 5838."

statement by the committee pointing [out its source and] significance. However, *the language of each of the [statutes] must be examined to determine its meaning and effect.* The following is a brief description of some of the changes that will be of value to litigants." (Emphasis supplied.)

Plaintiff would have this Court interpret the committee comment and the statutory provision in question to reach a result that is inconsistent with the plain wording of the statutory language.[38] We decline to follow that course.

C

One final and persuasive reason for finding that the two-year period of limitation applies to malpractice actions brought against attorneys as well as against physicians is that it is consistent with considerations of public policy.

"Considerations having to do with public policy exert a significant influence in the process of statutory interpretation since the tendency of the courts has always been to favor interpretations which are consistent with public policy." 2A Sutherland, *supra,* § 56.01, p 401.

An attorney is called upon by his or her profession to make decisions that involve the exercise of independent professional judgment of essentially the same serious quality as those made by a physician, albeit involving a different expertise. *Cf.*

[38] 73 Am Jur 2d, Statutes, § 330, pp 474-475, states the following:

"The announced object or report of a legislative commission appointed for the purpose of investigating the laws generally, or the laws on a specified subject, and of recommending any desirable changes, may be taken into consideration for the purpose of determining the meaning of statutes submitted by them to, and adopted by, the legislature. *Such report, however, is not controlling, and the rule does not prevail where the language used in the statute is clear and unambiguous:"* (Emphasis supplied.)

Kambas, supra, 389 Mich 255-256. In our view, attorneys are deserving of the same protection afforded physicians, surgeons and dentists by the two-year malpractice period of limitations embodied in MCL 600.5805(3); MSA 27A.5805(3).

Affirmed.

COLEMAN, C.J., and WILLIAMS and FITZGERALD, JJ., concurred with RYAN, J.

BLAIR MOODY, JR., J. *(concurring).* I concur with much of the analysis employed and the conclusion reached in Justice RYAN'S opinion that actions charging malpractice against attorneys fall within the two-year malpractice statute of limitation. MCL 600.5805(3); MSA 27A.5805(3).

The legislative history, particularly the excision of the limiting phrase "physicians, surgeons or dentists" from the two-year malpractice statute of limitation, lends substantial force to the conclusion that the Legislature intended to broaden the applicability of this provision. The fact that the committee comment to § 5805 states, "[e]xisting time periods have been used", appears to mean only that the malpractice limitation period remains the same. This comment does not reflect a legislative intention to define or restrict the type of action that may constitute "malpractice" for purposes of applying the malpractice statute of limitation.

The only issue presented for resolution in the instant case is whether actions charging malpractice against attorneys fall within the malpractice limitation period. It is a majority's understanding that the Legislature intended to broaden the class of malpractice actions subject to § 5805(3) beyond malpractice actions against physicians, surgeons or dentists. At the time the Revised Judicature Act

was enacted and at the present time, attorneys were and are subject to liability for malpractice under the common law. In *addition,* attorneys are professionals who must be licensed[1] as one prerequisite to practicing their profession.

Since it is clear that attorneys were and are subject to liability for malpractice at common law it is therefore unnecessary in this case to conclusively construe the effect of other sections of the RJA, particularly MCL 600.2912; MSA 27A.2912 and MCL 600.5838; MSA 27A.5838, and thus implicitly decide whether the malpractice statute of limitation applies to actions against members of *all* state-licensed professions. Further consideration of § 2912 and § 5838 may be helpful in future cases in ascertaining the Legislature's intent concerning the scope of § 5805(3) and its application to actions against members of other state-licensed professions. Accordingly, I would affirm the judgment of the Court of Appeals.

LEVIN, J. This case presents the question whether an action alleging legal malpractice is governed by the two-year period of limitation "for actions charging malpractice", MCL 600.5805(3); MSA 27A.5805(3), or by the general three-year period of limitation "for all other actions to recover damages for injuries to persons and property". MCL 600.5805(7); MSA 27A.5805(7).

The Judicature Act of 1915 expressly limited the shorter malpractice period of limitation to actions charging "malpractice of physicians, surgeons or dentists". 1915 PA 314. As part of the general revision and consolidation which culminated in the Revised Judicature Act of 1961, the language of this provision was changed to state, "[t]he period

[1] See, *e.g.,* MCL 600.901 *et seq.;* MSA 27A.901 *et seq.*

of limitations is 2 years for actions charging malpractice".

The revisors who drafted the act explained in their comments to § 5805, of which this provision is a part, that "[s]ection 5805 is a compilation of the limitations on the general tort remedies. *Existing time periods have been used".*

The question whether the omission of the "physicians, surgeons or dentists" language was intended to expand the applicability of the shorter malpractice period to other actions alleging malpractice was before this Court in *Kambas v St Joseph's Mercy Hospital of Detroit,* 389 Mich 249, 253-254; 205 NW2d 431 (1973). In *Kambas,* the Court concluded that the revision had not expanded the application of the malpractice limitation to nurses, and, thus, that actions alleging malpractice of registered nurses were subject to the general three-year period of limitation rather than the two-year period for malpractice. The Court said:

> "If it had been the intent of the Legislature to broaden the malpractice limitation, clearly they should have set forth a definition of malpractice."

The Court also said, in apparent recognition of the revisors' comment to § 5805:

> "Section 5805 is nothing more than a compilation of existing limitations with no change in time periods."

Although the majority in the instant case maintains otherwise, it appears inescapable to me that by broadening the malpractice limitation to include actions charging legal malpractice the Court has departed from the construction of § 5805(3) indicated in *Kambas* and has, without an adequate

or workable basis for distinction, granted to lawyers what was withheld from nurses. Having extended the benefit of the shorter malpractice limitation period to members of the legal profession, it will be difficult to explain a refusal to extend it to other professions.

I dissent not only because I continue to be persuaded[1] that the legislative history of the Revised Judicature Act of 1961 indicates that the change in language was an effort to simplify the statute rather than to expand the application of the shorter malpractice limitation period, but also because of the uncertainty created by the construction adopted by the majority in place of the construction indicated in *Kambas.* I would hold that the Revised Judicature Act of 1961 did not change the substantive application of the malpractice period of limitation and therefore, as in *Kambas,* that it does not apply to professionals other than physicians, surgeons and dentists.

I

The majority concludes that the applicability of the malpractice limitation is to be determined according to whether an action for the negligence of a professional was considered a "malpractice" action by the common law. This means, in effect, that the applicability of the two-year or three-year limitation period will henceforth depend on whether statutes or reported cases can be found which characterize an action for negligence in the conduct of the profession involved as a "malpractice" action. This construction gives talismanic significance to whether the term "malpractice" was used in prior reported decisions and statutes

[1] *Kambas v St Joseph's Mercy Hospital of Detroit,* 33 Mich App 127, 132; 189 NW2d 879 (1971) (LEVIN, J., dissenting).

to describe an action for the negligence of a professional. No substantive distinction among such actions is implied by the use of the term; to apply the malpractice limitation period to a given profession according to whether an action against a member of that profession was called a "malpractice" action in a judicial opinion before 1961 gives controlling significance to terminology rather than to substance.

Indeed, since the use of the term before today implied no substantive distinction among actions for negligence in the practice of different professions, whether the term was used in an old case or statute may have turned on no more than the writing style of the author. At least it may be said that, since lawyers will now need to research only words, not concepts, preparation for argument on the applicability of the malpractice limitation period to a particular profession has been simplified to a battle between Lexis operators.

The majority's construction has the effect of rendering uncertain the period of limitation applicable to any given profession. After today, only members of the legal and medical professions (including nurses) can know with confidence which period applies until a court, and probably not until this Court, has searched reported decisions, treatises and statutes relating to actions for the negligent practice of that profession to ascertain whether the word "malpractice" has been used with regard to it with sufficient frequency for the Court to conclude that such an action was considered a "malpractice" action at common law.

The majority's construction may also result in the application of the malpractice limitation period far beyond what could reasonably have been intended by the Legislature. Even a cursory review

of case law reveals that "malpractice" has been used to refer to the improper professional conduct of such varied professionals as embalmers and funeral directors,[2] barbers,[3] veterinarians,[4] optometrists,[5] and, in the context of "malpractice in office", county commissioners[6] and even judges.[7]

Moreover, while the Court states that it does not now decide whether actions against professionals other than attorneys are subject to the two-year malpractice limitation period, the Court provides no indication of a rationale for limiting the application of its construction. If, in the course of the profession-by-profession assessment by the courts of whether actions for the negligent practice of the profession were denominated "malpractice" actions in the common law, a generic common-law definition of malpractice is evolved (see Black's Law Dictionary [4th ed], p 1111: "[malpractice is a]ny professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct"), it will be difficult to distinguish on a principled basis between physicians and lawyers, on the one hand, and such professionals as accountants, chiropractors, psychologists and architects, on the other. (In this connection we note that this Court has said: "[T]he responsibility of an architect does not differ from that of a lawyer or physician." *Bayne v Everham,* 197 Mich 181, 199-200; 163 NW 1002 [1917]).

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[2] *Boydston v State,* 277 P2d 138 (Okla, 1954).

[3] *Turner v Bennett,* 108 SW2d 967 (Tex Civ App, 1937).

[4] *In the Matter of the Suspension or Revocation of the License of Raymond Kerlin, DVM,* 151 NJ Super 179; 376 A2d 939 (1977).

[5] *Kime v Aetna Casualty & Surety Co,* 66 Ohio App 277; 33 NE2d 1008 (1940).

[6] *Cargile v State,* 194 Ga 20; 20 SE2d 416 (1942).

[7] *In re Inquiry Concerning a Judge No 53, Linwood T Peoples,* 296 NC 109; 250 SE2d 890 (1978).

If there is a difference between malpractice actions and ordinary negligence actions it is that, since the former involves negligence in the practice of a profession, the applicable standard of care is that of a reasonable member of the profession rather than of a reasonable layman. If the Court's construction has the effect of extending the malpractice limitation period to all professionals of whom a higher standard of care is required, then it will be difficult to explain why the Revised Judicature Act of 1961 did not extend the malpractice limitation period to all state-licensed professionals.[8]

If the shorter malpractice limitation period applies to all state-licensed professions, then it applies not only to physicians and lawyers but also, for example, to taxidermists, foresters, surveyors, contractors, landscape architects and community planners. If that is to be the course of adjudication of § 5805(3), *Kambas* should be openly overruled. Otherwise, nothing will be left of the *Kambas* decision save that nurses, alone among state-licensed professionals, will be denied the benefit of the shorter malpractice limitation period.

Perhaps the Court is of the opinion that case-by-case adjudication of whether actions for the negligent practice of various professions were known by the common law as "malpractice" actions will eventually produce a reasonable limitation of its construction. It is contrary to the purposes of the

[8] The act expanded the coverage of MCL 600.2912; MSA 27A.2912, which holds a pseudo-professional to the standard of care required of the profession to which he pretends, beyond physicians and surgeons to all state-licensed professions, indicating that the practice of all state-licensed professions requires a higher standard of care than is required of laymen. As the committee comment to § 2912 notes:

"What this section does is hold the unlicensed person to the standard of care to which a member of the state licensed profession would be held, instead of to the standard of care of a layman, to which unlicensed persons are held at present."

Revised Judicature Act of 1961, however, to create even such temporary disarray in the jurisprudence of the state. The purpose of the revision was to consolidate, simplify and clarify, not to create uncertainty.

I would adhere to the construction of § 5805(3) indicated in *Kambas*. Until the Legislature clearly expresses an intent to expand the application of the malpractice limitation period by specifying the types of "malpractice" to which it applies—and those to which it does not—that limitation applies only to the malpractice of physicians, surgeons and dentists.

II

The majority states that "[i]t is clear that we are dealing with a statute whose language is plain and unambiguous on its face", and that "[o]nce a statute has been declared unambiguous on its face, there is no room for further construction; legislative intent must be gleaned from the clear and explicit words of the statute". Thus, it is argued, there is no need to consider the legislative history of the act or other extrinsic aids to construction to ascertain the intended meaning of § 5805(3).

While it may be clear that the general meaning of malpractice is negligent or otherwise wrongful conduct in the practice of a profession, it should be evident from the preceding discussion that it is signally unclear whether the term "malpractice" was used in § 5805(3) to refer only to such negligent practice by the medical profession (which, especially in the late 1950's when the Revised Judicature Act was being drafted, had been and continues to be the most common meaning of the term), or to the malpractice of only physicians and lawyers, or to the malpractice of physicians, law-

yers and other state-licensed professionals (except nurses), or to the malpractice of members of any profession to which a standard of care higher than that of a layman is applied (except nurses).

This is the second case taken by this Court within the last ten years solely to resolve the meaning of this "plain and unambiguous" term.

The majority concludes that the term "malpractice" was intended to have the meaning given it by the common law. Such a construction does not rely exclusively on a facially clear meaning of the statute but, rather, uses the common law as an extrinsic aid in the construction of the term. Aside from the question of whether any aspect of the common law is clear and unambiguous, it is evident that the common law has not developed a clear definition of which actions for the negligent practice of a profession are "malpractice" actions. Given that an action is one for the negligent practice of a profession and thus that the applicable standard of care is that of a reasonable member of the profession rather than that of a reasonable layman,[9] the reason for the lack of definition is that nothing has heretofore hinged on whether an action was characterized as a "malpractice" action. It is thus not only unclear whether a particular negligence action is a "malpractice" action at common law, but it is also unclear whether the common law has ever addressed the question.

A court whose responsibility in applying statutes

[9] If the use of the "malpractice" label has signified no more than the applicability of the higher standard of care due from members of a profession, then actions against all professionals subject to a higher standard of care would have to be considered "malpractice" actions. Such a construction would not only result in a very broad extension in the applicability of the malpractice period of limitation, but would also be plainly inconsistent with *Kambas,* since nurses are subject to such a higher standard of care.

is to discern and effectuate the legislative intent may not justifiably ignore competent indicia of that intent. While it has been said that a court will enforce the plain and unambiguous meaning of a statute, the rationale underlying this statement is that in doing so the court will be giving effect to the legislative intent. The linguistic meaning apparent on the face of a statute will be given effect unless other indicia of legislative intent demonstrate with even greater clarity that a contrary meaning was intended. For a court to use the blinders of a self-imposed rule of statutory construction to shut out such indicia is to abdicate the court's responsibility to implement the legislative purpose.

III

The majority concludes that "the deletion of the words 'physicians, surgeons or dentists' was the purposeful removal from the statute of language of limitation and is a clear and specific indication of legislative intent to change substantively the meaning of MCL 600.5805(3); MSA 27A.5805(3)."

To be sure, had such a deletion occurred in the context of a specific amendment of the section and in the absence of evidence of a contrary intent, that would be a strong and perhaps conclusive argument. As a general rule, amendatory statutes are presumed to intend a change in the law, although even this general rule must be qualified in recognition that some amendments attempt only to clarify the original intent of the statute.[10]

Where the change in the language of a provision, however, occurs not in the context of a specific amendment but as part of a general and

[10] *Detroit Edison Co v Janosz,* 350 Mich 606; 87 NW2d 126 (1957).

comprehensive revision and consolidation of statutes into a code, as is the case here, the presumption is otherwise. The United States Supreme Court has said of linguistic and arrangement changes in the 1948 revision of the federal judicial code: " 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' " *Fourco Glass Co v Transmirra Products Corp,* 353 US 222, 227; 77 S Ct 787; 1 L Ed 2d 786 (1957), quoting *Anderson v Pacific Coast Steamship Co,* 225 US 187, 199; 32 S Ct 626; 56 L Ed 1047 (1912).[11] See, also, *Muniz v Hoffman,* 422 US 454; 95 S Ct 2178; 45 L Ed 2d 319 (1975) (revision of criminal code); *Tidewater Oil Co v United States,* 409 US 151; 93 S Ct 408; 34 L Ed 2d 375 (1972) (revision of judicial code); *United States v Ryder,* 110 US 729; 4 S Ct 196; 28 L Ed 308 (1884).

The difference in treatment of changes occurring in the context of general revisions and changes occasioned by specific amendments has been generally recognized:

"The presumption that obtains in the case of an amendment of a statute, that a departure from the law formerly existing is intended, has little, if any, force in the case of a general revision or codification of the laws of a state. Indeed, it is a settled rule of construction that where the entire legislation affecting a particular subject matter has undergone revision and consolidation by codification, the revised sections will be pre-

[11] In finding that the 1948 revisions did not substantively alter the law at issue in *Fourco,* the Court also relied on the expressions in both the Senate and House reports that the revisors' notes explained all changes, that the notes did not express any substantive change, and that "several of those having importantly to do with the revision say no change is to be presumed unless clearly expressed". *Fourco Glass Co v Transmirra Products Corp,* 353 US 222, 227-228; 77 S Ct 787; 1 L Ed 2d 786 (1957).

sumed to bear the same meaning as the original sections, and this is true notwithstanding that there is an alteration in phraseology or an omission or addition of words, for in such case the new language may properly be attributed to a desire to condense and simplify the law or to improve the phraseology." 73 Am Jur 2d, Statutes, § 325, p 472 (footnotes omitted).

This principle has been applied to find that a change through a statutory revision from "as provided in this act [article]" to "as provided in sections 76-403, 76-405 and 76-411" did not change the applicability of the altered provision to other sections of the act. *In re Estate of James,* 192 Neb 614; 223 NW2d 481 (1974). It has been applied to find that a change in a provision that had barred arbitration in a controversy where "one of the parties * * * is an infant" to bar arbitration in a controversy "involving an infant" was not intended to change the law so as to bar arbitration of a dispute over child support and maintenance. *Schneider v Schneider,* 17 NY2d 123; 269 NYS2d 107; 216 NE2d 318 (1966). It has been applied to find that the deletion of the phrase "of the Treasury" from a provision that a statute of limitations commenced running from the "statement of account * * * by the accounting officers [of the Treasury]" was not intended to make the statute commence running from the statement of account by any government accounting officer. *United States v Standard Accident Ins Co,* 280 F2d 445 (CA 1, 1960). It has been applied to find that a language change authorizing solitary imprisonment "for the purpose of discipline" rather than "as a prison discipline for the government and good order of the convicts" did not intend to preclude the use of solitary confinement solely for the purposes expressed in the deleted language: "for the govern-

ment and good order of the convicts". *Kelly v Brewer,* 239 NW2d 109 (Iowa, 1976). It has similarly been applied in many other cases.[12]

The reasons for the presumption regarding changes made in the course of a general revision and compilation of statutes is clear. Major purposes of such revisions are to organize, consolidate, simplify and modernize the language of various statutes pertaining to the same general subject matter without any change in the substantive meaning of the prior laws. The realization of such objectives necessarily requires some alterations in the arrangement and wording of the prior laws. Even where the revision is intended to effect some substantive changes, as was the Revised Judicature Act of 1961, it cannot be presumed that any given change was intended to be substantive rather than stylistic unless such intent has been clearly expressed.

This is particularly true where the revision is as broad in scope as the Revised Judicature Act of 1961, which dealt not only with statutes pertaining to the judiciary but also court rules. The committee report observed:

"Overlapping of the statutes and rules has been

[12] See, *e.g., Davis v Conour,* 178 Colo 376, 382; 497 P2d 1015, 1018 (1972); *Wood County v Board of Vocational, Technical & Adult Education,* 60 Wis 2d 606, 617-618; 211 NW2d 617 (1973); *Fargo v Annexation Review Comm of Cass County,* 148 NW2d 338, 348-349 (ND, 1966); *Mankato Citizens Telephone Co v Comm'r of Taxation,* 275 Minn 107; 145 NW2d 313 (1966); *People v Hobbs,* 35 Ill 2d 263; 220 NE2d 469 (1966); *Town Crier, Inc v Chief of Police of Weston,* 361 Mass 682, 686; 282 NE2d 379 (1972); *Ohio Dep't of Natural Resources v Sellers,* 14 Ohio App 2d 132, 138-139; 237 NE2d 328, 333 (1968); *Jefferson County Teachers Ass'n v Board of Education of Jefferson County,* 463 SW2d 627, 629 (Ky, 1970); *Briggs Drive, Inc v Moorehead,* 103 RI 555; 239 A2d 186 (1968); *Welch v Humphrey,* 200 Md 410; 90 A2d 686 (1952); *Town of Southington v Francis,* 159 Conn 64; 266 A2d 387 (1970); and 1A Sands, Sutherlands' Statutory Construction (4th ed), § 28.10, pp 327-328.

largely eliminated. * * * As a result there are *fourteen hundred fewer statute sections.* This is made possible by the elimination of approximately *nine hundred sections* because special or general provisions of the rules now cover the substance of these sections. *Five hundred other sections* have been consolidated to make the draft statute more clear, or have been dropped because of duplication with other general or special provisions in the statute." Michigan State Bar Joint Committee on Michigan Procedural Revision—Final Report, Part I, Committee Report and Recommendations (1960) ("Committee Report"), p 9, fn 8. (Emphasis supplied.)

When the Legislature is presented with the committee report on a revision of this scope, and where innumerable linguistic changes are intended merely to simplify and modernize without substantive effect, the Legislature cannot possibly give each change the consideration accorded proposed legislation in the ordinary course of legislative procedure.[13]

Given the scope of the revision and the nature of the changes, particular importance attaches to the revisors' comments directed to the Legislature, this Court and the Bar which called attention to and explained the nature of changes made by the revision. Where, as here, the committee comments did not call to the attention of the Legislature what would be, under the majority's construction, a major change in the law but instead said to the Legislature that no change in "time periods" had been made, it is unrealistic to assume that a deletion of language during the revision was intended to work that major change in the law. As

[13] *Briggs Drive, Inc v Moorehead, supra,* p 563. This Court has observed that the scope of codifications requires a somewhat different application of the title/object clause of the constitution (Const 1963, art 4, § 24). *People v Milton,* 393 Mich 234, 247-248; 224 NW2d 266 (1974); *Regents of University of Michigan v Pray,* 264 Mich 693, 697; 251 NW 348 (1933).

mentioned before, the committee comment accompanying § 5805 states, in full: "Section 5805 is a compilation of the limitations on the general tort remedies. Existing time periods have been used." Or, as expressed in *Kambas,* "[s]ection 5805 is nothing more than a compilation of existing limitations with no change in time periods."

It was thus explained to the Legislature, this Court and the Bar that § 5805 merely brought together in one section the various limitations on general tort remedies, without change in the applicable periods of limitation. To find that the section was nonetheless intended to change the time period applicable to actions for the malpractice of lawyers, and perhaps for the malpractice of other professionals, from three years to two years is to infer a change in the law contrary to what was explained to the Legislature.

Where the revision was intended to alter the scope of prior statutes regarding limitations on bringing actions, the committee took care to explain the change. Thus, as to the section on limitations applicable to mortgage foreclosures, the committee comment states:

> "Section 5803 is drawn from [1948 CL 609.12] but the second sentence of the statute extends its scope to cover the remedies of foreclosure by publication and other entries under the mortgage as well as foreclosure through the courts."

Similarly, the committee comment to § 5807 states:

> "Section 5807 states the periods of limitations relating to contract damage remedies and extends their application to actions for specific performance of contracts."

The committee comment to § 5823 states:

"Section 5823 broadens the scope of [1948 CL 609.27] by including the term 'counterclaim' to the extent of the plaintiff's proved claim."

Each of these changes, all of which the committee considered to merit highlighting and explanation, were accomplished by language changes far more significant and lucid than the deletion of "physicians, surgeons or dentists" from § 5805(3), which in the majority's view reflected a clear and unambiguous intent to effect a major change in the law. In § 5803, an entire sentence was added to effect the change. In § 5807, the phrase "or to enforce the specific performance of any contract" was used to expand the coverage of the section to actions for specific performance. In § 5823, the term "counterclaim" was substituted for "set-off" to broaden the scope of the section.

Since the committee took care to explain even changes which appeared so plainly from the language of the new sections, it would be natural for the Legislature to assume that a change as subtle as that which the majority concludes was made in § 5805(3) would have been highlighted in the comments. It is thus unlikely that the Legislature was even aware of the change in § 5805(3), which, since it involved only the deletion of language, would not have appeared from the new language but only from a comparison to the language of the old section.

The broadening of coverage of § 2912[14] and the committee comments thereon are of special significance. The source section for § 2912 applied only to physicians and surgeons, as the source section

[14] MCL 600.2912; MSA 27A.2912.

for § 5805(3) applied only to physicians, surgeons and dentists, and provided that the rules applicable to actions for malpractice against physicians and surgeons should also be applicable to actions against persons professing or holding themselves out to be physicians or surgeons. 1948 CL 620.29. This section was expanded to cover persons holding themselves out to be "member[s] of a state licensed profession".

Unlike the expansion the majority infers from the changes to § 5805(3), this expansion was clearly detailed in the committee comments to the section:

"The source section pertained only to physicians and surgeons. *Note that the broadening of this section* does not create a new cause of action." (Emphasis supplied.)

Moreover, this expansion of § 2912 was noted in the committee report as a major change from prior statutes. It was the only change in the statutes pertaining to malpractice that was so noted. Under the headings "Major Changes—Statutes", "Actions for malpractice", the committee report refers to § 2912 and states:

"At the present time a loophole exists in the action for malpractice. This has been plugged by providing that the standard of the profession will apply to persons professing to be members of the profession, even though they have not been duly licensed." Committee Report, p 28.

In two separate sections of the Revised Judicature Act of 1961 (§ 2912 and § 5838),[15] statutes

[15] MCL 600.2912; MSA 27A.2912; MCL 600.5838; MSA 27A.5838.

pertaining to malpractice were worded to cover professionals in addition to physicians, surgeons and dentists. This Court held in *Kambas,* and the majority in the instant case agrees, that these sections were not intended to alter the definition of "malpractice" in § 5805(3). It is, however, informative to observe that in each of these two sections, where coverage beyond physicians, surgeons and dentists was clearly intended, the revisors did not simply use the word "malpractice", as was done in § 5805(3), but instead used or added language to clarify the intended coverage: "a member of a state licensed profession". Had the revisors intended to similarly expand the applicability of § 5805(3), it is most likely that they would have used similar language.

Surely it is not material whether, as stated by the majority, "[i]n our view, attorneys are deserving of the same protection afforded physicians, surgeons and dentists by the two-year malpractice period of limitations". If it is to be the policy of Michigan to afford attorneys or other professionals the same protection as is afforded members of the medical profession (although not nurses), that policy should be expressed with clarity by the Legislature and not inferred by this Court from an unremarked compression in language during the course of a broad, general revision and consolidation of statutes.

We would adhere to the construction of § 5805(3) indicated in *Kambas:* the applicability of the malpractice limitation was not expanded beyond physicians, surgeons and dentists by the changes in language in the Revised Judicature Act of 1961.

We would reverse and remand for a new trial.

KAVANAGH, J., concurred with LEVIN, J.

PEOPLE v SAENZ

Docket No. 63565. Decided July 13, 1981. On request by the defendant for review of the record the Supreme Court, after response by the prosecutor to an order to show cause why the defendant's conviction should not be reversed, in lieu of granting leave to appeal, reversed the defendant's conviction of armed robbery and remanded for entry of a judgment of conviction of unarmed robbery and resentencing.

Richard A. Saenz was convicted by a jury in Washtenaw Circuit Court, Patrick J. Conlin, J., of armed robbery. The victim, who was a salesperson at a Fotomat store, testified that he thought that the defendant had a weapon of some kind under his coat when the defendant said "give me all the money in the register". At the close of the prosecution's case, the trial court denied the defendant's motion for a directed verdict of acquittal on the armed robbery charge. The Court of Appeals, Danhof, C.J., and V. J. Brennan and Carroll, JJ., affirmed in an unpublished per curiam opinion (Docket No. 77-5219). Defendant requests review of the record.

In a unanimous opinion the Supreme Court *held:*

The belief of the victim that the robber is armed must be induced by the use or fashion of "any article" with which the assailant is armed. Testimony that a defendant used his hand and a covering to resemble a gun has been held to raise a question for the jury whether the defendant was armed with an article used to induce the reasonable belief that it was a dangerous weapon, but such cases are inapposite because there is no such testimony in the record here. The victim's testimony here was that he *thought* the defendant had a weapon of some kind, but that he saw no article which resembled a weapon, or a bulge under the defendant's coat, or his hand shaped to look like a weapon. Such testimony cannot be the basis for a conviction of armed robbery.

Reversed and remanded for resentencing on a conviction of unarmed robbery.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,*

Prosecuting Attorney, and *David A. King,* Assistant Prosecuting Attorney, for the people.

Wm. Douglas Winters for defendant.

PER CURIAM. Defendant's conviction of armed robbery[1] was affirmed by the Court of Appeals. His brief raised three questions, only one of which persuaded us of merit. Accordingly we directed the prosecutor to show cause why the defendant's conviction should not be reversed because there was insufficient evidence that any article was used or fashioned so as to lead the victim to believe that it was a weapon.

Upon consideration of the prosecutor's response and the record of the trial testimony we reverse the defendant's armed robbery conviction and remand to the Washtenaw Circuit Court for entry of a judgment of conviction of unarmed robbery and for resentencing.

The armed robbery statute reads:

"Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or *any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon,* shall be guilty of a felony * * *." MCL 750.529; MSA 28.797.

At the close of the prosecution's case, the defendant's motion for a directed verdict on the armed robbery charge was denied. His theory was that there was no evidence that the defendant was armed with a dangerous weapon, or any article used or fashioned in a manner to lead the victim

[1] MCL 750.529; MSA 28.797.

to reasonably believe it to be a dangerous weapon. The only testimony relevant to this question was that of the victim. On direct examination, he described the circumstances leading up to the robbery:

"*A.* * * * I went over to the register and counted out the change. As I was handing him back the change, he says, 'Whil[e] you're at it, give me all the money in the register.'

"*Q.* Where did he have his hand, if anywhere?

"*A.* He was leaning on the outside ledge on his left elbow with his left hand inside the window.

"*Q.* Where was his right hand?

"*A.* His right hand was underneath his coat on the right side.

"*Q.* Could you stand up, please, and demonstrate to the Jury what you mean?

"*A.* Well, he was kind of leaning like this into the window, and he had his hand under here like this (indicating)."

The victim was asked about his reaction to the situation:

"*Q.* What, if anything, did you think at the time that he said, 'You'd better give me the rest of the money,' or, 'Why don't you give me the rest of the money,' and had his hand in his coat?

"*A.* Well, at first it kind of stunned me. And then I looked at him, and he looked like he meant business, so I went over and got the money out of the register.

"He told me to put it in a bag. But as I was getting it out, I asked him, 'Do you want me to put it in a bag?' And he said no, just give it to him.

"*Q.* What did you think that he had in his hand?

"*A.* I thought he might have a—some kind of weapon."

Then, on cross-examination, the victim testified as follows:

"*Q.* Now, in this—on May 18th, 1976, you never saw a weapon, is that correct?

"*A.* No, I didn't.

"*Q.* And the man that robbed you had never said that he had a gun or any weapon, is that correct?

"*A.* He did not say he had one.

* * *

"*Q.* Right. And is it also correct that you never saw a bulge under his coat?

"*A.* Well, he—when he walked up, his coat was unbuttoned.

"*Q.* At that time you never saw a bulge under his coat?

"*A.* I was not looking for one.

"*Q.* Did you ever see any article which resembled a weapon?

"*A.* No, I didn't.

"*Q.* Now, when the robber had his hand underneath his coat, that hand did not resemble a weapon, is that correct?

"*A.* I didn't look too close. All I noticed was he had his hand underneath his coat.

"*Q.* Okay. So, basically, the hand was out of sight, underneath the coat?

"*A.* All the way up to the sleeve of the coat.

"*Q.* Okay. But is it also correct that the hand itself was not shaped in the form of a weapon, is that correct?

"*A.* I couldn't tell.

"*Q.* As far as you know.

"*A.* I couldn't tell under the coat, no.

"*Q.* So far as you know, the hand was not shaped—

"*A.* As far as I know.

"*Q.* Okay. To look like a weapon, is that correct?

"*A.* Correct."

The prosecutor argues that the victim believed

the defendant had a weapon and that this was a reasonable belief under the circumstances. This argument addresses only one consideration and ignores the requirement that the belief must be induced by the use or fashion of "any article" with which the assailant is armed.

The Court of Appeals based its holding herein on the authority of *People v Shipp,* 34 Mich App 67; 190 NW2d 750 (1971), and *People v Jury,* 3 Mich App 427; 142 NW2d 910 (1966). The rule of these cases is that testimony that defendant used *his hand and a covering so as to resemble a gun* raises a factual question for the jury's consideration, as to whether defendant was armed with an article used to induce the reasonable belief that it was a dangerous weapon.

The correctness of these decisions is not before us, for there was no such testimony in this record.

In sum the victim's testimony here was that he thought the defendant had a weapon of some kind; he saw no article which resembled a weapon; he saw no bulge under defendant's coat nor his hand shaped to look like a weapon.

Such testimony cannot be the basis for an armed robbery conviction.

Reversed and remanded for resentencing on unarmed robbery.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

STACHOWIAK v SUBCZYNSKI

Docket No. 64214. Decided July 13, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the case to that Court for consideration of another issue.

Elizabeth and Paul Stachowiak brought an action for medical malpractice against Janusz Subczynski, M.D. A jury in Wayne Circuit Court, Patrick J. Duggan, J., returned a verdict for the defendant of no cause of action. The defendant was permitted, during his testimony, to use charts of statistics taken from medical textbooks as the sources on which he had relied in choosing the course of treatment for Elizabeth Stachowiak, who had suffered from an aneurysm. The Court of Appeals, T. M. Burns, P.J., and M. F. Cavanagh and MacKenzie, JJ., reversed and remanded for a new trial on the ground that material in a textbook is inadmissible for purposes other than impeachment of an expert witness (Docket No. 78-849). Defendant applies for leave to appeal.

In a per curiam opinion signed by Justices Kavanagh, Williams, Levin, Fitzgerald, Ryan, and Moody, the Supreme Court *held:*

1. The objection to the admission into evidence of treatises and other professional literature to prove the truth of the matters asserted in them is that the material is hearsay. However, the hearsay objection applies only if the evidence is offered to prove the truth of the matter asserted. Evidence that cannot be admitted to prove the truth of the matters asserted has been frequently admitted for other purposes. The trial judge's ruling and instructions to the jury in this case made it clear that the evidence was not admitted to prove the truth of the matter asserted, but rather was admitted to explain why the doctor proceeded as he did. The doctor's reasons for choosing the course of treatment and his understanding of the probable outcomes of various treatments were relevant to the action because the thrust of the complaint was that the conservative course of treatment initially followed by the defendant was improper.

2. The trial judge recognized that the display of the charts

created the danger that the jury might have difficulty in limiting its consideration of the material to proper purposes. However, it was central to the defense that Dr. Subczynski based his judgment of the treatment to be used on his understanding of the consequences of various treatments. The potential for misuse of the charts by the jury was reduced by the fact that similar statistics were presented during the testimony of other expert witnesses. Finally, the trial judge took steps to minimize the risk of misuse of the evidence by the jury. He required the removal of identifying information from the charts before they could be displayed and gave careful and repeated instructions to the jury as to the limited purpose for which the evidence was offered. It cannot be said that he abused his discretion in allowing use of the charts.

The judgment of the Court of Appeals is reversed and the case is remanded to that Court for consideration of the other issue raised by the plaintiffs.

Chief Justice Coleman concurred in the reversal but would decide the plaintiffs' allegation of improper argument by the defendant's counsel, rather than remand the matter to the Court of Appeals. The transcript shows heated arguments by counsel for the plaintiffs and for the defendant, which included deprecatory remarks about the expert witnesses. However, the trial judge issued a cautionary instruction to the jury, and the statements were not so prejudicial that they could not be cured by a cautionary instruction.

93 Mich App 245; 287 NW2d 194 (1979) reversed.

Lopatin, Miller, Bindes, Freedman, Bluestone, Erlich & Rosen (by *Michael Gagleard)* for plaintiffs.

Sullivan, Ranger, Ward & Bone for defendant.

PER CURIAM. The jury returned a verdict for the defendant in this medical malpractice case. The Court of Appeals reversed because the defendant used charts taken from medical textbooks during his testimony, and the defendant has applied for leave to appeal. We reverse and remand to the Court of Appeals for further proceedings.

I

Plaintiff Elizabeth Stachowiak was admitted to a hospital on May 12, 1972, and came under the care of Dr. Subczynski, a neurosurgeon. She was diagnosed as having a subarachnoid hemorrhage. Dr. Subczynski suspected that Mrs. Stachowiak had an aneurysm in the anterior connecting artery. However, during this first hospitalization he did not perform an arteriogram to confirm whether the aneurysm existed and, if so, to determine its location. His reason for not doing so was his belief that Mrs. Stachowiak was such a poor risk for surgery that an operation could not be performed even if an arteriogram located the aneurysm.

A conservative course of treatment was followed, and Mrs. Stachowiak was discharged from the hospital on May 27, 1972. She was readmitted a month later. An unsuccessful arteriogram was attempted on July 5, 1972, and a successful one performed on July 13, 1972, locating an aneurysm in the anterior connecting artery. Surgery to clip the aneurysm was performed on July 21, 1972.

The thrust of the complaint by the plaintiffs was that the conservative course of treatment initially followed by Dr. Subczynski was improper. They maintained that the arteriogram should have been performed on Mrs. Stachowiak's first admission to the hospital, and that on the discovery of the location of the aneurysm, prompt surgery should have been performed. They attribute Mrs. Stachowiak's post-operative difficulties to the delay in performing surgery.

The defense had prepared several charts, apparently enlargements of pages from medical textbooks, and proposed to use them during the testimony of Dr. Subczynski. The charts presented

information such as probabilities over time of death from an aneurysm in the absence of medical intervention, showing high probabilities of death within the first few days, with steady decreases thereafter. Another showed death rates from bleeding aneurysms given different modes of treatment as determined by a cooperative study by a number of researchers.

Plaintiffs' counsel objected to the use of these charts as hearsay and maintained that allowing their use would be comparable to admitting medical textbooks as substantive evidence, citing *Mihailoff v Meijer, Inc,* 53 Mich App 312; 218 NW2d 798 (1974).

The defense argued that the information on the charts was that on which Dr. Subczynski relied in making his decisions regarding the course of treatment of Mrs. Stachowiak. Regardless of the accuracy of the information, the jury was entitled to know that Dr. Subczynski did rely on available data in choosing the course of treatment, as that fact bears on the reasonableness of his conduct.

The trial judge required defense counsel to excise from the charts all indications that they were taken from medical textbooks. He ruled that the charts themselves could not be given to the jury during deliberations, but that they could be used during the examination of Dr. Subczynski. The judge instructed the jury that the charts were not admitted for the truth of the information they presented, but only as relating to the doctor's claim that he relied on this information in treating the patient. The charts were used during Dr. Subczynski's testimony, and there were a number of further objections that specific testimony went beyond the guidelines set by the trial judge. The judge gave additional cautionary instructions similar to the original one.

II

The Court of Appeals noted that statements in learned treatises are not admissible for purposes other than impeachment, citing MRE 707[1] and our decision in *Bivens v Detroit Osteopathic Hospital,* 403 Mich 820 (1978).[2] The Court concluded that because the exhibits were excerpts from a learned treatise, it was error to permit their use at trial, and reversed.[3] 93 Mich App 245; 287 NW2d 194 (1979).

III

The objection to the admission of treatises and other professional literature to prove the truth of the matters asserted in them is, of course, that the material is hearsay. McCormick on Evidence (2d ed), § 321, p 743. Although some have argued for allowing the use of such material as substantive

[1] "To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only."

The rule was not in effect at the time of the trial of this case in December 1977.

[2] "As we held in *Jones v Bloom,* 388 Mich 98 [200 NW2d 196] (1972), learned treatises are admissible for impeachment purposes. We declined to make learned treatises admissible as substantive evidence in the recently promulgated Michigan Rules of Evidence. Compare Federal Rule of Evidence 803(18). The trial judge thus erred by allowing plaintiff's counsel to read to the jury excerpts from a medical textbook."

[3] In addition, the Court of Appeals found that certain comments made by defense counsel in closing argument were improper. However, it did not decide whether they required reversal.

evidence,[4] as the Court of Appeals noted in this case, we have not done so. MRE 707; *Bivens v Detroit Osteopathic Hospital, supra.*

However, as the trial judge recognized, the hearsay objection applies only if the evidence is offered to prove the truth of the matter asserted. MRE 801(c) defines hearsay:

> " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The rule was the same before the adoption of MRE 801(c). Evidence that could not have been admitted to prove the truth of the matters asserted has been frequently admitted for other purposes. *E.g., Belvidere Land Co v Owen Park Plaza, Inc,* 362 Mich 107; 106 NW2d 380 (1960); *Simpson v Burton,* 328 Mich 557; 44 NW2d 178 (1950); *McNitt v Henderson,* 155 Mich 214; 118 NW 974 (1908). The trial judge's ruling and instructions to the jury in this case could not have been clearer that the evidence was not admitted to prove the truth of the matter asserted, but rather was admitted to explain why the doctor proceeded as he did. There can be no doubt that the doctor's reasons for choosing the course of treatment and his understanding of the probable outcomes of various treatments were relevant to the action.

IV

However, analysis must not stop with the determination that the evidence was relevant and not subject to a hearsay objection. MRE 403 requires

[4] 6 Wigmore on Evidence (Chadbourn rev), §§ 1690-1693; FRE 803(18).

the exercise of discretion by the trial judge in ruling on the admissibility of evidence:

"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."[5]

As the trial judge recognized in this case, the display of these charts created the danger that the jury might have difficulty limiting its consideration of the material to proper purposes.[6] However, in the circumstances of this case we find no error in the trial judge's ruling as to the use of these charts. First, it is clear that it was central to the defense that Dr. Subczynski based his judgment as to how to proceed with the treatment on his understanding of the consequences of various treatments. Second, the potential for misuse of the charts by the jury was reduced by the fact that similar statistics were presented during the testimony of other expert witnesses. Finally, the trial

[5] MRE 403 is consistent with prior Michigan law. *E.g., People v DerMartzex,* 390 Mich 410, 415; 213 NW2d 97 (1973).

[6] The trial judge observed:

"I guess my only concern—not only concern—a concern I have is that sometimes it is extremely tough to separate that which is being offered for the truth of the matter contained and that on which someone relied."

After further argument, the judge said:

"I think the doctor can, in this type of case, since it is going to the basis for forming his opinion, may say: I relied on these studies in forming my opinion. But the truth of those studies, the accuracy of those studies is not even relevant in that question.

* * *

"Now, to the extent that he wants to introduce those studies, page by page, then I think we are unnecessarily buttressing and I would not let the content of those in in the verbatim form that may be contained in the textbook."

judge took steps to minimize the risk of misuse of the evidence by the jury. He required the removal of identifying information from the charts before they could be displayed and gave careful and repeated instructions as to the limited purpose for which the evidence was offered.[7] We cannot say that he abused his discretion in allowing use of the charts.

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate the judgment of the Court of Appeals and remand the case to that Court for consideration of the other issue raised by the plaintiffs. On remand, the circuit court judgment should be affirmed unless the Court of Appeals finds that reversal is required because of comments by defense counsel in closing argument.

We do not retain jurisdiction.

KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

COLEMAN, C.J. *(for reversal).* I would reverse for reasons stated in the per curiam opinion.

However, I would not remand to the Court of Appeals for consideration of plaintiffs' allegation

[7] For example, the trial judge told the jury at one point:

"The jury will continue to be instructed that any information that he recites from any other studies are not to be considered by them as substantive evidence or for the truth of the matter, simply as information that he relied on. Its accuracy will have to be decided by the jury, or his right to rely on it shall be decided by the jury in their judgment."

He later instructed:

"Let me give an instruction at this time so the jury understands clearly. The doctor has testified as you have just heard from some reports from other joint studies or other doctors and you must understand that he was not a part of those nor can he testify as to the accuracy of those reports.

"And I am not allowing that evidence into this trial for the accuracy of those reports. I am only allowing it in for the simple fact that he claims he relied on these reports and you may give that whatever weight you decide in your deliberations."

of improper closing argument by the defendant, but would decide the matter herewith. There is no reason to add to the expense of further consideration by the Court of Appeals, the result of which foreseeably would be appealed again to this Court.

The transcript reveals heated closing arguments by both plaintiffs and defendant, followed by a rebuttal by plaintiffs' second attorney which substantially nullified defendant's deprecatory remarks about plaintiffs' experts. He then added a few deprecatory remarks of his own. The judge issued a cautionary instruction.

The trial had proceeded for over two weeks (December 5-22, 1977). It is understandable that the nerves of all counsel were a bit frayed, but I agree with the trial judge that the statements were not so prejudicial that they could not be cured by a cautionary instruction.

Therefore, I concur in part and dissent in part.

PEOPLE v CHAMPION

Docket No. 65075. Decided July 13, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the defendant's conviction and remanded the case for a new trial.

Christopher L. Champion was convicted by a jury in Kalamazoo Circuit Court, Patrick H. McCauley, J., of second-degree murder. The defendant called two witnesses who testified that the defendant had a good reputation for being truthful, peaceful, and law-abiding. The prosecutor did not cross-examine the defendant's witnesses about any specific acts of misconduct of the defendant but called another witness to rebut the testimony of the character witnesses. The trial court, over defense counsel's objection, allowed the prosecutor to elicit testimony from the rebuttal witness that the defendant had used, possessed, and sold controlled substances. The Court of Appeals, Danhof, C.J., and R. B. Burns and MacKenzie, JJ., affirmed (Docket No. 43108). Defendant applies for leave to appeal.

In a unanimous opinion, the Supreme Court *held:*

As a general rule, evidence of good character may only be rebutted by evidence that it is bad. Specific acts of misconduct may not be shown for that purpose. The prosecutor may cross-examine the defendant's witness to test his knowledge and candor, and for that purpose he may be asked if he has heard of specific acts of misconduct. The prosecutor's rebuttal witnesses may testify only as to reputation, however. In this case, the prosecutor reversed the procedure permitted by the Michigan Rules of Evidence by inquiring into specific instances of conduct in examination of a rebuttal witness.

Reversed and remanded to the Kalamazoo Circuit Court for a new trial.

97 Mich App 25; 293 NW2d 715 (1980) reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,*

Prosecuting Attorney, and *Stephen M. Wheeler,* Principal Appellate Attorney, for the people.

Carl Ziemba for defendant.

PER CURIAM. The defendant placed before the jury his reputation for being truthful, peaceful and law-abiding. He challenges the prosecutor's introduction in rebuttal of evidence of specific acts of misconduct. We agree with the defendant and reverse his conviction.

I

The facts underlying this prosecution were well-stated by the Court of Appeals. 97 Mich App 25, 27-28; 293 NW2d 715 (1980).

The defendant called Merritt W. Tumanis and Walter Raymond to testify as character witnesses. Mr. Tumanis testified that he had known the defendant for about a year and a half and that the defendant had a good reputation in the community for truthfulness and veracity and for being a peaceful and law-abiding citizen. Mr. Raymond testified that he had known the defendant all his life and that the defendant had a good reputation for being truthful, peaceful and law-abiding.

On cross-examination of these character witnesses, the prosecutor did not inquire about any specific acts of misconduct. The prosecutor did call Larry Martin to rebut the testimony of these character witnesses. Defense counsel objected, and the prosecutor responded:

"the door has been opened, they elicited testimony that this defendant is a law-abiding citizen, at this point I believe I can now inquire into that."

The trial judge overruled the objection:

"Case law in the State of Michigan indicates once a defendant has placed his character in issue it is proper for prosecution to introduce evidence that the defendant's character is not as impeccable as it is claimed, you may ask any questions concerning his reputation as to peaceful and law-abiding citizen. Limit it to those issues."

The prosecutor was allowed to elicit testimony from Mr. Martin to the effect that the defendant used marijuana and cocaine, sold marijuana, and had ten pounds of marijuana at his residence on one occasion.

On appeal, the defendant claimed that it was reversible error for the trial judge to let the prosecutor impeach the character witnesses with Larry Martin's rebuttal testimony. The Court of Appeals rejected his argument:

"Under MRE 405(a), the people are allowed to inquire with specific instances of conduct on cross-examination where defendant offered testimony as to reputation." 97 Mich App 32.

II

MRE 405(a) provides:

"*Reputation.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct."

The rule codifies Michigan's common law:

"As a general rule, evidence of good character may only be rebutted by evidence that it is bad. Specific acts of misconduct may not be shown for that purpose." *People v Powell,* 223 Mich 633, 640; 194 NW 502 (1923).

The prosecutor may *cross-examine* the defendant's witness "to test his knowledge and candor * * *, and for that purpose he may be asked if he has heard of specific acts of misconduct". *People v Rosa,* 268 Mich 462, 465; 256 NW 483 (1934). The prosecutor's rebuttal witness may testify only as to reputation, however. In this case, the prosecutor reversed the procedure permitted under MRE 405(a) by inquiring into specific instances of conduct[1] in examination of a rebuttal witness.

In lieu of granting leave to appeal, under GCR 1963, 853.2(4), we reverse the judgments of the Court of Appeals and the circuit court and remand the case to the Kalamazoo Circuit Court for a new trial.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

[1] We recognize the additional qualifier "relevant" in the rule, but we are not asked to address and therefore do not decide the relevance of the specific instances of conduct inquired into in this case.

PEOPLE v CLABIN

Docket No. 65138. Decided July 13, 1981. On application by defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the defendant's conviction. Rehearing denied *post,* 1157.

Allen Clabin, an inmate at the State Prison of Southern Michigan, was convicted on his plea of guilty in Jackson Circuit Court, Charles J. Falahee, J., of possession by an inmate of a weapon. The defendant argues on appeal that the statute under which he was convicted has not been properly re-enacted after 1977, when the Supreme Court decided that the amendment by which it was added in 1972 violated the title-body clause of the constitution. The Court of Appeals, MacKenzie, P.J., and Bashara and D. C. Riley, JJ., affirmed on the ground that the Legislature had cured the constitutional error by amending the title of the statute in 1977 to include the object of the 1972 amendment (Docket No. 46582). The defendant applies for leave to appeal.

In a unanimous opinion, the Supreme Court *held:*

When the Court declared the 1972 amendment to be unconstitutional, the amendment was rendered void and ceased to be of any effect. While the reason for the decision was that the title of the statute was deficient, it was the law as embodied in the 1972 amendment which was voided, and not the title of the act. Amendment of the title of an act after a declaration of unconstitutionality of a portion of the act itself, no matter what the reason for the finding of unconstitutionality, will not suffice to resurrect the voided portion. If the voided portion is to be once again considered a part of the law, then the law must be "revised, altered or amended". The constitution clearly provides that in such a case, reference only to the title of a law is insufficient. The section of the act which is altered or amended must be "re-enacted and published at length". In this case, since the Legislature did not re-enact the 1972 amendment in 1977 when it amended the title, the constitution mandates the conclusion that the Legislature's attempt to remedy the situation was ineffectual.

The defendant's conviction is reversed.

97 Mich App 340; 294 NW2d 266 (1980) reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *P. E. Bennett)* for defendant.

PER CURIAM. The defendant, while an inmate in prison, stabbed another prisoner. After plea bargaining, he pled guilty to a charge of possessing a weapon while an inmate contrary to MCL 800.283; MSA 28.1623. On appeal he argues that his conviction is invalid because the language of MCL 800.283; MSA 28.1623 which has applicability to this case had never been properly re-enacted after this Court declared it unconstitutional in *People v Stanton,* 400 Mich 192; 253 NW2d 650 (1977). We agree with the defendant and we reverse his conviction.

I

In *People v Stanton,* we declared that the 1972 amendment of 1909 PA 17 was unconstitutional and therefore void. The amendment provided:

"A convict without authorization, shall not have on his person or under his control or in his possession any weapon or other implement which may be used to injure any convict or other person, or to assist any convict to escape from imprisonment." 1972 PA 105.

The basis for our decision in *People v Stanton* was our conclusion that the Legislature, in enacting the amendment, had violated the title-object

limitation in Const 1963, art 4, § 24[1] because the title of 1909 PA 17 did not embrace the scope of the 1972 amendment and the amendment did not alter the act's title.

In 1977 PA 164, the Legislature sought to cure this defect by amending the title of 1909 PA 17 to include the following language: "to prohibit the control or possession by a convict of all weapons or other implements which may be used to injure any convict or person or in assisting any convict to escape from punishment". However, the Legislature did not re-enact the 1972 amendment.

II

The defendant argued in the Court of Appeals that his conviction was invalid because the 1972 amendment, rendered void by this Court's decision in *People v Stanton,* was never re-enacted. The defendant further contended that the Legislature's attempted re-enactment by amending only the title violated Const 1963, art 4, § 25 which provides:

"No 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."

The Court of Appeals rejected the defendant's contentions. *People v Clabin,* 97 Mich App 340; 294 NW2d 266 (1980). The Court reasoned:

"We are satisfied with the *constitutionality* of the

[1] Const 1963, art 4, § 24 provides:

"No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title."

method utilized by the Legislature to amend the statute's title. A statutory title is not considered part of the law itself, having no inherent legal effect beyond that of summarizing the law. *Brooks v Hydorn,* 76 Mich 273, 280-281; 42 NW 1122 (1889). See *Doe v Oettle,* 97 Mich App 183; 293 NW2d 760 (1980). Thus, in the instant case, it cannot be said that there was any amendment of the *law* by reference to the title. There was only an amendment of the title by both reference to and publication of the title. The Legislature's full statement of the amended title adequately complied with § 25's requirement of reenactment and publication.

"We are also assured of the *efficacy* of the instant statute. If the Legislature defectively exercises its legislative powers, it may subsequently cure its errors through amendment. The amended laws are considered valid for any future application. See generally *People ex rel Bristol v Board of Supervisors of Ingham County,* 20 Mich 95 (1870), *Briggs v Campbell, Wyant & Cannon Foundry Co,* 2 Mich App 204, 219; 139 NW2d 336 (1966).

"This general rule allowing correction of the law is equally applicable to the correction of titles. 'Where the original title is defective, the Legislature has the inherent power to cure the defect by amending the title.' *Kriger v South Oakland County Mutual Aid Pact,* 49 Mich App 7, 15; 211 NW2d 228 (1973), *rev'd on other grounds* 399 Mich 835 (1977). The Legislature need not reenact and publish the amended act in its entirety. As long as it is clear which act the Legislature is referring to, only the affected statutory portions need be reenacted and published. See *Midland Twp v State Boundary Comm,* 401 Mich 641, 662-663; 259 NW2d 326 (1977), *Surtman v Secretary of State,* 309 Mich 270, 276; 15 NW2d 471 (1944), *People v Shuler,* 136 Mich 161; 98 NW 986 (1904).

"While this method of legislating may seem confusing or appear lazy, it is an acceptable method of updating the law. See *Midland Twp, supra.* Interested parties should read the multiple documents together so as to constitute a constitutional enactment. *Midland Twp, supra.* The keystone in all cases is notice. When a portion of a statute is declared ineffectual, it is not

immediately erased from the books or from memory. If the Legislature acts promptly to correct the defective section, no uncertainty about the statute's content can arise. When there is timely action, notice can never become a real issue.

"In *Kriger, supra,* the Supreme Court had earlier voided an act because its title did not indicate the scope of one of its sections, *i.e.,* a violation of the title-object rule. Const 1963, art 4, § 24. The Court of Appeals, in an opinion reversed on other grounds by the Supreme Court, upheld the title amendment subsequently passed by the Legislature to remedy the deficiency.

" 'In this case, the Legislature in the amendatory act's title set out its intent to amend the title and certain sections of 1964 PA 170, providing notice to the public and the Legislature, as the rule intends. They proceeded to act in accord with their expressed purpose in the body of the act. Such a legislative procedure conforms to the constitutional mandate of art 4, § 24. While the Court lacks the power to expand or contract legislative titles or provisions, this is precisely the power conferred on the Legislature by the Constitution.

* * *

" 'The title here expressed the purpose and scope of the enactment; to amend the title and certain sections of 1964 PA 170. The enactment was within the purpose and scope expressed in the title. It was proper to expect that the body of the act would reflect the title. Const 1963, art 4, § 24, was not violated.' *Kriger, supra,* 15.

"In the instant case, we believe that the Legislature similarly succeeded in reviving the 1972 amendment through its title amendment in 1977. The two documents when read together form a constitutionally permissible law."

III

When this Court declared the 1972 amendment of 1909 PA 17 to be unconstitutional, the amendment was rendered void and ceased to be of any

effect. While the reason for this Court's decision was that the title of 1909 PA 17 was deficient, it was the law as embodied in the 1972 amendment which was voided, and not the title of the act.

Amendment of the title of an act, after a declaration of unconstitutionality of a portion of the act itself, no matter what the reason for the finding of unconstitutionality, will not, in and of itself, suffice to resurrect the voided portion. If the voided portion is to be once again considered a part of the law, then the law must be "revised, altered or amended". Const 1963, art 4, § 25 clearly provides that in such a case, reference to the title only of a law is insufficient. The section of the act which is altered or amended must be "re-enacted and published at length".

IV

The Court of Appeals reliance on *Kriger v South Oakland County Mutual Aid Pact,* 49 Mich App 7; 211 NW2d 228 (1973), is misplaced. In *Kriger* the Legislature, in its effort to cure the title-object defect, not only amended the title but also re-enacted and published the section of the act which had been the source of the problem. 1970 PA 155.

In the instant case, since the Legislature did not in 1977 PA 164 re-enact the 1972 amendment, Const 1963, art 4, § 25 mandates the conclusion that the Legislature's attempt to remedy this situation was ineffectual.

Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's conviction.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PEOPLE v OVALLE

Docket No. 64813. Decided July 13, 1981. On application by defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgments of the Court of Appeals and the circuit court, and remanded the case to the circuit court for further proceedings. Motion for clarification denied November 4, 1981.

Vicente Ovalle was convicted on his plea of guilty in Saginaw Circuit Court, Gary R. McDonald, J., of second-degree murder. The trial judge conducted the guilty plea proceeding in English but, because of the defendant's difficulty with the English language, appointed an interpreter, who was a lawyer, to translate into Spanish the advice to the defendant of the rights that would be waived by his plea. The transcript of the proceedings recorded the English-language colloquy between the trial judge and the interpreter as the interpreter explained to the defendant, in Spanish, the rights from a form supplied by the trial court. After each explanation in Spanish the translator advised the court that the defendant "understands" or "says he understands". The Court of Appeals, T. M. Burns, P.J., and Cynar and Bach, JJ., affirmed in an unpublished per curiam opinion (Docket No. 78-3972). Defendant applies for leave to appeal.

In a unanimous opinion, the Supreme Court *held:*

The responsibility for determining that the defendant's plea is understanding, voluntary, and accurate is the trial judge's. The court rule concerning pleas of guilty requires the trial judge to speak directly to the defendant and advise him of the consequences of his plea. That was not done in this case. Where the defendant's lack of command of the English language requires the use of an interpreter, the interpreter's function is to translate the trial judge's statements to the defendant and the defendant's responses. Here, the effect of the procedure was to delegate to the interpreter the trial judge's responsibility to determine that the plea is an understanding one. This was improper, despite the fact that the interpreter was a lawyer.

Reversed and remanded to the circuit court for further proceedings.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Linda Berns Wright,* Appellate Prosecuting Attorney, for the people.

State Appellate Defender (by *Stuart B. Lev)* for defendant.

PER CURIAM. The defendant raises several questions regarding the use of an interpreter to translate between Spanish and English during his guilty plea proceeding. We conclude that the procedure used was improper and reverse.

I

There is no dispute that the defendant severely beat his ex-wife on February 24, 1978, fatally injuring her. He was charged with murder. The defendant filed a notice of insanity defense, and a psychiatric examination was ordered. At the ensuing competency hearing, the circuit judge found the defendant competent to stand trial on the condition that an interpreter be available to translate between English and Spanish if necessary because of the defendant's difficulty with the English language.

On May 30, 1978, the defendant pled guilty of second-degree murder, and was thereafter sentenced to 15 to 30 years in prison. The Court of Appeals affirmed, and the defendant applied for leave to appeal.

II

In issue is the manner in which the defendant was advised of the rights that he waived by plead-

ing guilty. GCR 1963, 785.7(1)(g). The trial judge began the plea proceeding by stating the plea bargain, advising the defendant as to the maximum sentence, inquiring as to the defendant's criminal record, and explaining that the plea to this charge could lead to his being found in violation of probation. The judge then began to advise the defendant of the rights that would be waived by his plea, but expressed concern about the defendant's understanding and decided that it would be better to have the rights translated into Spanish. The transcript records the English-language portion of this colloquy as follows:

"*The Court:* If I accept this plea that he will not have a trial of any kind and that he would give up his rights that he would have at a trial.

"*Mr. Vargas:*[1] He doesn't want a jury, he wants to plead guilty.

"*The Court:* But he understands paragraph (g) [of the court rule]. And I'll make a copy of this for the file. And we will refer to it as (g).

"*Mr. Vargas:* (g)(i). I'll tell him (g)(ii) now. I'll explain paragraph (g)(iii).

"All right. I explained (g)(iii) to him.

"*The Court:* And does he indicate that he understands?

"*Mr. Vargas:* Yes, he understands.

"*The Court:* And he understands (i) and (ii) also?

"*Mr. Vargas:* Yes, he does. He says he understands paragraph (g)(iv).

"He understands (g)(v).

"He says he understands (g)(vi).

"He understands (g)(vii).

"He says he understands (g)(viii).

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[1] The interpreter, Mr. Vargas, was also a lawyer, although the defendant was represented by another attorney during the proceeding.

"*The Court:* (g)(ix).

"*Mr. Vargas:* (g)(ix).

"He says he understands (g)(x).

"*The Court:* All right. The record will show that the paragraph number that we're referring to is a guilty plea form that the court has for its own benefit that I will make a photocopy of and keep with the file in this matter."

The trial judge then asked the defendant in English if he understood that by pleading guilty he was waiving the rights explained by the interpreter, to which the defendant replied in the affirmative. The factual basis for the plea was also taken in English.

III

GCR 1963, 785.7 places the responsibility for determining that the defendant's plea is understanding, voluntary, and accurate on the trial judge. As to the requirements of rule 785.7(1)(g), the trial judge is to speak directly to the defendant and advise him of the consequences of his plea. That was not done in this case.[2] There are times, as here, when a defendant's lack of command of the English language requires the use of an interpreter. However, the interpreter's function is to *translate* the trial judge's statements to the defen-

[2] Sometimes the failure of the trial judge to personally give all of the required advice to the defendant does not require reversal. See *Guilty Plea Cases*, 395 Mich 96, 114; 235 NW2d 132 (1975). However, in those cases, the record demonstrates that the information involved was provided to the defendant in another way. In the present case, the lack of a record of the conversations in Spanish between the defendant and the interpreter precludes such a finding.

dant and the defendant's responses.[3] Here, the effect of the procedure was to delegate to the interpreter the trial judge's responsibility to determine that the plea is an understanding one. This was improper, despite the fact that the interpreter was a lawyer.

Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and the circuit court and remand to the circuit court for further proceedings.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

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[3] See MRE 604:

"An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation."

We note that in this case the interpreter was not sworn as required by the rule.

PEOPLE v COLE

Docket No. 65045. Decided July 13, 1981. On application by the people for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and reinstated the defendant's conviction.

Nora M. Cole was convicted by a jury in Tuscola Circuit Court, Norman A. Baguley, J., of assault with intent to commit great bodily harm less than murder. The defendant testified that she shot the victim, who was her son-in-law, because she thought that he was going to get a gun and harm her or her family. The prosecutor attempted to impeach the defendant's testimony by cross-examining her on a prior statement, which she had given to the Michigan State Police two days after the assault, to the effect that she believed that her son-in-law was going to get a metal stake used to chain a dog. There was no objection by the defendant either to the prosecutor's cross-examination on the defendant's failure to mention the gun in her statement to the State Police or to the prosecutor's argument to the jury in this regard. The Court of Appeals, Beasley, P.J., and D. E. Holbrook, Jr., and Robinson, JJ., in an unpublished per curiam opinion, reversed the defendant's conviction on the ground that permitting a reference to the defendant's "nonutterance" about the gun indirectly restricted the exercise of her constitutional right to remain silent in the face of accusation (Docket No. 78-3401). The people apply for leave to appeal.

In a unanimous opinion, the Supreme Court *held:*

In this case the defendant had made a statement to the State Police which conflicted with her testimony at trial. Thus, the prosecutor was not attempting to use silence at the time of arrest to impeach an explanation subsequently given at trial. The Supreme Court of the United States has held recently that cross-examination that merely inquires into prior inconsistent statements makes no unfair use of silence, because a defendant who voluntarily speaks after receiving the warnings about waiving the constitutional right to remain silent has not been induced to remain silent. As to the subject matter of the statements, the defendant has not remained silent at all.

Therefore, the cross-examination of the defendant with regard to her prior inconsistent statement was permissible.

The judgment of the Court of Appeals is reversed, and the defendant's conviction is reinstated.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Artis M. Noel,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General, Prosecuting Attorneys Appellate Service, for the people.

Forrest Walpole for defendant.

PER CURIAM. The question posed in this case is whether the prosecutor's cross-examination of the defendant mandates reversal of her conviction in light of *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973). Because we are persuaded that the principle espoused in *Bobo* was not contravened by the prosecutor's cross-examination, we reinstate the defendant's conviction of assault with intent to do great bodily harm less than murder.

I

The defendant was charged with assault with intent to murder in connection with the shooting of her son-in-law. At trial, the defendant testified as follows on direct examination:

"*Q.* Did there come a point in time where you ask *[sic]* him to leave?

"*A.* Yes, sir, after he threatened me about a cannon and he also said that when he left my yard that he was going to Pontiac to kill other members of the family and so I asked him to leave.

"*Q.* Then what happened?

"*A.* He refused to and he moved as though, I'm

almost sure he was getting a gun and that's when I fired my gun.

"*Q.* What exactly was going on in your mind?

"*A.* I was thinking of the children into the house that was in danger and that's exactly—I did not intend to kill the man. I was trying to protect the children into the house that he had been so desperately trying to kill, how do I explain, just a minute. At that particular moment I only did what I thought I had to do to maintain the peace, so my family would not get hurt.

"*Q.* Were you afraid at that point in time that he was going to do harm to you and your family?

"*A.* Yes.

"*Q.* And did—was it at that time that he made a movement, is that the time that you thought he was going for a gun?

"*A.* Yes, I was positive of it.

"*Q.* Where did you think the gun was?

"*A.* In the back where he always hid it before.

"*Q.* Had you seen it there before on prior occasions?

"*A.* Yes.

"*Q.* Was it your intent to kill him at that time?

"*A.* No, sir.

"*Q.* Was it your intent to inflict great bodily harm to him?

"*A.* I was trying to shoot a warning shot, he moved over in front of it."

Thus the defendant's testimony on direct examination was that she thought her son-in-law was going to get a gun.

Two days after the assault occurred the defendant gave a statement to the Michigan State Police in which she alleged that at the time she shot she believed that her son-in-law was going to get a metal stake used to chain a dog. No mention of a gun was made.

The prosecutor explored this conflict on cross-examination:

"*Q.* Do you recall during that statement saying anything to Mr. Wolner concerning a gun?

"*A.* No, Ma'am.

"*Q.* Aside from this rifle?

"*A.* No, Ma'am.

"*Q.* Did you say anything to Detective Sergeant Wolner on June 20th about a gun or about Mr. Hmeidan having a gun?

"*A.* No, Ma'am.

"*Q.* You did not say anything to him on that day about Mr. Hmeidan having a gun?

"*A.* That's right.

"*Q.* Did you say anything to Mr. Wolner on that day about Mr. Hmeidan having a weapon?

"*A.* I said he was after a weapon.

"*Q.* You stated that you thought that he was after a weapon, is that correct?

"*A.* Yes.

"*Q.* And when you made that statement, when you made the statement to Detective Wolner on that date as to where you thought that weapon was located and what you thought that weapon was?

"*A.* Yes, Ma'am.

"*Q.* Do you recall what you said to Detective Wolner concerning that weapon it was that you thought Mr. Hmeidan was after?

"*A.* Yes, Ma'am.

"*Q.* All right, and what weapon was it?

"*A.* A steel dog stake."

The issue was further developed as follows:

"*Q.* And you told the State Police about this dog stake, this dog stake, whatever you call it?

"*A.* Yes, Ma'am.

"*Q.* You told them about that on June 20th.

"*A.* Yes, Ma'am.

"*Q.* But you didn't make any mention about a gun on that date, did you?

"*A.* No, Ma'am.

"*Q.* You didn't make any mention of seeing Basim Hmeidan with a gun?

"*A.* No, Ma'am, nothing.

"*Q.* You did think to say that you were worried about —the only reason you gave was that your worry was this dog stake that was over on the left-hand side of the porch, is that correct?

"*A.* No, that's not correct.

"*Q.* You didn't mention a gun, right?

"*A.* Right."

The defendant's failure to mention the gun was reiterated by the prosecutor in closing argument. There was no objection lodged by the defendant either to the prosecutor's cross-examination on this point or to her closing argument in this regard.

The Court of Appeals concluded that the above-quoted cross-examination of the defendant warranted reversal of the defendant's conviction under *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973).

II

In *People v Bobo* we held that:

"We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. 'Nonutterances' are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did." 390 Mich 355, 359.

In *People v Bobo* there was an attempt to introduce evidence that, when arrested, the defendant made no statement. Here the defendant had made a statement which conflicted with her testimony at trial. Thus here the prosecutor was not attempting

to use an accused's silence at the time of arrest to impeach an explanation subsequently given at trial.

The situation in the instant case is similar to one confronted by the United States Supreme Court in *Anderson v Charles,* 447 US 404; 100 S Ct 2180; 65 L Ed 2d 222 (1980). In that case, the defendant had indicated at the time of his arrest that he had stolen a car at a particular location. At trial, however, the defendant testified that he stole the car at a different location. The prosecutor cross-examined him at trial concerning this discrepancy. The United States Supreme Court found no infringement upon the defendant's exercise of his constitutional right to remain silent. The Court held:

> "*Doyle [v Ohio,* 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976)] bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda [v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."

The parallel between the situation in *Anderson v Charles* and that present in the case at bar is manifest.

We conclude that the cross-examination of the defendant with regard to her prior inconsistent statement was permissible.

Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate

defendant's conviction of assault with intent to do great bodily harm less than murder.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PEOPLE v PATTON

Docket No. 64439. Decided July 13, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the defendant's conviction and remanded the case for entry of a conviction of manslaughter and resentencing, or for further proceedings. Rehearing denied *post,* 1158.

Ira R. Patton was convicted by a jury in Ionia Circuit Court, Charles W. Simon, Jr., J., of first-degree murder. It was undisputed that the defendant had stabbed and killed his wife, Beverly Patton. The principal issue of fact was whether this was a crime of passion, as the defendant claimed, or one of deliberation. The defense offered in evidence the summons which was served in the divorce proceedings between the defendant and his wife to establish the date of the proceedings. In rebuttal, the prosecution offered an affidavit by Beverly Patton, which she had given in the divorce proceedings to obtain a preliminary injunction against the defendant, in which she stated that the defendant had been abusive and violent against her and that she feared for her safety. The trial court admitted the affidavit on the theory that because the defendant had presented the summons he had opened the door to reception of whatever else was in the court's file in the divorce. In his argument to the jury, the prosecutor alluded to the affidavit as supporting his theory that Beverly Patton was in fear for her life. The Court of Appeals, Cynar, P.J., and D. F. Walsh and R. B. Burns, JJ., affirmed in an unpublished per curiam opinion (Docket No. 78-1984). Defendant applies for leave to appeal.

In a unanimous opinion, the Supreme Court *held:*

The affidavit of the defendant's wife was clearly hearsay because it was offered to prove the truth of the matters asserted and did not fall within any of the exceptions to the hearsay rule. It should not have been received in evidence. The use by the defense of the divorce file to establish the date of the proceedings does not justify a conclusion that whatever else was in the file could also be used. The reception in evidence of the affidavit of the defendant's wife in divorce proceedings denied the defendant his constitutional right of confrontation. Accordingly, the trial court abused its discretion in overruling

the defendant's objection to the admission of the affidavit. The affidavit was introduced in order to demonstrate prior assaultive behavior by the defendant against the victim for the purpose of showing premeditation. It is clear that the prosecution emphasized to the jury the importance of the statements in the affidavit in attempting to establish that the defendant was guilty of first-degree murder. The evidence could have supported a verdict of either second-degree murder or manslaughter; the jury might have so found had the affidavit not been admitted in evidence. Therefore, it was erroneous to admit the affidavit in evidence, and the error was not harmless. The disposition of this issue makes it unnecessary to address the other issue raised on appeal by the defendant.

The defendant's conviction is reversed and the case is remanded for entry of a conviction of manslaughter and resentencing, unless the prosecutor is persuaded that the ends of justice would be better served by a new trial on a charge of first-degree murder.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Randy H. Smith,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General, Prosecuting Attorneys Appellate Service, for the people.

O'Connor, McNamara & O'Keefe for defendant.

PER CURIAM. At the defendant's trial on a charge of murder in the first degree, the prosecutor was permitted, over defense objection, to place into evidence an affidavit which the victim (defendant's wife) had supplied in connection with a petition for a preliminary injunction in a divorce proceeding. Because we conclude that the affidavit was inadmissible as hearsay and that the admission of this evidence was not harmless error, we reverse and remand for a new trial.

I

The fact that the defendant stabbed and killed his

wife was undisputed.[1] The defense at trial essentially was that this was a crime of passion and not of "cold-blooded deliberation". In fact, defense counsel informed the jury that he was not asking for an acquittal but rather for a verdict of manslaughter.

At one point in the trial, defense counsel offered in evidence the summons which was served in a divorce proceeding involving the defendant and his wife. The purpose of the offer was to establish the date of that proceeding. The evidence was received. However, in rebuttal, the prosecutor offered in evidence an affidavit which the defendant's wife had given in connection with a petition for a preliminary injunction in the divorce proceeding. In the affidavit, the defendant's wife had stated: "[T]he defendant drinks to excess and when intoxicated is abusive and has struck and beat her on several occasions; defendant has a violent temper and plaintiff fears for the safety of herself and the minor children of the parties hereto". In ruling that the affidavit would be received in evidence, the trial judge concluded that since defense counsel had made reference to the divorce trial in order to establish the date when divorce proceed-

[1] Evidence adduced at the trial revealed that the defendant's wife, Beverly Patton, was having an affair with Harrison Wilburn. There was evidence that on the evening of the homicide, the defendant had seen the two of them in an act of sexual intercourse in Wilburn's hotel room. On the day of the homicide, the defendant had informed his probation officer that he wanted to seek custody of his two children because of the affair and he alleged that his wife and Wilburn were having sexual intercourse in front of the children.

Around 11:30 p.m. the defendant went to his wife's residence. There he found his wife's brother and his own children. The brother went to look for the defendant's wife. Shortly, thereafter the defendant's wife and Wilburn arrived. Wilburn and one of the defendant's children left to go to a bar to purchase some beer. The defendant went into the house for the purpose of obtaining a gun to shoot Wilburn. His wife and he argued and he stabbed and killed her.

ings commenced, he had opened the door to reception of whatever else was in the file.

The jury was instructed that they could convict the defendant of first-degree murder, second-degree murder, or voluntary manslaughter, or that they could acquit. The jury returned a verdict of murder in the first degree.

The defendant appealed his conviction to the Court of Appeals. That Court, in an unpublished per curiam opinion, affirmed. The defendant has applied for leave to appeal to this Court.

II

The defendant argues that the admission of the affidavit which had been filed by his wife in conjunction with divorce proceedings was reversible error. Defendant claims that the introduction of the affidavit deprived him of the basic right of confrontation of the witnesses against him. He contends that he was greatly prejudiced by the introduction of this evidence and points to the prosecutor's final argument in which the prosecutor alluded to the affidavit as supporting his theory that the defendant's wife was in fear for her life.

The prosecution's response is that admission of the affidavit was within the trial court's discretion and that the defendant has failed to establish an abuse of discretion. The prosecution also contends that even if there was an abuse of discretion, the error was harmless.

The Court of Appeals refused to reverse on this ground, holding:

"As defendant has failed to establish any prejudice resulting from the admission into evidence of certain documents from the court file in the divorce proceeding

between defendant and decedent, we decline to reverse on this ground."

The affidavit of the defendant's wife was clearly hearsay because it was offered to prove the truth of the matters asserted therein and did not fall within any of the exceptions to the hearsay rule. It should not have been received in evidence. See MRE 801 and 804. We disagree with the trial court's conclusion that defense counsel's use of the divorce file to establish the dates of the proceedings justified a ruling that whatever else was in the file could also be utilized. Obviously, the reception in evidence of the affidavit supplied by the defendant's wife in conjunction with divorce proceedings denied the defendant his constitutional right of confrontation. Accordingly, we conclude that the trial court abused its discretion in overruling the defendant's objection to the admission of this affidavit.

The next question which must be addressed, however, is whether the reception of this evidence was harmless error. The affidavit was introduced in order to demonstrate prior assaultive behavior for the purpose of showing premeditation so as to convict the defendant of murder in the first degree. In his closing argument, the prosecutor stated:

"I would submit to you, ladies and gentlemen, that there was good reason for him having trouble visiting his kids, in light of a petition that is also part of the divorce pleadings, this particular divorce, along with a supporting affidavit indicating that she had reason to fear him. Reason of sufficient force and effect based on this affidavit of the victim, Beverly Patton, in this matter for the court to issue a restraining order restraining him or enjoining him from being in her

presence or in the kids' presence. Now, this is probably one of the most unique particular facts about this case, because in a murder case you obviously don't have testimony of the victim. In this case, you have a sworn affidavit indicating prior physical confrontations and her fear of him, both for herself and for the children."

Thus it is clear that the prosecution emphasized the importance of the statements contained in the affidavit in attempting to establish that the defendant was indeed guilty of murder in the first degree.

The evidence at trial in this matter could have supported a verdict of either murder in the second degree or manslaughter. Indeed, the jury might have so found had the affidavit not been admitted in evidence. We find therefore that it was error to admit the affidavit in evidence and that the error was not harmless.

Our disposition of this issue makes it unnecessary to address the other issue raised on appeal by the defendant.

Therefore, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's conviction and remand the matter to the circuit court for entry of a judgment of conviction of the lesser included offense of manslaughter and for resentencing. If, however, the prosecuting attorney is persuaded that the ends of justice would be better served, upon notification to the trial court before resentencing, the trial court shall vacate the judgment of conviction and grant a new trial on the charge that the defendant committed the crime of first-degree murder.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PEOPLE v RIDER

Docket No. 65658. Decided July 13, 1981. On application by defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, remanded the case to Kalamazoo Circuit Court for further proceedings.

Carlton Rider was convicted on his plea of guilty in Kalamazoo Circuit Court, Donald T. Anderson, J., of breaking and entering a building with intent to commit larceny. The defendant testified at the plea-taking proceeding that, after business hours and without permission to do so, he opened a door of a gasoline service station where he worked with a key given to him by his employer and took money which belonged to the station. The Court of Appeals, R. B. Burns, P.J., and J. H. Gillis, J. (D. C. Riley, J., dissenting), affirmed in a memorandum opinion, holding that the facts admitted by the defendant sufficiently supported his plea of guilty (Docket No. 47916). Defendant applies for leave to appeal.

In a unanimous opinion, the Supreme Court *held:*

Only a minimum amount of force is necessary to establish the element of a breaking in a case of breaking and entering, but the force exerted must be unauthorized. Where a person is given a key with no qualifications on its use, any subsequent use of the key should not be considered a breaking. There is no burglary if the person entering has a right to do so. It cannot be discerned from the record in this case whether any restrictions were placed upon the defendant's use of his key. Accordingly, the case was remanded to the Kalamazoo Circuit Court to give the prosecutor an opportunity to demonstrate that the defendant's right to use the key was restricted and that his use of it violated the restriction. If the prosecutor is unable to establish those facts, the judgment of conviction must be set aside.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Paul Burakoff,* Assistant Prosecuting Attorney, for the people.

Carlton Rider, *in propria persona.*

PER CURIAM. This case presents the question of whether the element of breaking in a prosecution for breaking and entering with intent to commit larceny contrary to MCL 750.110; MSA 28.305 is established where it is demonstrated that the defendant gained entry to the premises by using a key which had been entrusted to him.

I

On July 2, 1979 the defendant pled guilty to a single count of breaking and entering with intent to commit larceny. During the course of the plea proceedings the defendant admitted that on the evening of February 19, 1979 he went to a gasoline service station owned by his employer. He opened the door with a key which had been given to him by his employer and took money from the premises.

The defendant subsequently appealed his conviction to the Court of Appeals. In an unpublished memorandum opinion a majority of the Court of Appeals panel rejected the defendant's claim that the factual basis which he provided did not establish that there had been a breaking. His conviction was affirmed, Judge RILEY dissenting.

The defendant has filed a delayed application *in propria persona* for leave to appeal.

II

In dissent Judge RILEY observed:

"While it is clear that only a minimum amount of force is necessary to establish a breaking [citations omitted], it is equally clear that *some* unauthorized

force must be exerted. [Citations omitted.] The facts of this case indicate that the defendant obtained entry to the gas station where the larceny occurred, by using a key given to him by the management. Although the issue of entry by key has never been addressed by the courts of this state, I agree with other jurisdictions that an unrestricted use of a key cannot constitute a breaking. *Stowell v People,* 104 Colo 255; 90 P2d 520 (1939), *Ealey v State,* 139 Ga App 110; 227 SE2d 902 (1976). See also *People v Woods,* 182 Colo 3; 510 P2d 435 (1973), *People v Carstensen,* 161 Colo 249; 420 P2d 820 (1966). When a person is given a key with no qualifications on its use, any subsequent exercise should not be considered a breaking." (Emphasis in original.)

In *Stowell v People, supra,* cited by Judge RILEY in her dissent, the Supreme Court of Colorado was called upon to decide whether a railroad conductor who used a key which had been entrusted to him to enter a warehouse where he stole some merchandise was guilty of burglary. In concluding that the defendant was not guilty of burglary, the Court held:

"Had the switch key not been furnished defendant by the company, nor any authority given him under the terms of his employment to enter the building at the time and place in question, the evidence would have supported a conviction of burglary under the statute. * * * From the record it appears that defendant had a right to enter this warehouse at the time and in the manner he did, provided his intent in so doing was lawful. Hence this offense, if burglary, is raised to that grade solely by his unlawful intent. But intent alone is not always sufficient for that purpose. There is 'no burglary, if the person entering has a right so to do, although he may intend to commit, and may actually commit, a felony, and although he may enter in such a way that there would be a breaking if he had no right to enter.' 90 CJ § 20, p 1016." 104 Colo 257.

We agree with the reasoning of the Supreme Court of Colorado and Judge RILEY.

III

At the plea-taking in the instant case, the following colloquy took place:

"*The Court:* Would you tell us what happened in regard to this incident?

"*The Defendant:* I went up to the station and opened the door with a key and intended to take the money and not return.

"*The Court:* What station?

"*The Defendant:* Ed's Refinery.

* * *

"*The Court:* Where did you get the key?

"*The Defendant:* They give everybody one.

"*The Court:* Were you an employee?

"*The Defendant:* Yes, sir.

"*The Court:* Were you still employed there when this happened?

"*The Defendant:* Yes.

"*The Court:* Did you claim you had a right to go in and take this money?

"*The Defendant:* No, sir.

"*The Court:* When you first went in, when you opened the door—you say you turned the key in the lock, opened the door and walked in. When you did that, at that moment did you intend to take money out of there?

"*The Defendant:* Yes, sir.

"*The Court:* Was it money that you had authority to take, that someone told you you could take?

"*The Defendant:* No.

"*The Court:* Was it your money?

"*The Defendant:* No, sir.

"*The Court:* Did you claim that there was any right to take this money?

"*The Defendant:* No, sir.

"*The Court:* Did you intend to deprive the owner of it without any authority?

"*The Defendant:* Yes, sir.

"*The Court:* Did you intend to deprive the owner of it permanently?

"*The Defendant:* Yes, sir.

"*The Court:* What time of the day or night was this?

"*The Defendant:* I'm not really sure. It was after—

"*The Court:* During business hours?

"*The Defendant:* No.

"*The Court:* Was it the time you normally might open?

"*The Defendant:* No, sir.

"*The Court:* Was it a time when the station was not normally open?

"*The Defendant:* Yes, sir.

"*The Court:* But you don't know whether it was day or night?

"*The Defendant:* It was at nighttime.

* * *

"*The Court:* It was after the station closed at night and before it opened in the morning?

"*The Defendant:* Yes, sir.

"*The Court:* Had you worked there that day?

"*The Defendant:* No."

We cannot discern from this record whether any restrictions were placed upon the defendant's use of his key. Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Kalamazoo Circuit Court. On remand the prosecutor shall be given an opportunity to demonstrate that the defendant's right to use the key was restricted and that defendant's use of the key violated the restriction. If the prosecutor is able to establish these facts and there is no contrary evidence, the judgment of conviction shall be affirmed. If the prosecutor is unable to establish these facts, the judgment of

conviction shall be set aside. If contrary evidence is provided, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. GCR 1963, 785.7(6). *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975).

On remand the circuit court shall also consider the defendant's motion for bond and for appointment of counsel.

We retain no jurisdiction.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

RUSINEK v SCHULTZ, SNYDER & STEELE LUMBER COMPANY

Docket No. 65509. Decided August 24, 1981. On application by plaintiffs for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals as to plaintiff Marie Rusinek and remanded the case to the Court of Appeals for consideration of an undecided issue. Rehearing denied 412 Mich 1101.

Eugene Rusinek brought an action against Schultz, Snyder & Steele Lumber Company and Richard Braybrook under the no-fault insurance act for personal injuries suffered by Mr. Rusinek in an automobile accident, and his wife, Marie Rusinek, claimed damages for loss of consortium. The Genesee Circuit Court, Robert M. Ransom, J., denied the defendant's motion to dismiss Mrs. Rusinek's claim for loss of consortium, and the jury awarded verdicts of $50,000 for Mr. Rusinek and $10,000 for Mrs. Rusinek. The Court of Appeals, MacKenzie and Corkin, JJ. (Cynar, P.J., dissenting in part), reversed on the grounds that loss of consortium is not part of the tort recovery preserved by the no-fault insurance act for persons injured by negligent motorists and that the trial court had erroneously instructed the jury on the issue of damages as to Mr. Rusinek's claim (Docket No. 78-3137). Plaintiffs apply for leave to appeal. *Held:*

The no-fault act has not abolished the common-law action for loss of consortium.

1. It is undisputed that loss of consortium is a noneconomic loss under the provision of the no-fault insurance act which partially abolished tort liability, but preserved it for certain damages for noneconomic loss. The question is whether the "liability for noneconomic loss" which the no-fault act preserves refers only to losses suffered by the "injured person" or whether the phrase "if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement" is merely the statement of a threshold condition that must be met before another person who suffers noneconomic loss may seek recovery in tort. The language of the statute is ambiguous and therefore subject to judicial construction.

2. The common-law action for loss of consortium is not

expressly abolished by the no-fault insurance act. There is nothing in the language of the act or in its legislative purposes that requires a construction that it does so by implication, because a claim of loss of consortium is derived from the injured spouse's action and does not create a new case, nor does it contribute significantly to the problems that the no-fault act was intended to alleviate.

The judgment of the Court of Appeals as to the claim of plaintiff Marie Rusinek is reversed, and the case is remanded to the Court of Appeals for consideration of the issue left unaddressed by the Court of Appeals.

98 Mich App 380; 296 NW2d 262 (1980) reversed in part.

Edwin Jakeway, P.C. (by *Bennett S. Engelman),* for plaintiffs.

Brownell, Andrews, Philpott & Piper for defendant.

PER CURIAM. In this case we examine the question of whether Michigan's no-fault insurance act has abrogated, in automobile injury cases, the common-law action for loss of consortium.

I

Plaintiffs, husband and wife, brought suit for damages arising out of an automobile accident which occurred on July 30, 1974. Plaintiff Eugene Rusinek claimed he sustained personal injuries to his neck, back and elbow amounting to "serious impairment of body function" within the meaning of the no-fault act. Plaintiff Marie Rusinek, who was not involved in the accident, claimed the loss of consortium arising out of her husband's injuries. The trial court denied a motion to dismiss the consortium claim, and, following trial on the question of damages, the jury returned a verdict of $50,000 in favor of Mr. Rusinek and a verdict of

$10,000 in favor of Mrs. Rusinek. A motion for a new trial was denied.

On appeal, the Court of Appeals reversed both verdicts, the panel agreeing that an instructional error required retrial on the issue of damages as to Mr. Rusinek, and a majority of the panel holding that Michigan's no-fault act had abolished the right of the spouse of a person injured in an automobile accident to recover in tort for loss of consortium.

The decision of the Court of Appeals on this question directly conflicts with the decision reached by another panel of the Court of Appeals in *Warner v Brigham,* 90 Mich App 640; 282 NW2d 428 (1979), *lv den* 407 Mich 907 (1979). In another reported decision, *Cotton v Minter,* 469 F Supp 199 (ED Mich, 1979), the United States District Court, interpreting Michigan law, held that Michigan's no-fault act does not preclude an action for loss of consortium.

We take up the question to resolve this conflict, and we hold that Michigan's no-fault act has not abolished the common-law action for loss of consortium.

II

The right of a spouse to recover from a tortfeasor for loss of consortium occasioned by injuries inflicted on the other spouse is well established in Michigan's common law. *Montgomery v Stephan,* 359 Mich 33; 101 NW2d 227 (1960). Consortium is defined as including "society, companionship, service, and all other incidents of the marriage relationship". *Washington v Jones,* 386 Mich 466, 472; 192 NW2d 234 (1971).

In 1972, Michigan enacted its no-fault insurance

act which partially abolished the common-law remedy in tort for persons injured by negligent motor vehicle tortfeasors. The act was a response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort liability system. The goal of the no-fault system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses through a system of compulsory insurance which would provide victims with benefits for their injuries as a substitute for their common-law remedy in tort. *Shavers v Attorney General,* 402 Mich 554; 267 NW2d 72 (1978). Section 3135 of the no-fault act, the operative provision which partially abolished tort liability and which is the source of the present controversy, provides, in pertinent part:

"(1) *A person remains subject to tort liability for noneconomic loss* caused by his or her ownership, maintenance, or use of a *motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.*

"(2) Notwithstanding any other provision of law, *tort liability* arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(3) and (4) was in effect *is abolished except as to:*

* * *

"(b) *Damages for noneconomic loss as provided and limited in subsection (1).*" (Emphasis added.) MCL 500.3135; MSA 24.13135.

It is undisputed that loss of consortium is a noneconomic loss. The question that has arisen, however, is whether "liability for noneconomic loss" refers only to losses suffered by the "injured person" who "has suffered death, serious impairment of body function or permanent serious disfig-

urement" or whether the phrase: "if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement", is merely the statement of a threshold condition that must be met before another who suffers noneconomic loss may seek recovery in tort. Under the latter interpretation the spouse of a person who receives above-threshold injuries may recover for loss of consortium, while under the former interpretation he or she may not.

In *Warner v Brigham, supra,* a majority of a Court of Appeals panel held that the language of the statute was clear; that it did not limit liability to those losses suffered by an injured person, and that any noneconomic loss compensable at common law may be recovered under the statute once the injured person has suffered injuries which meet the statute's threshold requirements. The dissenting member of the panel, Judge BASHARA, found the language of the statute ambiguous and wrote that the only reasonable construction consistent with the operative language of the statute and the act's purpose of limiting automobile injury tort actions was that tort recovery was limited to injured persons who meet the threshold requirements.

A majority of the Court of Appeals panel in the instant case agreed with the reasoning of Judge BASHARA and held that the spouse of a person injured in an automobile accident may not recover for loss of consortium. Judge CYNAR dissented from this part of the decision, saying that because the purpose of the no-fault act is to compensate persons injured in automobile accidents and since claims for loss of consortium had long been recognized in Michigan and the no-fault act did not specifically exclude such claims, the act should be

construed as not barring the spouse's claim for loss of consortium.

III

While we agree that the language of the statute is ambiguous and subject therefore to judicial construction, we believe the dispositive principles of construction applicable here are found in the United States District Court decision in *Cotton v Minter, supra.* There the Court concluded that neither the language of the statute nor the legislative purpose of the act were dispositive. The Court noted that the statute was equally susceptible of either interpretation and that it was unlikely that the existence of consortium claims contributed significantly to the problems of high legal costs and the over-burdened court system that the no-fault act was designed to alleviate. Consequently, the Court followed the long-established principle of statutory construction that statutes which abolish the common law should be construed narrowly. *Bandfield v Bandfield,* 117 Mich 80; 75 NW 287 (1898). The Court concluded that since loss of consortium is a well-established cause of action at common law in Michigan the no-fault statute should not be construed as impliedly repealing the right to recover for loss of consortium.

We find the rationale of the Court in *Cotton v Minter* to be persuasive. Const 1963, art 3, § 7 provides:

> "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."

Although a statute which expressly extinguishes a

common-law right is a proper exercise of legislative authority, *Myers v Genesee County Auditor,* 375 Mich 1; 133 NW2d 190 (1965), statutes in derogation of the common law must be strictly construed, *Morgan v McDermott,* 382 Mich 333; 169 NW2d 897 (1969), and will not be extended by implication to abrogate established rules of common law, *Bandfield v Bandfield, supra.* The statute, however, must be construed sensibly and in harmony with the legislative purpose. *In re Cameron's Estate,* 170 Mich 578; 136 NW 451 (1912).

Applying these principles to the question presented in this case, we conclude that the no-fault act must be construed as retaining the common-law action for loss of consortium. The common-law action for loss of consortium in Michigan is not expressly abolished by the language of § 3135. If this section abolishes this common-law right it must be found to do so by implication. There is nothing, however, in the language of the act or its legislative purposes that requires such a construction. Since it is derived from the injured spouse's action, a claim of loss of consortium does not create a new case nor does it contribute significantly to the problems the act was intended to alleviate.

Accordingly, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse that part of the Court of Appeals judgment which reversed the trial court judgment as to plaintiff Marie Rusinek and remand the case to the Court of Appeals for consideration of the issue left unaddressed by the Court of Appeals. In all other respects the application for leave to appeal is denied because the Court is not persuaded that the question presented should now be reviewed by this Court.

The motion for leave to file a brief amicus curiae is thereby rendered moot and it is denied.

Costs to appellants.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

BAILEY v GRAVES

Docket No. 63604. Argued November 13, 1980 (Calendar No. 1).—Decided August 24, 1981. Rehearing denied 412 Mich 1101.

Dewitt Bailey brought an action against Richard Graves and Joseph Piersante, Detroit police officers, for assault and battery. The plaintiff's neck was broken during a struggle with the police officers, who were executing a warrant to search for narcotics at an apartment where the plaintiff was a visitor. The Wayne Circuit Court, Charles Kaufman, J., instructed the jury on the issue of exemplary damages but failed to grant the defendants' request for a further instruction that exemplary damages may only be awarded on a finding of malice, or willful and wanton misconduct, or reckless carelessness or negligence of the defendants. The jury returned a verdict for the plaintiff with unapportioned damages of $225,000. The Court of Appeals, M. J. Kelly, P.J., and Bashara and R. B. Burns, JJ., affirmed in an unpublished per curiam opinion (Docket No. 76-2826). Defendants appeal.

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

Exemplary damages may be awarded only where it is first shown that the defendant's conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights. Therefore, the instruction to the jury in this case was erroneous. The fact that a tort is committed intentionally does not mean that it was committed with malice or reckless disregard of the rights of others, or wantonly, as necessary to permit exemplary damages. The failure of the trial court to instruct the jury on the circumstances in which exemplary damages are properly recoverable seriously prejudiced the defendants because consideration whether the defendants acted maliciously or so willfully and wantonly as to demonstrate a reckless disregard of the plaintiff's rights might well have altered the resulting verdict. Because the verdict was

REFERENCES FOR POINTS IN HEADNOTES

[1] 22 Am Jur 2d, Damages §§ 236-241, 249, 250.

[2] 6 Am Jur 2d, Assault and Battery §§ 187, 190.
22 Am Jur 2d, Damages §§ 361, 362.

not apportioned, the tainted quantum of damages is unknown, and the question of damages must be retried.

Reversed and remanded for further proceedings.

1. DAMAGES — EXEMPLARY DAMAGES.

An award of exemplary damages is justifiable only where it is first shown that the defendant's conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights.

2. DAMAGES — EXEMPLARY DAMAGES — INSTRUCTIONS TO JURY.

Failure to grant a request to instruct the jury in an action for assault and battery that exemplary damages may only be awarded on a finding of malicious or willful and wanton misconduct demonstrating a reckless disregard of the plaintiff's rights by the defendants seriously prejudiced the defendants and is reversible error where consideration of that issue might well have altered the resulting verdict for the plaintiff with unapportioned damages.

Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C. (by *David K. Barnes, Jr.),* for plaintiff.

George W. Crockett, Jr., Acting Corporation Counsel, *Sylvester Delaney,* Deputy Corporation Counsel, and *Hurticene Hardaway,* Assistant Corporation Counsel, for defendants.

WILLIAMS, J. The question presented in this civil action for assault and battery is whether the trial court erred in its instruction to the jury on exemplary damages, which failed to explain plaintiff's burden of proof and the standard of misconduct requisite for recovery of such damages.[1] We hold that the instruction given was deficient in those

[1] Defendants also claim relief on the theory that the trial court erroneously refused to give their proposed instructions XVI and XIX on self-defense. The Court of Appeals correctly ruled that this issue was not properly preserved below. *Hunt v Deming,* 375 Mich 581, 584; 134 NW2d 662 (1965). Furthermore the opinion recognized that, even if an objection proper in form had been made, "neither the evidence adduced at trial, nor the defendants' pretrial statement, pleadings, or written theory of the case submitted to the court raised the issue of self-defense".

particulars. *Wise v Daniel,* 221 Mich 229; 190 NW 746 (1922). Defendants are entitled to a properly instructed jury. Accordingly, we reverse and remand for retrial on the question of the amount of damages plaintiff suffered as a result of defendants' misconduct, without limitation to any particular element of such damages. *Winchester v Meads,* 372 Mich 593, 599; 127 NW2d 337 (1964).

FACTS

On September 19, 1972, a search warrant for narcotics was executed on a Detroit apartment. Plaintiff's neck was broken during a struggle with two of the officers. This civil action for assault and battery followed.

At trial, plaintiff testified that he was visiting the apartment at the time of the raid. He reported that he surrendered immediately to the officers who forced the door. He said he was promptly handcuffed, and taken into a bedroom where he was beaten and thrown on his head; he was then taken into the living room where the beatings, this time with a claw hammer, continued. He denied any attempt to use force to defend himself; the only gun in the apartment, he testified, presumably remained in a kitchen drawer during the execution of the warrant.

The defendants' version of the events varied from the plaintiff's in every salient particular. Defendant Piersante testified that plaintiff was fleeing from the police toward the bedroom when he was tackled to prevent access to a gun, allegedly lying on the bed. He denied beating the plaintiff.

The trial court instructed the jury on exemplary

damages, as requested by the plaintiff, in the following language:[2]

"Now, in that connection, if you find for the plaintiff, you may consider the question of exemplary damages. Exemplary damages are defined as additional compensation to the plaintiff for humiliation, sense of outrage and indignity resulting from the defendants' actions, and for injuries to the plaintiff's feelings. Exemplary damages may not be awarded for the purpose of punishing a defendant. Such damages are an additional sum which are in your discretion and are designed to compensate the plaintiff for those elements which I have just mentioned."

The jury returned a verdict of $225,000 in favor of the plaintiff, without apportioning damages. The trial court subsequently denied motions for judgment notwithstanding the verdict and for new trial. The Court of Appeals affirmed.[3]

This Court granted leave to appeal on April 17, 1980. 408 Mich 894 (1980).

I

The principal cases setting forth the grounds for exemplary damages are *Wise v Daniel, supra,* and

[2] The instruction requested by defendants read:

"If you find for the plaintiff, you may consider the question of exemplary damages. Exemplary damages are to compensate the plaintiff for humiliation, embarrassment, and the sense of outrage, resulting from the defendants' actions. *The right to recover exemplary damages* is not based on punishing the defendant but *must arise out of the outrageous nature of the act by the defendant. Such exemplary damages are only recoverable if plaintiff has proven, by a preponderance of the evidence, malice, or willful or wanton misconduct, carelessness or negligence by the defendant; negligence so great as to indicate a reckless disregard of the rights or safety of others. If plaintiff has not proven such outrageous conduct on the part of the defendant, he may not recover exemplary damages."* (Emphasis added.)

[3] Unpublished opinion, July 16, 1979, Docket No. 78-2826.

McFadden v Tate, 350 Mich 84; 85 NW2d 181 (1957). The instruction given by the judge in *Wise* read:

"On this last proposition, if you do find that the defendant deliberately and premeditatedly drew the gun and shot him, you may give, besides actual damages, that is, loss of wages and pain and suffering, what are called added or cumulative damages; that is damages for outraged feelings by reason of the malice that goes with it, if you so find. But you are to give these added damages only in case he shot him deliberately after they separated, you see." 221 Mich 233.

Reviewing this instruction, our Court stated:

"We * * * feel the jury was left in no doubt as to the meaning when such damages were limited to plaintiff's sense of outrage by reason of the malicious act of defendant. * * *

"If a cow kicks a man in the face the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the 'cussedness' of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage. If a man employs spite and venom in administering a physical hurt he must not expect his maliciousness to escape consideration when he is cast to make compensation for his wrong. If the defendant maliciously inflicted the injury then the jury had a right to take into consideration such fact together with all the circumstances disclosed and award such sum by way of compensation as the plaintiff ought to receive, and the defendant ought to be made to pay." 221 Mich 233-234.

Similarly, in *McFadden,* this Court approved the trial judge's instruction which required the jury to find malice, saying:

"In discussing the matter of damages in his charge to

the jury the trial judge stated, in substance, that if the assault and battery was determined as occurring without justification or reasonable excuse, and to be 'wilful, wanton and malicious', the plaintiff was entitled to recover damages for necessary expenses, loss of wages, pain and suffering, and 'exemplary damages'.

* * *

"The trial judge was not in error in advising the jury with reference to the computing of damages by way of compensation if the injury inflicted on plaintiff was determined to have been so inflicted maliciously, wilfully and wantonly." 350 Mich 88-89.

These cases stand for the proposition that an award of exemplary damages is justifiable only where it is first shown that defendant's conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights.

II

In the instant case, the trial court failed to charge the jury, in accordance with defendants' request, that a determination of malicious or willful and wanton conduct on the part of the defendants was a *sine qua non* to the award of exemplary damages. This was error. Furthermore the plaintiff is not correct in asserting that, when the trial judge instructed the jury on the issue of liability that the tort was *intentional,* that the required malice, fraud or willful and wanton conduct on the part of the defendant to establish entitlement to exemplary damages was adequately covered. The fact that a tort is committed intentionally does not mean that it was committed with malice or reckless disregard of the rights of others, or wantonly, as necessary to permit exemplary damages. In addition, to hold the contrary would

be to permit exemplary damages in most assaults, for example, which obviously is not what exemplary damages are intended for.

We noted in *Rouse v Gross,* 357 Mich 475, 481-482; 98 NW2d 562 (1959), that "[t]he error which calls for a new jury trial is one of such significance as to have prejudiced the result * * * without which * * * the result might well have been different". (Citations omitted.)

The trial court in this case erred in failing to define the circumstances in which exemplary damages are properly recoverable. This error seriously prejudiced defendants, since it permitted the jury to award exemplary damages without consideration of the factors which must be present to justify such an award. Consideration of those factors—whether defendants acted maliciously or so willfully and wantonly as to demonstrate a reckless disregard of plaintiff's rights—might well have altered the resultant verdict.

CONCLUSION

Defendants are entitled to a properly instructed jury. The trial court erred reversibly by failing to inform the jury of the conduct which is a necessary precursor to recovery of exemplary damages.

Since the verdict was not apportioned, the tainted quantum of plaintiff's damages is unknown. Accordingly, we reverse and remand for retrial of the question of the amount of damages plaintiff suffered as a result of this assault and battery, without limitation as to any particular element of such damages.

Costs to abide final results.

COLEMAN, C.J., and KAVANAGH, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with WILLIAMS, J.

PEOPLE v HUGHES

Docket No. 64131. Decided August 24, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded to the Washtenaw Circuit Court for a new trial. Rehearing denied 412 Mich 1101.

Howard Hughes, III, was convicted by a jury in Washtenaw Circuit Court, William F. Ager, Jr., J., of first-degree murder. The trial court denied the request of defense counsel that, if the defendant chose to testify, references to his conviction of second-degree murder 14 years earlier be excluded. The defendant thereupon elected not to testify in his own behalf. The Court of Appeals, Allen, P.J., and D. E. Holbrook, J. (T. M. Burns, J., dissenting), affirmed, holding that the trial court did not abuse its discretion in ruling that reference to the prior conviction was admissible (Docket No. 78-1038). Defendant applied for leave to appeal, and after response by the prosecutor, the Supreme Court, in a per curiam opinion signed by Justices Kavanagh, Williams, Levin, Fitzgerald, and Ryan, *held:*

The prejudicial effect of evidence of a 14-year-old conviction of essentially the same crime as that with which the defendant was charged outweighed its probative value.

1. Although the trial judge's explanation is confusing, it appears that he properly recognized that he had discretion to exclude the evidence of defendant's prior conviction or to admit it for the limited purpose of attacking the defendant's credibility. In his exercise of this discretion, however, he erred because he apparently believed that evidence of the defendant's college education and subsequent accomplishments would be pertinent to his credibility. There is no probative relationship between a person's educational achievements or other accomplishments and his or her disposition to truthfulness.

2. The probative value of a prior felony conviction on the issue of credibility is not to be weighed against the probative value of some other evidence. It is to be weighed against its potential prejudicial effect on the fairness of the defendant's trial. Among the factors to be considered are the nature of the

prior offense, whether the conviction was for substantially the same conduct as that for which the accused is on trial, and the effect on the decisional process if the accused does not testify for fear of impeachment by prior convictions. The purposes of the inquiry are to put before the jury only those prior convictions indicative of the defendant's disposition toward truthfulness and veracity, and to keep from the jury those convictions which; although they may be indicative of defendant's disposition toward truthfulness, may interfere with the jury's ability to determine the defendant's guilt or innocence on the basis of the evidence. Such interference is what is meant by "prejudice". If, after evaluating these factors, the judge believes the prejudicial effect of admitting prior conviction evidence outweighs its probative value, the evidence should be excluded.

The judgment of the Court of Appeals is reversed and the case is remanded to the Washtenaw Circuit Court for a new trial, with directions intended to obviate other questions not decided.

Justice Moody, joined by Chief Justice Coleman and Justice Ryan, concurred in the result in a separate opinion. The fact that 14 years separated the two offenses, the fact that the crimes were substantially similar, the fact that the nature of the prior conviction, although probative, offers modest insight as to credibility, and the fact that the defendant did not testify lead to the conclusion that the prejudicial nature of this evidence outweighed its probative value.

93 Mich App 333; 287 NW2d 226 (1979) reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *Elizabeth Osgood Pollard,* Assistant Prosecuting Attorney, for the people.

Arthur J. Tarnow for defendant.

PER CURIAM. The defendant was charged with felony murder in the killing of a policeman during a bank robbery. His first trial ended in a hung jury. At his second trial in 1977, the defendant was convicted and sentenced to life. The Court of Appeals affirmed the conviction. Defendant filed

an application for leave to appeal with this Court and the prosecutor responded. After careful consideration of the contentions of both parties and review of the record, in lieu of granting leave to appeal, we reverse and remand to the trial court for a new trial.

Prior to the presentation of the defense testimony at the second trial, the defendant's counsel asked the trial judge to exclude references to the defendant's 1963 conviction of second-degree murder. The trial judge denied the request declaring:

"As to the second request, [that] the court suppress any testimony, if the defendant takes the stand as to his past record, of course this only applies, any reference on defendant's past criminal record could only be brought if the defendant testifies. If he testifies, the court in exercising discretion, would feel that it would be proper to cross-examine the defendant only as to his felony record [of] which he either has been found guilty or pled guilty, not misdemeanors or anything of this nature. * * * The court feels that this would go to the credibility of the defendant if he testifies. In the same manner, defendant, as if he testifies, testimony as to his college education where or what he's been doing pursuant, those things that he's accomplished, this also being brought forth as to anything which would affect his credibility, may also be presented by counsel for defendant, if the defendant testifies. This would be pertinent to his credibility. So what counsel appears to be arguing [is] that it would be proper to show that the defendant has done excellent work in school, and so forth, and that he's been without a blemish for many years, but then defendant seems to claim that at that point the testimony should stop and say everything that's good should be permitted to be offered as to his credibility, but nothing in any way affecting his credibility should be offered, and the court, in its discretion, feels that this case on the basis of what the court has heard and seen, the court feels that this would be proper for cross-examination as to this felony."

Although we find this explanation confusing, it appears that the judge properly recognized that he had discretion to exclude the evidence of defendant's prior conviction or to admit it for the limited purpose of attacking the defendant's credibility. In his exercise of this discretion, however, he erred in two particulars. First, he apparently believed that evidence of defendant's college education and subsequent accomplishments would be pertinent to his credibility. There is no probative relationship between a person's educational achievements or other accomplishments and his or her disposition to truthfulness. Second, the "credibility" import of a prior felony conviction is not to be weighed against the "credibility" import of some other evidence. It is to be weighed against its potential prejudicial effect on the fairness of the defendant's trial.

In *People v Jackson,* 391 Mich 323, 333; 217 NW2d 22 (1974), and *People v Baldwin,* 405 Mich 550, 552-553; 275 NW2d 253 (1979), we set forth guidelines for the exercise of the trial court's discretion in balancing the prejudicial effect of evidence of prior convictions against their probative value on the issue of credibility. Among the factors to be considered are the nature of the prior offense, whether the conviction was for substantially the same conduct as that for which the accused is on trial, and the effect on the decisional process if the accused does not testify for fear of impeachment by prior convictions.[1]

The purpose of this inquiry is two-fold:

1) To put before the jury only those prior convictions indicative of the defendant's disposition toward truthfulness and veracity; and

[1] The trial in this case preceded the March 1, 1978 effective date of the Michigan Rules of Evidence. The listed factors continue to be relevant in the balancing required by MRE 609(a)(2).

2) To keep from the jury those convictions which, although they may be indicative of defendant's disposition toward truthfulness, may interfere with the jury's ability to determine the defendant's guilt or innocence on the basis of the evidence. Such interference is what is meant by "prejudice".

If, after evaluating these factors, the judge believes the prejudicial effect of admitting prior conviction evidence outweighs its probative value, the evidence should be excluded.

Here the conviction was of essentially the same crime as that with which the defendant was charged and was approximately 14 years old. For these reasons we are persuaded that the prejudicial effect of this evidence outweighed its probative value.

The defendant also contends that he was denied equal protection of the law because the trial court denied him a complete transcript of the first trial. He further argues that the trial judge should have disqualified himself because he, along with the other judges of the Washtenaw Circuit Court, attended the funeral of the Ypsilanti policeman who was killed during the armed robbery.

Inasmuch as we have ordered a new trial on the basis of defendant's first assertion of error, to obviate the problems implicated in the other questions we direct that on retrial the defendant be furnished a complete transcript of the first trial which resulted in a mistrial and that the State Court Administrator assign a visiting judge to hear the case. In ordering the appointment of a visiting judge we intimate no finding of bias or prejudice on the part of the trial judge or of the other judges of the Washtenaw Circuit Court.

Pursuant to GCR 1963, 853.2(4), we reverse the

judgment of the Court of Appeals and remand to the Washtenaw Circuit Court for a new trial.

KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, and RYAN, JJ., concurred.

BLAIR MOODY, JR., J. *(concurring).* I concur with the result reached by the Court. The defendant was charged with felony murder. The trial judge denied the request of the defendant to exclude references to the defendant's prior conviction of second-degree murder that occurred 14 years previously.

In *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974), it was stated:

> "Among the factors to be considered are the nature of the prior offense, whether it is for substantially the same conduct for which the accused is on trial, and the effect on the decisional process if the accused does not testify from fear of impeachment by prior convictions."[1]

Furthermore, this Court has approved the factors outlined in *Gordon v United States,* 127 US App DC 343; 383 F2d 936 (1967), which include: "As a general guide, those convictions which are for the same crime should be admitted sparingly."

The fact that 14 years separated the two offenses, the fact that the crimes were substantially similar, the fact that the nature of the prior conviction, although probative, offers modest insight as to credibility, and the fact that the defendant did not testify lead to the conclusion that the prejudicial nature of this evidence outweighed its probative value.

COLEMAN, C.J., and RYAN, J., concurred with BLAIR MOODY, JR., J.

[1] It is to be noted that upon retrial MRE 609 will be applicable.

PEOPLE v PULLEY

Docket No. 62820. Argued May 6, 1980 (Calendar No. 2).—Decided August 24, 1981.

James C. Pulley was convicted on his plea of guilty in Kent Circuit Court, George V. Boucher, J., of attempted possession of heroin with intent to deliver, and he was sentenced to six to ten years imprisonment. The defendant argued on appeal that his sentence should be vacated because he was not present at a presentence conference conducted off the record, in chambers, between the sentencing judge and defense counsel. The Court of Appeals, D. C. Riley, P.J., and Bronson and Gillespie, JJ., affirmed in a memorandum opinion, on the ground that the record showed that the defendant and his attorney were given the opportunity to challenge the presentence report and given the right of allocution (Docket No. 78-2410). Defendant appeals.

Held: A majority of the Court, Chief Justice Coleman and Justices Kavanagh, Fitzgerald, Ryan, and Moody, is of the opinion that the defendant in this case was not prejudiced by his absence from the sentence conference. The Court also set forth a proposed amendment to the court rules governing the subject.

In a per curiam opinion, Justices Kavanagh, Fitzgerald, and Moody wrote:

1. An analysis of the character of the sentencing proceeding shows its kinship to the process of determining guilt or innocence at trial, and the consequent need for the defendant's presence and participation. Michigan sentencing policy requires that the sentence be tailored to the particular circumstances of the case and to the offender. To so tailor the sentence, the judge must gather complete and detailed information about the offender. The judge must assess the reliability of the informa-

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REFERENCES FOR POINTS IN HEADNOTES

[1-8] 21 Am Jur 2d, Criminal Law §§ 303-305.

Voluntary absence of accused when sentence is pronounced. 6 ALR2d 998.

Accused's right, under Federal Constitution, to be present at his trial—Supreme Court Cases. 25 L Ed 2d 931.

[2] 21 Am Jur 2d, Criminal Law § 530.

tion received, assure that it is reasonably up-to-date, determine its competency as a sentencing consideration, and resolve challenges to its accuracy.

2. The lack of knowledge of what went on in the conference denigrates the defendant's personal right of allocution. As Pulley contends, it may be that to provide the defendant a chance to speak after the judge and counsel have extensive discussions in chambers is worthless, and that, if the defendant has been excluded from the crucial discussion of sentencing, he not only must challenge any preconceived determination, but must do so in ignorance of the facts on which the judge relied.

3. Closely related to assuring the actual fairness and reliability of the proceeding is assuring the appearance of fairness and reliability so essential to maintaining confidence in the courts as instruments of justice. Proceedings secret to the defendant are antithetic to the defendant's perception that he is being treated fairly. Of comparable importance to the defendant's perception of fair treatment is society's perception that the process by which it deprives certain of its members of their liberty is fair, just, and reliable. Although it may be burdensome to society to allow the defendant to participate actively in the sentencing proceeding, recognition of the right to do so signifies a way of dealing with persons which is fundamental to a free society.

4. A majority of the Court, however, is of the opinion that this defendant was not prejudiced by his absence from the sentence conference. Accordingly, the per curiam authors declined at this time to require, as a matter of policy, that an accused be present upon request at this conference.

5. In the light of the concerns expressed in the opinion, the Court is considering the adoption of a court rule governing the subject, set forth as an appendix to the opinion.

The decision of the Court of Appeals is affirmed.

Justice Williams, joined by Justice Levin, dissented in part. He concurred with the determination to consider adoption of a court rule, but believed that the defendant in this case was deprived of constitutional due process, and would remand for resentencing. A right as fundamental as the right to be personally present is not subject to such formalistic confinement as to end with trial and thus to depend on the chronological stage of the proceeding rather than on the substantive nature of the inquiry. The right to be present should depend on the character of the proceeding and whether the reasons supporting a defendant's right to be present at trial are equally applicable to that proceeding.

OPINION OF THE COURT

1. CRIMINAL LAW — SENTENCING — PRESENCE OF DEFENDANT.

The sentencing proceeding, which requires the judge to tailor the sentence to the particular circumstances of the case and the offender, is akin to the determination of guilt or innocence at trial, and there is a consequent need for the presence and participation of the defendant.

2. CRIMINAL LAW — SENTENCING — PRESENTENCE CONFERENCE — PRESENCE OF DEFENDANT — RIGHT OF ALLOCUTION.

Absence of the defendant from a conference where the trial court discusses with counsel the report of the presentence investigation denigrates the defendant's personal right of allocution, because he must challenge any preconceived determination without knowledge of what went on in the conference (GCR 1963, 785.8[2]).

3. CRIMINAL LAW — SENTENCING — PRESENCE OF DEFENDANT — FAIRNESS.

Sentencing proceedings secret to the defendant, whether or not fair in fact, are antithetic to the defendant's perception that he is being treated fairly.

4. CRIMINAL LAW — SENTENCING — PRESENCE OF DEFENDANT — FAIRNESS.

The appearance of fairness and reliability of courts is essential to maintaining confidence in them as instruments of justice; liberty ought not to be taken away from a person unless the process is fair, just and reliable, and recognition of the right of the defendant to participate actively in the sentencing proceeding signifies a way of dealing with persons which is fundamental to a free society.

5. CRIMINAL LAW — SENTENCING — PRESENTENCE CONFERENCE — PRESENCE OF DEFENDANT.

The Supreme Court declined to require, as a matter of policy, that an accused be present upon request at a presentence conference between the trial court and counsel where the Court concluded that the defendant was not prejudiced by his absence from the sentence conference and there was no showing that what transpired at the conference was objectionable in any fashion.

6. CRIMINAL LAW — SENTENCING — PRESENTENCE CONFERENCE — PRESENCE OF DEFENDANT — DUE PROCESS.

A defendant is deprived of constitutional due process of law by his absence from a conference where the trial court discusses with counsel the report of the presentence investigation (US Const, Am XIV; Const 1963, art 1, § 17).

7. CRIMINAL LAW — PRESENCE OF DEFENDANT — DUE PROCESS.

The Due Process Clause provides defendants the fundamental right to be present personally at every stage of the trial where their substantial rights may be affected by the proceedings and where their presence relates to the fullness of their opportunity to defend against the charge (US Const, Am XIV; Const 1963, art 1, § 17).

8. CRIMINAL LAW — PRESENCE OF DEFENDANT — DUE PROCESS.

A right as fundamental as the right of the defendant to be present personally is not subject to such formalistic confinement as to end with trial and thus to depend on the chronological stage of the proceeding rather than on the substantive nature of the inquiry; the right to be present should depend on the character of the proceeding and whether the reasons supporting a defendant's right to be present at trial are equally applicable to that proceeding (US Const, Am XIV; Const 1963, art 1, § 17).

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people.

George S. Buth for defendant.

PER CURIAM. James Corzel Pulley was charged with one count of unlawful delivery of heroin and one count of conspiracy to deliver heroin. He pled guilty of attempted possession with intent to deliver heroin,[1] and was sentenced to serve six to ten years imprisonment.

Pulley appealed, raising one issue: whether his

[1] MCL 335.341(1)(a); MSA 18.1070(41)(1)(a); MCL 750.92; MSA 28.287.

sentence should be vacated because he was not present at an in-chambers, off-the-record presentence conference between the sentencing judge and Pulley's attorney. The Court of Appeals affirmed in an unpublished opinion.[2] We granted leave to appeal.

I

At the outset of the in-court sentencing proceeding, the circuit judge addressed defense counsel, saying:

"Mr. Dodge, you have already discussed this matter with the court in chambers. Do you wish to respond any further to the presentence investigation report?"

It is thus apparent that the judge and defense counsel discussed the presentence report and, presumably, the sentence, in Pulley's absence. The balance of the sentencing record shows that the prosecutor was also given the opportunity to respond to the presentence report, and that Pulley was accorded his opportunity for allocution.

Pulley asserts that his opportunity for allocution and to refute the contents of the presentence report was made ineffective by his absence from the presentence conference, and that the presentence conference is a critical stage of a criminal prosecution at which a defendant has a constitutional right to be present. The prosecutor maintains that Pulley had a full opportunity for allocu-

[2] The Court of Appeals said:

"The in-chambers off-the-record sentencing conference between the trial court and defense attorney did not violate defendant's rights. The record affirmatively shows that both defense counsel and defendant were given the opportunity to challenge the presentence report pursuant to GCR 1963, 785.12 and the right to allocution pursuant to GCR 785.8."

tion and to respond to the presentence investigation report, and that his right to be present extends only to his trial, which ends with the rendition of the verdict.

II

While the power to set the range of punishment for a given offense is legislative,[3] bringing that statutory range of discretion to bear upon an individual defendant in the form of a sentence has been confided to the judiciary.[4] The exertion of such judicial process has traditionally required that the accused be given the opportunity to personally participate.[5]

" 'A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.' " *People v Medcoff,* 344 Mich 108, 114; 73 NW2d 537 (1955), quoting *Lewis v United States,* 146 US 370, 372; 13 S Ct 136; 36 L Ed 1011 (1892).

In 1882, this Court invalidated a statute prescribing the procedure applicable to persons convicted and imprisoned as disorderly by a justice of the peace.[6] The statute required the circuit court, at the beginning of each term, to inquire into the circumstances of each case, to hear any proofs offered, and to order a prisoner released, bound out as an apprentice or servant or committed to jail at hard labor. The Court said:

[3] *People v Hall,* 396 Mich 650, 658; 242 NW2d 377 (1976); *People v Palm,* 245 Mich 396, 404; 223 NW 67 (1929).

[4] *People v Cook,* 147 Mich 127, 133; 110 NW 514 (1907).

[5] See, generally, *Faretta v California,* 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

[6] *In the Matter of Fowler,* 49 Mich 234; 13 NW 530 (1882).

"Now surely it requires no argument at the present day, nor citation of authorities, to show that none of these things can be done by the circuit court unless the person convicted is personally present. It would be so clearly contrary to our fundamental law to permit evidence to be introduced and considered against a person convicted or accused; or to permit the sentence imposed to be increased, as this statute provides, in the absence of the person convicted, that we cannot think the Legislature contemplated such a thing. If attempted it would be clearly unconstitutional and of no force or effect." *In the Matter of Fowler,* 49 Mich 234, 238; 13 NW 530 (1882).

An analysis of the character of the sentencing proceeding reveals its kinship to the process of determining guilt or innocence at trial, and the consequent need for defendant's presence and participation. Michigan sentencing policy currently requires that

"the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v McFarlin,* 389 Mich 557, 574; 208 NW2d 504 (1973).

To so tailor the sentence, the judge must gather complete and detailed information about the offender.[7] The judge must assess the reliability of the information received,[8] assure that it is reasonably up-to-date,[9] determine its competency as a

[7] *People v Triplett,* 407 Mich 510, 514; 287 NW2d 165 (1980).

[8] *United States v Weston,* 448 F2d 626 (CA 9, 1971).

[9] *People v Triplett, supra.*

sentencing consideration,[10] and resolve challenges to its accuracy.[11]

The lack of knowledge of what went on in conference denigrates the defendant's personal right of allocution. GCR 1963, 785.8(2). What Pulley has argued may often be true:

"To provide the defendant with a chance to speak after extensive chamber discussions is worthless. If defendant has been excluded from this crucial sentencing discussion, he not only must challenge any preconceived determination, but must do so in the dark."

Closely related to assuring the actual fairness and reliability of the proceeding is assuring the *appearance* of fairness and reliability so essential to maintaining confidence in courts as instruments of justice.[12] Proceedings secret to the defendant, whether or not fair in fact, are antithetic to the defendant's perception that he is being treated fairly. As expressed in an English case in which a witness had been questioned by the court in the absence of the defendant:

"That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in acting as they did. It may be that they sent for this officer in the interests of the accused; it may be that the information which the officer gave was in the interests of the accused. That

[10] *United States v Tucker,* 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); *People v Provost,* 403 Mich 843; 271 NW2d 777 (1978); *People v Anderson,* 391 Mich 419; 216 NW2d 780 (1974); *People v Grimmett,* 388 Mich 590; 202 NW2d 278 (1972); *People v Earegood,* 383 Mich 82; 173 NW2d 205 (1970).

[11] *People v Lee,* 391 Mich 618; 218 NW2d 655 (1974); *People v Malkowski,* 385 Mich 244; 188 NW2d 559 (1971); *People v McIntosh,* 62 Mich App 422; 234 NW2d 157 (1975); *People v Zachery Davis,* 41 Mich App 683; 200 NW2d 779 (1972). See *Townsend v Burke,* 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948).

[12] *United States v Gregorio,* 497 F2d 1253, 1258 (CA 4, 1974).

does not matter. Time and again this court has said that *justice must not only be done but must manifestly be seen to be done." Rex v Bodmin Justices ex parte McEwen,* [1947] KB 321, 325; [1947] 1 All Eng Rep 109 (emphasis supplied).

One has only to imagine a defendant sitting in the courtroom while his attorney, probably appointed by the state, and the judge are discussing his fate behind closed doors to see how easily the defendant's predictable dissatisfaction with the fairness of his sentence will become dissatisfaction with the fairness of the system.

Of comparable importance to the defendant's perception of fair treatment is society's perception that the process by which it deprives certain of its members of their liberty is fair, just and reliable:

"Against the practical ease of administration associated with informality must be weighed the ceremonial value of solemn formality and procedural regularity as indices of society's commitment to the principle that liberty and life ought not to be taken away cheaply or carelessly. Although it may be burdensome to society and, in rare cases, even disadvantageous to the defendant to allow him and his counsel to participate actively in the sentencing proceeding, recognition of their right to do so, whatever other justifications it may have, signifies a way of dealing with individuals which is fundamental to a free society."[13]

III

A majority of the Court, however, is of the opinion that this defendant was not prejudiced by his absence from the sentence conference. There has been no showing, on this record, that what transpired at the conference was objectionable in

[13] Note, *Procedural Due Process at Judicial Sentencing for Felony,* 81 Harv L Rev 821, 832 (1968).

any fashion. Accordingly, while the foregoing statements in this opinion reveal some of our concerns regarding the issue of a defendant's right to be present at such a conference, we decline at this time to require, as a matter of policy, that an accused be present upon request at this conference.

In light of our concerns, however, we are considering the adoption of a rule governing this area. A proposed rule is set forth in the appendix to this opinion. The proposal will be published for comment prior to our further consideration of it.

We have also examined the defendant's claims that his absence from the sentence conference violated his constitutional rights. We find those contentions to have no merit.

The motion for leave to file a supplemental brief is denied.

The decision of the Court of Appeals is affirmed.

KAVANAGH, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred.

COLEMAN, C.J., and RYAN, J. We concur in the Court's conclusion that the defendant was not prejudiced by his absence from the sentence conference.

APPENDIX

IN THE MATTER OF THE PROPOSED AMENDMENT OF GCR 1963, 785.8.

RULE 785. CRIMINAL PROCEDURE.

.1—.7 (Unchanged.)

.8 Sentencing.

(1) Sentence Conferences. A defendant has the right to be present at any conference between the

court and the defendant's lawyer regarding the sentence to be imposed. This right shall be afforded unless the defendant affirmatively waives the right either on the record or in writing.

(2) Sentence Proceedings. Before sentence is imposed, the court shall

(a) give defendant and his lawyer a reasonable opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence; and

(b) state the minimum and maximum sentence imposed by the court, together with any credit for time served to which the defendant may be entitled.

(3) Absence of Defendant's Lawyer. Sentence may not be imposed in the absence of the defendant's lawyer unless the defendant affirmatively waives the lawyer's presence.

(4) Failure to Comply With Rule. The provisions of subrule 785.8 are mandatory and failure to comply shall require resentencing.

.9—.13 (Unchanged.)

WILLIAMS, J. *(concurring in part; dissenting in part).* With my colleagues' determination to consider a court rule to guarantee defendants' right to be personally present at every stage of the trial where their substantial rights may be affected, including in-chambers conferences with the judge, I am in full concurrence.

However, I respectfully differ with my colleagues' finding that the defendant in this case was not deprived of constitutional due process. I believe he was and would have reversed the decision of the Court of Appeals and remanded for resentencing.

In *People v Medcoff,* 344 Mich 108; 73 NW2d 537

(1955), this Court found that defendant's absence during an examination by the trial court into possible misconduct by jurors constituted reversible error.[1] The right of the defendant "to be present at all stages of the trial where his substantial rights might be affected" was found to be as fundamental as the right to trial by an impartial jury.[2] The Court recognized that under *Snyder v Massachusetts,* 291 US 97; 54 S Ct 330; 78 L Ed 674 (1934), the Due Process Clause provides defendants

"the right to be personally present at every stage of the trial where their substantial rights may be affected by the proceedings and where their presence relates to the fullness of their opportunity to defend against the charge."[3]

Although the examination of the jurors at issue in *Medcoff* occurred during the trial, the Court observed that

"when considering what is the 'trial' for purposes of this question [defendant's right to be present] we can exclude formal and preliminary matters *or matters occurring after the hearing on the merits or rendition of the verdict,* as well as other matters." (Emphasis supplied.)

Relying on this dictum,[4] the prosecutor maintains

[1] One part of *Medcoff's* holding, that prejudice is conclusively presumed to have resulted from defendant's absence, was rejected in *People v Morgan,* 400 Mich 527, 536; 255 NW2d 603 (1977), in favor of the standard of "any reasonable possibility of prejudice".

[2] *Medcoff, supra.*

[3] *Medcoff, supra,* p 115. See also *Faretta v California,* 422 US 806, 819, fn 15; 95 S Ct 2525; 45 L Ed 2d 562 (1975):

"It is now accepted * * * that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, *Snyder v Massachusetts* * * *."

[4] The prosecution also relies on *People v Ormsby,* 48 Mich 494; 12

that a defendant's right to be personally present ends with the trial, and thus that the right to be present depends on the chronological stage of the proceeding rather than on the substantive nature of the inquiry.

A right as fundamental as the right to be personally present is not subject to such formalistic confinement.

A proper analysis of when a defendant has the right to be present should depend on the character of the proceeding and whether the reasons supporting a defendant's right to be present at trial are equally applicable to that proceeding. Of particular concern are whether substantial interests of the defendant may be affected, and whether the defendant's presence bears a reasonably substantial relation to his opportunity to affect the reliability or fairness of the judicial process being exerted upon him.

LEVIN, J., concurred with WILLIAMS, J.

NW 671 (1882), and *People v Boyd,* 49 Mich App 388; 212 NW2d 333 (1973). *Ormsby* held that a defendant has no right to be present when the court hears a motion for new trial on the ground that the verdict was contrary to the evidence, analogizing that proceeding to review by an appellate court. The nature of the inquiry in *Ormsby, i.e.,* an analysis of the legal sufficiency of evidence adduced at trial, is factually distinguishable from the present case where new evidence was received and evaluated to reach the initial determination of the proper sentence. *Boyd* involved a pretrial suppression hearing and, rather than supporting the prosecutor's position, apparently concluded that the defendant had the right to be present. *Boyd's* further conclusion that the right was waivable was conditioned upon a finding of no prejudice from the defendant's absence, a finding that cannot be made on this record.

CITIZENS INSURANCE COMPANY OF AMERICA v TUTTLE

Docket No. 65132. Argued April 7, 1981 (Calendar No. 5).—Decided August 24, 1981.

Citizens Insurance Company of America brought an action in tort against Donald Tuttle to recover the cost of repairs paid by Citizens to its insured for damages to a tractor and trailer after a collision with Tuttle's cow which was running loose on US 2 in Schoolcraft County. The complaint alleged violation of the statute prohibiting allowing an animal to run at large and a second count of negligence. The insured owner of the truck, Zaiger Beverage Company, and the driver, Edgar Schaedig, were permitted to intervene as plaintiffs to assert certain other claims against Tuttle which are not involved in this appeal. The Schoolcraft Circuit Court, William F. Hood, J., granted summary judgment for the defendant on the ground that the no-fault insurance act abolished any tort liability arising out of the accident. The Court of Appeals, Allen, P.J., and Beasley, J. (Bashara, J., dissenting), affirmed, deciding that the statutory abolition of tort liability applies where a motor vehicle is involved in any way (Docket No. 78-4737). The plaintiffs appeal. *Held:*

The tort liability abolished by the no-fault act is only such liability as arises out of the tortfeasor's ownership, maintenance, or use of a motor vehicle, not liability which arises out of other conduct, such as the negligent keeping of cattle.

1. The no-fault insurance act was not intended to work a comprehensive abolition of all tort liability incident to a motor vehicle accident. Injuries to persons or property arising from a motor vehicle collision do not give rise to tort liability unless the injury is caused by a wrongful act of commission or omission. Absent a wrongful act, the collision is simply an accident for the consequences of which no one is liable in tort. Tort

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REFERENCES FOR POINTS IN HEADNOTES

[1-11] 7 Am Jur 2d, Automobile Insurance §§ 25, 348, 249, 366.

Validity and construction of "no-fault" automobile insurance plans. 42 ALR3d 229.

liability thus arises, in the normal sense of those words, from some wrongful act of the liable party.

2. In this case, the wrongful act asserted is Tuttle's improper keeping of his cow. Such a wrongful act does not relate to the ownership, maintenance or use of a motor vehicle. Tuttle would have been subject to tort liability for his wrongful keeping of a cow whether she collided with a motor vehicle, trampled a rose garden, or walked through a plate glass window. His tort liability here did not "arise from" the ownership, maintenance or use of a motor vehicle any more than it would have "arisen from" the ownership, maintenance or use of a rose garden or a plate glass window; it arose solely from the wrongful keeping of a cow.

3. The no-fault act is a system of compensating injuries and damages incurred in accidents *caused by* motor vehicles. Compensation is due without regard to fault, and the tort system for adjudicating fault was partially abolished. In the context of the no-fault act, therefore, the abolition of tort liability carries the implicit sense of tort liability for injuries or damage *caused by* the ownership, maintenance or use of a motor vehicle.

4. This construction of the statute based on the language used and the no-fault concept is in accord with the meaning intended to be conveyed by identical language in the model act used as a source in the drafting of the no-fault act. It is probable that the Legislature, in using the language of the model act, intended the meaning ascribed to that language by the drafters of the model act, particularly where that meaning is the most natural sense of the language used.

5. The policy apparently expressed by the no-fault act in conditioning the abolition of tort liability upon the obtaining of no-fault coverage is that a person is to be relieved of tort liability only upon participating, through the payment of premiums, in a system for spreading the costs of compensating injuries caused by vehicles without regard to fault. To extend the abolition of tort liability to non-motorist tortfeasors would be to give a broader effect to the abolition of tort liability than would be given the requirement that no-fault insurance be in effect, and thus in part to defeat that policy. The non-motorist tortfeasor is the equivalent of the uninsured motorist and should be treated similarly. Both are outside the basic no-fault system of allocating the costs of accidents and both remain subject to tort liability.

6. A contrary construction is unreasonable. The statute, in subsection 1, provides for retention of tort liability for noneconomic loss above a certain threshold caused by ownership,

maintenance or use of a motor vehicle. By its terms, it addresses only tort liability of the *motorist* defendant for noneconomic loss. If the general abolition of tort liability in subsection 2 is construed, as the Court has concluded it should be, as abolishing only the motorist's tort liability, then the two subsections work together to abolish the tort liability of a motorist generally but to limit that abolition with respect to noneconomic loss to below-threshold loss. But if subsection 2 is construed to abolish the tort liability of the non-motorist as well as the motorist defendant, then the non-motorist alone will be immune from liability for above-threshold noneconomic loss. Such a construction would be contrary to the apparent intention of subsection 1 to have no effect on tort liability for above-threshold noneconomic loss, and would also require finding that the Legislature intended to distinguish between motorist and non-motorist tortfeasors and retain only the motorist's liability for noneconomic loss. There is nothing in the no-fault act or its policy or in the model acts to support such a distinction or intention.

7. Derogation of both statutory and common-law rights to recover noneconomic loss should not be inferred from ambiguous language of the statute where a reasonable construction would retain the rights, and the statute also expresses a policy to retain such rights where the injury is severe. Moreover, if the tort liability abolished were construed to include all tort liability for injuries or damage incurred in accidents involving vehicles with respect to which no-fault coverage is in effect, then the tort liability of an uninsured motorist would be abolished whenever he is involved in an accident with an insured motorist, which would be contrary to the clear intent of the act.

8. It could be argued that the no-fault act should be read so that the scope of the tort liability retained is coextensive with an insurer's right of subtraction or reimbursement from recovery on a tort claim. At the time the no-fault statute was enacted, however, it provided the insurer with a right of subtraction for or reimbursement from *any* tort recovery to the extent it duplicated personal protection insurance benefits, without specification of the types of tort recoveries to which the right applied. The 1978 amendment specifying the types of tort recovery for which subtraction or reimbursement is permitted was intended to clarify the limitations upon the insurer's right of subtraction for and reimbursement out of a third-party tort recovery, and was enacted at a time when litigation involving that issue was pending in the Supreme Court. There is no

indication of an intent to alter the scope of the abolition of tort liability, and none may be inferred.

Justice Levin also wrote separately to say that the possibility of duplication of personal protection insurance benefits by a tort recovery from a non-motorist tortfeasor is a further indication of the desirability of a comprehensive legislative review of the no-fault act. It may also be appropriate to consider whether the enactment of the no-fault act should alter the common-law collateral source rule normally applicable to tort actions to reduce a plaintiff's tort recovery to the extent it duplicates personal protection benefits paid or payable under mandatory no-fault insurance coverage.

Reversed and remanded for trial.

96 Mich App 763; 294 NW2d 224 (1980) reversed.

1. AUTOMOBILES — TORTS — NO-FAULT INSURANCE — ACTIONS.

The tort liability abolished by the no-fault insurance act is only such liability as arises out of the defendant's ownership, maintenance or use of a motor vehicle, not liability which arises out of other conduct (MCL 500.3135; MSA 24.13135).

2. AUTOMOBILES — TORTS — NO-FAULT INSURANCE — ACTIONS.

The no-fault insurance act was not intended to work a comprehensive abolition of all tort liability incident to a motor vehicle accident (MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.).*

3. AUTOMOBILES — TORTS — ACTIONS.

Injuries to persons or property arising from a motor vehicle collision do not give rise to tort liability unless the injury is caused by a wrongful act of commission or omission; absent a wrongful act, the collision is simply an accident for the consequences of which no one is liable in tort.

4. AUTOMOBILES — TORTS — ANIMALS — NO-FAULT INSURANCE — ACTIONS.

An action in tort for damages to a truck resulting from a collision with the defendant's cow is not one arising from the ownership, maintenance or use of an automobile within the meaning of the provision of the no-fault insurance act abolishing liability for such torts where the wrongful act asserted is the improper keeping of the cow in violation of the statute prohibiting allowing an animal to run at large (MCL 433.11 *et seq.,* 500.3135; MSA 18.789[1] *et seq.,* 24.13135).

5. AUTOMOBILES — TORTS — NO-FAULT INSURANCE.

The no-fault insurance act is a system of compensating injuries

and damages incurred in accidents caused by motor vehicles in which compensation is due without regard to fault, and it partially abolished the tort system for adjudicating fault; in that context, the abolition of tort liability carries the implicit sense of tort liability for injuries or damage *caused by* the ownership, maintenance or use of a motor vehicle (MCL 500.3135; MSA 24.13135).

6. AUTOMOBILES — NO-FAULT INSURANCE — TORTS — STATUTES.

It is probable that the Legislature, in using the language of the model Uniform Motor Vehicle Accident Reparations Act to abolish tort liability partially for motor vehicle accidents, intended the meaning ascribed to that language by the drafters of the model act, particularly where that meaning is the most natural sense of the language used (MCL 500.3135; MSA 24.13135).

7. AUTOMOBILES — NO-FAULT INSURANCE — TORTS — PUBLIC POLICY.

The policy apparently expressed by the no-fault insurance act in conditioning the abolition of tort liability upon the obtaining of no-fault coverage is that a person is to be relieved of tort liability only upon participating, through the payment of premiums, in a system for spreading the costs of compensating injuries caused by vehicles without regard to fault (MCL 500.3135; MSA 24.13135).

8. AUTOMOBILES — NO-FAULT INSURANCE — TORTS — ACTIONS — NONECONOMIC LOSS.

The no-fault insurance act provides in one subsection for retention of tort liability for noneconomic loss above a certain threshold caused by ownership, maintenance or use of a motor vehicle, and the general abolition of tort liability in another subsection abolishes only tort liability of the motorist defendant; so construed, the two subsections work together to abolish the tort liability of a motorist generally but to limit that abolition with respect to noneconomic loss to below-threshold loss (MCL 500.3135; MSA 24.13135).

9. AUTOMOBILES — NO-FAULT INSURANCE — NONECONOMIC LOSS — STATUTES — CONSTRUCTION.

Derogation of both statutory and common-law rights to recover noneconomic loss should not be inferred from ambiguous language of the no-fault insurance act where a reasonable construction would retain the rights, and the statute also expresses

a policy to retain such rights where the injury is severe (MCL 500.3135; MSA 24.13135).

10. AUTOMOBILES — NO-FAULT INSURANCE — TORTS — ACTIONS.

It would be contrary to the clear intent of the no-fault insurance act to retain the tort liability of the uninsured motorist if the tort liability abolished by the statute were construed to include all tort liability for injuries or damage incurred in accidents involving vehicles with respect to which no-fault coverage is in effect (MCL 500.3135; MSA 24.13135).

11. AUTOMOBILES — NO-FAULT INSURANCE — TORTS — STATUTES — CONSTRUCTION — AMENDMENT.

The amendment of the no-fault insurance act specifying the types of tort recovery for which the insurer is permitted subtraction or reimbursement was intended to clarify the limitations on the insurer's right of subtraction and reimbursement, and was enacted at a time when litigation involving that issue was pending in the Supreme Court; there is no indication of an intent to alter the scope of the abolition of tort liability, and none may be inferred (1978 PA 461).

Davis & Olsen Law Office for plaintiffs.

Nebel & Revord Law Office for defendant.

Amicus Curiae:

Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen (by *Steven G. Silverman)* for Michigan Trial Lawyers Association.

LEVIN, J. The question presented is whether the provision of the no-fault act which abolishes certain tort liability relieves a non-motorist tortfeasor of liability for losses arising from a motor vehicle accident caused by his lack of care. We hold that it does not.

Edgar Schaedig was driving a truck owned by Zaiger Beverage Company when he collided with defendant Donald Tuttle's cow, which was running

loose on the highway. The truck jackknifed and ran into a ditch.[1]

Citizens Insurance Company of America, the insurer of the truck, paid Zaiger Beverage for the cost of repairing extensive damage to the truck and became subrogated to its claims against Tuttle. Citizens Insurance filed this action against Tuttle to recover the amounts paid, on the ground that Tuttle was at fault in failing to keep the cow properly fenced in. This appeal involves only the question of Tuttle's liability for the damage to the truck.[2]

The trial court granted Tuttle's motion for summary judgment, on the ground that any tort liability arising out of the accident had been abolished by the no-fault motor vehicle liability act.[3] The Court of Appeals, one judge dissenting, affirmed. We reverse and remand for trial. The tort liability abolished by the no-fault act is only such liability as arises out of the defendant's ownership, maintenance or use of a motor vehicle, not liability which arises out of other conduct, such as the negligent keeping of cattle.

I

Section 3135, which provides for the abolition of tort liability, states:

[1] Zaiger Beverage Company was allowed to join the action to assert its claims against Tuttle for the extra expense of hiring another truck while its truck was being repaired, and for the increase in its insurance premiums. Schaedig was allowed to join to assert his claim against Tuttle for the temporary loss of his employment caused by the truck being disabled. There is no claim of physical injury to Schaedig.

[2] It was alleged that Tuttle's cow being at large was contrary to MCL 433.11 *et seq.;* MSA 18.789(1) *et seq.,* and, in a second count, that Tuttle was negligent in not keeping the cow properly fenced in.

[3] MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.*

"(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

"(2) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(3) and (4) was in effect is abolished except as to:

"(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer such harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

"(b) Damages for noneconomic loss as provided and limited in subsection (1).

"(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured." MCL 500.3135; MSA 24.13135.[4]

The Court of Appeals noted that, in contrast to

[4] The accident in the instant case occurred on April 5, 1977. Effective July 1, 1980, a fourth exception was added to subsection (2):

"(d) Damages up to $400.00 to motor vehicles, to the extent that the damages are not covered by insurance. An action for damages pursuant to this subdivision shall be conducted in compliance with subsection (3).

"(3) In an action for damages pursuant to subsection (2)(d):

"(a) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

"(b) Liability shall not be a component of residual liability, as prescribed in section 3131, for which maintenance of security is required by this act.

"(4) Actions under subsection (2)(d) shall be commenced, whenever

subsection (1) of § 3135, subsection (2) fails to specify whether only tort liability arising out of a *defendant's* ownership, maintenance or use of a motor vehicle was abolished or whether the tort liability which was abolished includes liability arising out of an accident involving only a *plaintiff's* ownership, maintenance or use of a motor vehicle and caused by tortious conduct of a nonmotorist defendant. The Court concluded, in light of the act's purpose to eliminate fault determinations, that "aside from the enumerated exceptions, tort liability is to be precluded whenever an automobile is involved in any way".

We conclude, however, that the no-fault act was not intended to work a comprehensive abolition of all tort liability incident to a motor vehicle accident.

Subsection (2) abolishes "tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle". Injuries to persons or property arising from a motor vehicle collision do not give rise to tort liability unless the injury is caused by a wrongful act of commission or omission. Absent a wrongful act, the collision is simply an accident for the consequences of which no one is liable in tort. Tort liability thus arises, in the normal sense of those words, from some wrongful act of the liable party.

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legally possible, in the small claims division of the district court or the conciliation division of the common pleas court of the city of Detroit or the municipal court. If the defendant or plaintiff removes such an action to a higher court and does not prevail, the judge may assess costs.

"(5) A decision of a court made pursuant to subsection (2)(d), shall not be res judicata in any proceeding to determine any other liability arising from the same circumstances as gave rise to the action brought pursuant to subsection (2)(d).

"(6) Subsections (2)(d), (3), (4), and (5) shall take effect July 1, 1980." 1979 PA 147; MCL 500.3135; MSA 24.13135.

In the instant case, the wrongful act asserted is Tuttle's improper keeping of his cow. Such a wrongful act does not relate to the ownership, maintenance or use of a motor vehicle. Tuttle's tort liability, if any, arose only from his alleged wrongful keeping of the cow, not from the ownership, maintenance or use of a motor vehicle.

Tuttle would have been subject to tort liability for his wrongful keeping of a cow whether it collided with a motor vehicle, trampled a rose garden, or walked through a plate glass window. His tort liability in the instant case no more "arose from" the ownership, maintenance or use of a motor vehicle than it would have "arisen from" the ownership, maintenance or use of a rose garden or a plate glass window. It arose solely from the wrongful keeping of a cow.

The no-fault act is a system of compensating injuries and damages incurred in accidents *caused by* motor vehicles. Compensation is due without regard to fault, and the tort system for adjudicating fault was partially abolished. In the context of the no-fault act, therefore, the abolition of "tort liability arising from the ownership, maintenance, or use * * * of a motor vehicle" carries the implicit sense of tort liability for injuries or damage *caused by* the ownership, maintenance or use of a motor vehicle.

Only persons who own, maintain or use motor vehicles can be subject to tort liability for injuries or damage caused by the ownership, maintenance or use of a motor vehicle. The non-motorist tortfeasor cannot be subject to tort liability for injuries or damage caused by the ownership, maintenance or use of a motor vehicle. The abolition of tort liability for injuries or damage caused by (arising from) the ownership, maintenance or use

of a motor vehicle, therefore, does not abolish the tort liability of the non-motorist tortfeasor.

The foregoing construction of subsection (2), based on the language used and the no-fault concept, is in accord with the meaning which the drafters of the Uniform Motor Vehicle Accident Reparations Act ("UMVARA"), one of the model acts utilized as source material in the drafting of the no-fault act, intended to convey by the use of identical language in the model act. Section 5(a) of UMVARA provides, with exceptions not at issue here, that "[t]ort liability with respect to accidents occurring in this state and arising from the ownership, maintenance, or use of a motor vehicle is abolished". 14 ULA, Civil Procedural and Remedial Laws, p 63. The comment to § 5 states:

> "[T]he only tort actions which are abolished are those which arise from the *defendant's* ownership, maintenance, or use of a motor vehicle. Among the potential tort actions thus retained by an automobile accident victim would be those against an automobile manufacturer for products liability or against a railroad in the case of an automobile-train collision." *Id.,* p 65 (emphasis supplied).

It is probable that the Legislature, in using the language of the model act, intended the meaning ascribed to that language by the drafters of the model act, particularly where that meaning is the most natural sense of the language used.

Moreover, subsection (2) abolishes tort liability arising from the ownership, maintenance or use only of vehicles for which the required no-fault insurance or other security has been obtained. The policy apparently expressed in so conditioning the abolition of tort liability upon the obtaining of no-fault coverage is that a person is to be relieved of

tort liability only upon participating, through the payment of premiums, in a system for spreading the costs of compensating vehicular injuries without regard to fault.[5] To extend the abolition of tort liability to non-motorist tortfeasors would be to incorporate into the no-fault system the costs of providing personal protection insurance benefits to motorists, passengers and pedestrians injured by non-motorist tortfeasors without incorporating offsetting premiums from non-motorist tortfeasors, since non-motorist tortfeasors are not required to purchase no-fault insurance with respect to their conduct as non-motorists.

Such extension would give a broader effect to § 3135's abolition of tort liability than would be given its requirement that no-fault insurance be in effect. To the extent that the abolition of tort liability is broader than the requirement of no-fault coverage, the policy of limiting tort immunity to those who have participated in the spreading of the costs of motor vehicle accident compensation would be defeated. The non-motorist tortfeasor is the equivalent of the uninsured motorist and should be treated similarly. Both are outside the basic no-fault system of allocating the costs of accidents and both remain subject to tort liability.[6]

[5] This policy is expressed in the draftsmen's comments to § 5(a)(1) of UMVARA, which excepts the uninsured motorist from the tort immunity provided in § 5:

"The rationale for denying the tort exemption to persons failing to comply with the requirement of providing security (Section 7) is that such persons have not contributed to the basic reparation benefits which are intended to replace much of existing tort liability."

[6] It should be noted that this construction of subsection (2)—as retaining the tort liability of non-motorist tortfeasors (tort liability not arising from the defendant's ownership, maintenance or use of a motor vehicle)—does not affect the obligation of a no-fault insurer to pay benefits to an injured non-motorist whose fault causes a collision. Although Tuttle is subject to liability in tort for damage he caused by improperly allowing his cow to be at large, that does not affect his right to recover no-fault benefits for damage to his cow.

Section 3121 of the act requires payment of benefits for "accidental

II

This construction of the abolition of tort liability intended by subsection (2), in addition to appearing directly from the language and antecedents of the section, also appears indirectly from the unreasonableness of a contrary construction.

To construe subsection (2) as abolishing tort liability arising from either a plaintiff's or a defendant's ownership, maintenance or use of a motor vehicle would create a serious conflict with the policy expressed in subsection (1). Subsection (1) provides:

"A person remains subject to tort liability for noneconomic loss *caused by his or her* ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1); MSA 24.13135(1) (emphasis supplied).

Subsection (1) is an exception to the general abolition of tort liability provided in subsection (2). The apparent intent of subsection (1) is to abolish tort liability for noneconomic loss resulting from below-threshold injuries—injuries not causing death, serious impairment of a body function, or

damage to tangible property *arising out of* the ownership, operation, maintenance or use of a motor vehicle", and provides that these benefits are due "without regard to fault". Similarly, § 3105 requires payment of benefits for "accidental *bodily injury arising out of* the ownership, operation, maintenance or use of a motor vehicle", and provides that these benefits are due "without regard to fault".

The operative effect of the expression "tort liability arising from" is inherently related to the party whose wrongful conduct gave rise to the liability. The operative effect of the expressions "[property] damage * * * arising out of" and "bodily injury arising out of", unlike the expression "tort liability arising from", is not implicitly related to the conduct of a particular party, and thus the "damage" and "injury" provisions apply without regard to whether the party claiming recovery negligently caused the damage or injury.

permanent serious disfigurement—and to not affect tort liability for noneconomic loss resulting from above-threshold injuries.[7]

By its terms, however, subsection (1) addresses only the tort liability of the motorist defendant for noneconomic loss—tort liability for noneconomic loss caused by the *defendant's* ownership, maintenance or use of a motor vehicle. If subsection (2) is construed, as we have concluded it should be, as abolishing only tort liability arising from the defendant's ownership, maintenance or use of a motor vehicle, then the two subsections work together. Subsection (2) abolishes the tort liability of a motorist generally, and subsection (1) limits that abolition in respect to noneconomic loss to below-threshold noneconomic loss.

If subsection (2) is given the non-parallel construction of abolishing the tort liability of the non-motorist as well as the motorist defendant, then subsection (2) will have a broader effect than subsection (1). The non-motorist alone will be immune from tort liability for above-threshold noneconomic loss.

Such a construction would be contrary to the apparent intent of subsection (1) to have no effect on tort liability for above-threshold noneconomic loss. It would also require finding that the Legisla-

[7] It appears to be the policy of the act to preserve a plaintiff's recovery for above-threshold noneconomic loss:

"The legislative intent, inferable from the face of [§ 3135], is clear: the Legislature intended to allow the catastrophically injured victim and the victim of extraordinary economic losses compensation in addition to that provided by §§ 3107 to 3110 of the act." *Workman v Detroit Automobile Inter-Ins Exchange,* 404 Mich 477, 508-509; 274 NW2d 373 (1979).

See MCL 500.3116(4); MSA 24.13116(4):

"A subtraction or reimbursement shall not be due the claimant's insurer from that portion of any recovery to the extent that recovery is realized for noneconomic loss as provided in section 3135(1) and (2)(b) * * * and survivor's loss as defined in sections 3107 to 3110 * * *."

ture intended by subsection (1) to distinguish between motorist and non-motorist tortfeasors in relation to their respective tort liability for above-threshold noneconomic loss and that the Legislature intended to retain only the motorist defendant's tort liability for noneconomic loss. We are unable to find anything in the no-fault act, its policy or the model acts to support such a distinction or intention.

To give such a non-parallel construction to subsection (2) would be to find that the Legislature, by the indirect means of an at best ambiguous provision and in apparent conflict with its intent to have no effect upon a plaintiff's right to recover for severe noneconomic loss, nonetheless intended to abolish the right to recover all noneconomic loss resulting from injuries in motor vehicle accidents caused, for example, by negligent, reckless or even intentional defects in the manufacture of a motor vehicle, or by the negligent, reckless or even intentional failure of a mechanic to properly repair a motor vehicle, or by the "unlawful selling, giving or furnishing to any [visibly intoxicated person] any intoxicating liquor". MCL 436.22; MSA 18.993.

Such derogation of both statutory and common-law rights to recover noneconomic loss should not be inferred from the ambiguous language of subsection (2), especially since an at least as reasonable and apparently more reasonable construction would retain the rights, since a model act on which the no-fault act was based used identical language with the intent of retaining the rights, and since the subsection immediately preceding subsection (2) expresses a policy to retain such rights where the injury is severe.

Moreover, if the tort liability abolished by subsection (2) were construed to include all tort liabil-

ity for injuries or damage incurred in accidents involving vehicles with respect to which no-fault coverage is in effect, then the tort liability of an uninsured motorist would be abolished whenever he is involved in an accident with an insured motorist. Such a result would be contrary to the clear intent of the act to retain the tort liability of the uninsured motorist.[8] In order to preserve the policy of retaining the tort liability of the uninsured motorist, it would be necessary to engraft a singular exception on subsection (2).

We conclude that subsection (2) was intended to abolish only tort liability arising from a defendant's ownership, maintenance or use of a motor vehicle. Tuttle thus remains subject to tort liability arising from his alleged lack of care in the keeping of his cow. We express no opinion regarding the ultimate resolution at trial of the factual allegations.

III

Several sections of the no-fault act are intended to reduce the cost of insurance by eliminating duplicative recoveries for losses incurred in motor vehicle accidents.[9]

Section 3116 provides the no-fault insurer a

[8] See *Bradley v Mid-Century Ins Co,* 409 Mich 1, 62; 294 NW2d 141 (1980), and MCL 500.3116(2); MSA 24.13116(2) which, in providing for the reimbursement of no-fault benefits duplicated by a tort recovery from an uninsured motorist, necessarily implies that the right to so recover in tort is retained.

[9] See, *e.g.,* MCL 500.3109; MSA 24.13109 (no-fault benefits are reduced to the extent governmental benefits are provided for the same injury); MCL 500.3109a; MSA 24.13109(1) (insurers are required to offer no-fault coverage coordinated with other coverage of the insured); and MCL 500.3116; MSA 24.13116 (no-fault insurers are provided a right of reimbursement out of certain tort recoveries of an insured to the extent the recovery duplicates required no-fault benefits).

right of subtraction from or reimbursement for personal protection insurance benefits to the extent an insured's tort recovery duplicates those benefits:

"A subtraction from or reimbursement for personal protection insurance benefits paid or payable under this chapter shall be made only if recovery is realized upon a tort claim arising from an accident occurring outside this state, a tort claim brought within this state against the owner or operator of a motor vehicle with respect to which the security required by section 3101(3) and (4) was not in effect, or a tort claim brought within this state based on intentionally caused harm to persons or property, and shall be made only to the extent that the recovery realized by the claimant is for damages for which the claimant has received or would otherwise be entitled to receive personal protection insurance benefits."

The no-fault insurer's right to subtraction or reimbursement is limited by § 3116(2) to recoveries from *motorist* tortfeasors or for intentional torts. There is no right to subtraction or reimbursement with respect to a tort recovery from a non-motorist defendant which duplicates personal protection insurance benefits.

It could be argued that the specification of tort recoveries with respect to which subtraction or reimbursement is provided should be read as expressing the legislative view of what tort recoveries were retained under the act, and that the Legislature intended by § 3116(2) to provide a right of subtraction for or reimbursement from any tort recovery still permitted under the act. It would follow that § 3135 should be read so that the scope of the tort liability retained is coextensive with an insurer's right of subtraction or reimbursement under § 3116(2).

At the time § 3135 was enacted, however, § 3116 provided the insurer with a right of subtraction for or reimbursement from *any* tort recovery to the extent it duplicated personal protection insurance benefits, without specification of the types of tort recoveries to which the right applied.[10] Thus, at the time § 3135 was originally enacted, the reimbursement provision of the no-fault act carried no implication of a limitation upon the tort recoveries retained by § 3135.

The amendment to § 3116 specifying the types of tort recovery for which subtraction or reimbursement was permitted should not be read as amending by implication the original meaning of § 3135 unless a clear intent to do so can be ascertained. The 1978 amendment to § 3116 was intended to clarify the limitations upon the insurer's right of subtraction for and reimbursement out of a third-

[10] Section 3116(2) was added by amendment in 1978. 1978 PA 461. Prior to its amendment, the pertinent subsection of § 3116 read:

"(1) A subtraction from personal protection insurance benefits shall not be made because of the value of a claim in tort based on the same accidental bodily injury. However, after recovery is realized upon a tort claim, a subtraction shall be made to the extent of the recovery, exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. If personal protection insurance benefits have already been received, the claimant shall repay to the insurers out of the recovery a sum equal to the benefits received, but not more than the recovery exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. The insurer shall have a lien on the recovery to this extent. A recovery by an injured person or his estate for loss suffered by him shall not be subtracted in calculating benefits due a dependent after the death and a recovery by a dependent for loss suffered by the dependent after the death shall not be subtracted in calculating benefits due the injured person."

See *Workman v Detroit Automobile Inter-Ins Exchange, supra,* p 510:

"[W]e construe § 3116 to mean that an insurance carrier paying personal injury protection benefits is entitled to reimbursement from the tort recovery of a person injured as a result of a motor vehicle accident only if, and to the extent that, the tort recovery includes damages for losses for which personal injury protection benefits were paid."

party tort recovery, and was enacted at a time when litigation involving that issue was pending in this Court.[11] There is no indication of an intent to alter the scope of § 3135's abolition of tort liability, and none may be inferred.

The judgment of the Court of Appeals is reversed and the cause remanded for trial. No costs, a public question.

COLEMAN, C.J., and KAVANAGH, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with LEVIN, J.

WILLIAMS, J. I concur because of part I.

LEVIN, J. *(concurring).* The possibility of duplication of personal protection insurance benefits by a tort recovery from a non-motorist tortfeasor is a further indication of the desirability of a comprehensive legislative review of the no-fault act as we approach its first decade of operation.

It may also be appropriate to consider whether the enactment of the no-fault act, with its policy of eliminating duplicative recoveries, should alter the common-law collateral source rule normally applicable to tort actions to reduce a plaintiff's tort recovery to the extent it duplicates personal protection benefits paid or payable under mandatory no-fault insurance coverage.

WILLIAMS, J., concurred with LEVIN, J.

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[11] *Workman v Detroit Automobile Inter-Ins Exchange, supra,* pp 521-523 (LEVIN, J., concurring).

PEOPLE v GOLDSMITH

Docket No. 64326. Decided August 24, 1981. On application by the parties for leave to appeal the Supreme Court, in lieu of granting leave to appeal, affirmed the decision of the Court of Appeals.

Almer K. Goldsmith was convicted by a jury in Wayne Circuit Court, Victor J. Baum, J., of assault with intent to commit murder and possession of a firearm during the commission of a felony. Before the jury retired, the trial court encouraged the jury to reach a unanimous verdict, and added that they should bear in mind that a jury which is unable to reach a unanimous verdict fails to accomplish its purpose and gives ammunition to persons who oppose the jury system. The Court of Appeals, N. J. Kaufman and D. C. Riley, JJ. (Danhof, C.J., dissenting), reversed the defendant's convictions on the grounds that the instruction should not have been given unless the jury had been deadlocked in its deliberation and that the instruction given substantially departed from the American Bar Association instruction approved by the Supreme Court (Docket No. 78-3014). The parties apply for leave to appeal.

In a unanimous per curiam opinion, the Supreme Court *held:*

The instruction complained of was a substantial deviation from the approved instruction and therefore reversal of the convictions was proper. However, the use of a proper instruction is not limited to deadlock situations.

1. The preface to the approved instruction provides that it may be given before the jury retires for deliberation. The purposes served by so giving it are two: the jury is instructed that their verdict must be unanimous, and the jurors are provided with some guidance concerning their duties during deliberations.

2. The effect of delivering the charge prior to deliberations differs from its effect when it is given in a deadlock situation. When given with the original instructions, its coercive effect is greatly diminished because it is one of many charges and, since the jury has not yet had any difficulty in reaching a verdict, there is no minority faction among the jurors who might feel

prodded by the charge to reach a verdict by surrendering their honest convictions.

3. Part of the instruction given in this case is essentially a call for the jury, as part of its civic duty, to reach a unanimous verdict, and it contains the message that a failure to reach a verdict constitutes a failure of purpose. Nothing in the standard instruction sanctions such a charge. It was a substantial departure from the approved charge and giving it was reversible error.

94 Mich App 155; 288 NW2d 372 (1979) affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Kim Robert Fawcett)* for defendant.

PER CURIAM. The issue presented in the instant case is whether reversible error was committed by delivery of a jury charge which deviated from the ABA instruction adopted by this Court in *People v Sullivan,* 392 Mich 324; 220 NW2d 441 (1974).[1] We

[1] In *Sullivan,* this Court disapproved future use of the *Allen* charge, which was an instruction commonly delivered to deadlocked juries. The popular name for this instruction derived from the United States Supreme Court's approval of the charge in *Allen v United States,* 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

In place of the *Allen* charge, the *Sullivan* Court adopted the ABA Standard Jury Instruction 5.4 which provides as follows:

"Length of deliberations; deadlocked jury.

"(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

"(i) that in order to return a verdict, each juror must agree thereto;

"(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

"(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

"(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

"(v) that no juror should surrender his honest conviction as to the

hold that the giving of this instruction was a substantial deviation from that approved in *Sullivan* and therefore the reversal of the defendant's convictions by the Court of Appeals was proper. However, we issue this opinion to make it clear that a proper *Sullivan* instruction may be given as part of the main charge to the jury.

Following the closing of proofs, near the conclusion of his main charge to the jury, the trial judge instructed the jury in part as follows:

"Any verdict which you reach will have to be unanimous. That means all 12 jurors will have to agree to a verdict of either guilty or not guilty.

"You should enter into your deliberations with an open mind, with a willingness to give serious consideration to the opinions of each other.

"Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement unanimously, if it can be done without sacrifice of individual judgment. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with his fellow jurors.

"No juror should surrender his honest conviction or belief as to what the weight or effect of the evidence is solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict. However, in the course of deliberations a juror should not hesitate to reexamine his own views and to change his opinion if convinced it is erroneous.

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weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

"(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

"(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement." American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury (Approved Draft, 1968), § 5.4.

"Let me remind you that when a jury is unable to reach a verdict, the jury has not accomplished its purpose. A jury unable to agree, therefore, is a jury which has failed in its purpose. Each time such an indecisive jury fails, ammunition is given to those who oppose the jury system as we know it, a system that requires a unanimous vote of all 12 jurors for either conviction or acquittal. As you deliberate, please bear this in mind."

No objection was posed to this portion of the charge at trial. Following approximately four hours of deliberation, the jury returned a verdict finding defendant guilty of the two offenses charged in the information, assault with intent to murder and possession of a firearm in the commission of a felony. MCL 750.83; MSA 28.278; MCL 750.227b; MSA 28.424(2).

On appeal, the defendant argued that the trial judge's instructions were erroneous since they operated to coerce the jury to return a verdict. In a two-to-one decision, the Court of Appeals reversed defendant's convictions. 94 Mich App 155; 288 NW2d 372 (1979).

The panel's majority found the instructions given in the instant case to be erroneous, interpreting a prior decision of this Court, *People v Sullivan, supra.* The majority premised its conclusion upon two grounds. First, insofar as the judge's instruction in this case paralleled the charge approved in *Sullivan,* the instruction was given at an inappropriate time. The panel in this case concluded that the *Sullivan* instruction may not be given during the original jury charge but, rather, may be delivered only where the jury has indicated it is deadlocked. Second, the majority held that the instruction given in this case substan-

tially departed from the charge approved in *Sullivan.*

In *Sullivan,* this Court disapproved further use of the *Allen* charge, *Allen v United States,* 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896), and adopted the American Bar Association Standard Jury Instruction 5.4 as the charge to be given in situations where a jury may be deadlocked.[2] Although the facts of *Sullivan* involved an *Allen*-like charge delivered to a deadlocked jury, we did not intend to limit the use of the approved ABA charge to deadlock situations. The preface to the instruction provides, "Before the jury retires for deliberation, the court may give an instruction which informs the jury". Therefore, a trial judge may deliver the ABA charge to the jury prior to commencement of the jury's deliberations.

The purposes served by delivering the ABA charge prior to deliberations are twofold. First, the jury is instructed that their verdict must be unanimous. Second, the jurors are provided with some guidance concerning their duties during deliberations. While they are obligated to deliberate with the goal in mind of reaching an agreement, the instruction also emphasizes that no juror need surrender his honest convictions concerning the evidence solely for the purpose of obtaining a unanimous agreement.

Further, the effect of delivering the ABA charge prior to deliberations differs from its effect when given in a deadlock situation. When given during the original instructions, the ABA charge's coercive impact upon the jury is greatly diminished.[3]

[2] See fn 1, *supra.*

[3] ABA Standard Jury Instruction 5.4 does not have the coercive impact of the *Allen* charge, especially when delivered during the main charge to the jury. See *United States v Skillman,* 442 F2d 542, 559 (CA 8, 1971); ABA Standards Relating to Trial by Jury (Approved Draft, 1968), § 5.4(a), commentary, p 147.

At this juncture, the instruction is one of many charges delivered to the jury. It tends to give guidance as to each juror's duty and responsibility during deliberations. At this point, the jury has not yet indicated any difficulty in reaching a verdict. There exists no "minority" faction among the jurors who might feel prodded by the charge to reach a verdict by surrendering their honest convictions. These considerations lead us to conclude that delivery of the ABA instruction during the main charge to the jury is proper.

The final issues to be resolved are whether the instruction delivered in the present case substantially departed from the ABA instruction approved in *Sullivan,* and if so, whether reversal is warranted. The first portion of the trial judge's instruction parallels the charge approved in *Sullivan.* However, the judge added the following:

"Let me remind you that when a jury is unable to reach a verdict, the jury has not accomplished its purpose. A jury unable to agree, therefore, is a jury which has failed in its purpose. Each time such an indecisive jury fails, ammunition is given to those who oppose the jury system as we know it, a system that requires a unanimous vote of all 12 jurors for either conviction or acquittal. As you deliberate, please bear this in mind."

In *Sullivan,* this Court indicated that substantial

In many cases involving review of an *Allen* or *Allen*-like instruction, the reviewing court concluded that where the charge was delivered during the original instructions to the jury, its coercive impact was greatly diminished or eliminated. See, *e.g., United States v Fioravanti,* 412 F2d 407, 419 (CA 3, 1969); *United States v Gugliel-mini,* 598 F2d 1149, 1151, 1153, fn 4 (CA 9, 1979); *United States v Wynn,* 415 F2d 135, 137 (CA 10, 1969); *United States v Simpson,* 144 US App DC 259, 260; 445 F2d 735 (1970); *Alcala v State,* 487 P2d 448, 460-461 (Wyo, 1971); *People v Uribe,* 13 Ill App 3d 1027, 1029-1030; 301 NE2d 492 (1973).

departures from the ABA standard instruction would be reversible error.

We conclude that the instruction given in the instant case was a substantial departure.[4] Part of the instruction given in this case is essentially a call for the jury, as part of its civic duty, to reach a unanimous verdict and contains the message that a failure to reach a verdict constitutes a failure of purpose. Nothing in the standard instruction sanctions such a charge and we conclude that the giving of such an instruction was reversible error.

For the foregoing reasons, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals.

Defendant's application for leave to appeal as cross-appellant has been considered and it is denied because the Court is not persuaded that the questions presented should be reviewed by this Court.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

[4] See also Standard 15-4.4, American Bar Association Standards for Criminal Justice (2d ed), which, except for stylistic changes, is identical to the instruction approved in *Sullivan*.

PEOPLE v TEAGUE

Docket No. 64806. Decided September 1, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the defendant's conviction and remanded the case for a new trial.

Mary Teague was convicted by a jury in Oakland Circuit Court, Alice L. Gilbert, J., of voluntary manslaughter for stabbing her former husband to death. The defendant claimed the killing was in self-defense, and she testified that her relationship with her former husband had been characterized by many acts of violence by him against her. The defendant denied that she had ever tried to kill her husband or use a weapon against him, and testified that she did not recall an event in 1965 when she found him in the company of another woman. Over objection, the prosecutor called as a rebuttal witness a police officer who testified that in 1965, more than ten years before the killing, the defendant told him that she had found her husband with another woman and had stabbed him, and that the officer had found that the husband had three stab wounds. The trial court decided that the police officer's testimony was admissible to impeach the defendant's denial that she had ever used a weapon against her husband. The Court of Appeals, Cynar, P.J., and MacKenzie and Corkin, JJ., affirmed in an unpublished per curiam opinion on the ground that past acts of violence toward the husband were admissible, and that the statement was admissible both because it was material to the question of intent and because it tended to impeach the defendant's direct testimony (Docket No. 78-5334). Defendant applies for leave to appeal.

In a per curiam opinion by Justices Kavanagh, Levin, Fitzgerald, Ryan, and Moody, the Supreme Court *held:*

The evidence was not admissible, either as substantive evidence of intent and motive or as impeachment of the defendant's testimony.

1. The evidence of an assault on the decedent under dissimilar circumstances more than ten years earlier was too remote to be relevant to her motive or intent in this case.

2. The testimony was not admissible as impeachment because

it was extrinsic evidence offered to impeach the defendant on a collateral matter. The testimony was collateral because it was neither relevant to the substantive issues in the case, nor independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness.

Reversed and remanded for new trial.

Chief Justice Coleman and Justice Williams, dissenting, would affirm for the reasons stated by the Court of Appeals.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Michael J. Modelski,* Assistant Prosecuting Attorney, for the people.

Milton R. Henry for defendant.

PER CURIAM. The defendant was convicted of manslaughter in the death by stabbing of her former husband, and the Court of Appeals affirmed. In her application to this Court, the defendant raises several questions. We reach only one, and conclude that evidence of a prior assault by the defendant on the deceased was improperly admitted in rebuttal. We reverse the defendant's conviction and remand the case to the circuit court for a new trial.

I

The defendant stabbed[1] her former husband in the kitchen of a restaurant that she operated, and he died a short time later. There were no other witnesses to the actual stabbing, but the defendant and the deceased had been overheard arguing.

During the prosecutor's case in chief, three of

[1] The defendant testified and denied remembering having stabbed the deceased. However, that she did so was never seriously contested at trial.

the deceased's relatives testified that the defendant had often threatened and had occasionally attacked the deceased.

The defendant testified that her relationship with the deceased had been characterized by many acts of violence by him against her. She said that on the night in question, she told him to leave the restaurant, but he would not do so. He was intoxicated and was swearing at her. She testified that he threatened to kill her if she called the police, and when she began to dial the telephone, he began choking her and striking her head against the wall. She struggled, attempting to free herself. She did not recall having a knife in her hand or stabbing him during the struggle. The deceased released her and left the restaurant.

The defendant denied ever having tried to kill her husband. On cross-examination she denied having used a weapon during episodes about which she had testified, and said that she did not recall an event in December 1965 at the home of her husband's sister when she found him in the company of another woman.

Over objection, the prosecutor called a police officer as a rebuttal witness. The officer testified that in December 1965 he had been assigned to investigate an attempted murder. The defendant had told him that she had found her husband with another woman and had stabbed him. The officer met with her husband and found that he had three stab wounds.

II

The testimony of the officer was first taken outside of the presence of the jury as an offer of

proof. The trial judge initially said that she would allow the rebuttal witness to testify, "for the purpose of rebutting the statement made by the defendant in that she never harmed Robert Teague". There was extensive argument, and the court reporter read back portions of the defendant's testimony to counsel. The trial judge thereafter modified her ruling:

> "*The Court:* Look, I made my ruling. You asked to see it. And I told you the basis for my ruling that she did state she didn't use any weapon against Robert Teague."

The Court of Appeals recognized the general rule that extrinsic evidence may not be used for impeachment when it relates to a collateral matter. However, in this case it found that evidence of past acts of violence by the defendant toward the deceased were admissible, and that it followed that her statement to the officer was admissible both because it was material to the question of motive and intent and because it tended to impeach her direct testimony.

III

We conclude that the evidence was not admissible, either as substantive evidence of intent and motive or as impeachment of the defendant's testimony. There are cases in which evidence of a defendant's prior threats to or attacks on another are relevant to prove the defendant's motive or intent. However, in this case the evidence of an assault on the decedent under dissimilar circumstances more than ten years earlier was too remote to be relevant.

IV

Officer Johnson's challenged testimony was not admissible as impeachment because it was extrinsic evidence offered to impeach the defendant's veracity on a collateral matter.

We have long adhered to the familiar rule that a witness may not be impeached by producing extrinsic evidence of collateral facts. *People v Culver,* 280 Mich 223; 273 NW 455 (1937); *People v Williams,* 159 Mich 518; 124 NW 555 (1910).

Officer Johnson's testimony that in 1965, more than 10 years before the incident involved in this case, the defendant stated that she had stabbed her husband after discovering him with another woman was collateral because it was neither "relevant to the substantive issues in the case" nor "independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness". See McCormick on Evidence (2d ed), § 47, p 99; § 36, pp 70-71. As explained above, the remoteness of the incident negates its relevance, and the testimony does not, absent the defendant's denial, bear on her veracity.

In view of the disposition of this issue, we find it unnecessary to reach the other errors claimed by the defendant.

Accordingly, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the defendant's conviction and remand to the circuit court for a new trial.

KAVANAGH, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

COLEMAN, C.J., and WILLIAMS, J. We would affirm for reasons stated by the Court of Appeals.

BAKER v BAKER

Docket No. 63660. Argued May 6, 1980 (Calendar No. 6).—Decided September 1, 1981.

Phillip P. Baker brought an action for divorce in the Alpena Circuit Court against Tanny L. Baker, praying that the custody of their minor children, Sharyll A. Baker and Arthur L. Baker, be awarded jointly to the parties. At an informal conference in the office of the Friend of the Court the plaintiff and defendant agreed that Mrs. Baker and the children would establish a new home in Colorado. Sharyll has remained with her mother in Colorado without objection by Mr. Baker, but after a month and a half, Mr. Baker went to Colorado and returned to Michigan with Arthur. After trial of the divorce action, the circuit court, Philip J. Glennie, J., decided that under the Child Custody Act the mother had a "clear preference" in the matter of custody because she had been the "guiding force" in raising the children, over the father's argument that the child's established custodial environment within the meaning of the act was in Alpena. The court granted a judgment of divorce giving custody of both children to the mother and reasonable rights of visitation to the father. The Court of Appeals, R. B. Burns, P.J., and D. E. Holbrook and Burdick, JJ., affirmed in an unpublished per curiam opinion (Docket No. 43878). Plaintiff appeals.

In an opinion by Justice Ryan, joined by Chief Justice Coleman and Justices Kavanagh, Levin, Fitzgerald, and Moody, the Supreme Court *held:*

The award of custody is affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error §§ 76, 136.
[2, 6, 8] 24 Am Jur 2d, Divorce and Separation §§ 783, 820.
42 Am Jur 2d, Infants §§ 43, 57.
[3] 24 Am Jur 2d, Divorce and Separation § 819.
[4] 24 Am Jur 2d, Divorce and Separation § 783.
[5, 9] 24 Am Jur 2d, Divorce and Separation § 783.
43 Am Jur 2d, Infants § 43.
[7] 24 Am Jur 2d, Divorce and Separation § 791.
[8] 24 Am Jur 2d, Divorce § 784.
42 Am Jur 2d, Infants §§ 44-47.

1. Review by the Supreme Court of the trial court's determination in this case is *de novo;* however, the Court is bound by the provisions of the Child Custody Act. Therefore, the Supreme Court must affirm the judgment granting custody of Arthur to Mrs. Baker unless it finds that the trial court committed clear legal error in making the order, made findings of fact against the great weight of the evidence, or committed a palpable abuse of discretion.

2. The Child Custody Act attempts to standardize the criteria for resolving child custody cases by declaring that the ultimate standard for the award of custody, the best interests of the child, is to be determined by evaluation and consideration of ten specifically identified factors. The provision of the statute forbidding a change of the established custodial environment in the absence of clear and convincing evidence was intended to minimize the prospect of unwarranted and disruptive orders changing custody and to erect a barrier against removal of a child from an established custodial environment, except in the most compelling cases. The statute also limits the power of an appellate court to disturb the decision of the trial court.

3. Absent the existence of an established custodial environment the trial judge was free to award custody of Arthur either to his mother or his father simply by determining the child's best interests as defined in the act. Therefore, to determine whether the trial court's authority to order a change of custody depended upon a showing by "clear and convincing evidence", as opposed to a mere preponderance of the evidence, the first question is whether the prerequisite "established custodial environment" existed. Certainly, the mere issuance of an interim order of custody in this case did not establish a custodial environment. Such an environment depends instead on a custodial relationship of a significant duration in which Arthur was provided the parental care, discipline, love, guidance, and attention appropriate to his age and individual needs, and a relationship between the custodian and child marked by qualities of security, stability, and permanence. In this case it is certainly true that Arthur's long-term contacts and associations in Alpena with a single school, familiar playmates in a familiar neighborhood, close familial ties, regular visits with his grandparents, and continuing participation in a neighborhood hockey program contributed importantly to a custodial environment which was fortified by an atmosphere in his home provided by two loving parents over an appreciable time. That environment, however, was ultimately destroyed by the breakup of the parents' marriage and the dissolution of the family. The re-

peated changes of custody and residence during the breakup, with the necessarily attendant emotional effects, destroyed the previously established custodial environment in which the boy was living with his family in Alpena and precluded the establishment of a new one, at least until after the trial. Arthur's contacts with the community and familiar associations in Alpena were not sufficient to preserve the custodial environment once the family dissolved and the boy entered into a new custodial relationship with his father alone, with a radically altered life-style in a new home. At the time of trial, there had been no appreciable time when the child naturally looked to his father *alone* for guidance, discipline, the necessities of life, and parental comfort in a stable, settled atmosphere in order that an "established custodial environment" could exist.

4. In the absence of an established custodial environment, the trial court's custody decision was not governed by the "clear and convincing" evidence standard. The court's duty was to decide, by a preponderance of the evidence, what custodial arrangement was dictated by the child's best interests as defined in the statute. The standards of the Child Custody Act for deciding a custody dispute, taken as a whole, fully embrace the significant contacts which the child has established during his life in a certain community and should be considered by the trial court. It is evident that the trial court did not overlook the significant long-term community contacts which Arthur had established in Alpena. Neither the Child Custody Act nor the court rule requiring special findings of fact in non-jury cases requires that in custody cases the court comment upon every matter in evidence or declare acceptance or rejection of every proposition argued. The trial court correctly observed that it was required to consider, evaluate, and determine the factors listed in the Child Custody Act to decide the matter, and proceeded to address the subject matter of each of them. The determination of the child's best interests was fully supported by the evidence. The conclusion that the child's stated preference to live with his father should be given little weight because it was unduly influenced by the father and inconsistent with his own best interests is one clearly within the discretion of the trial judge to make and is supported by the evidence.

5. There are no grounds to disturb the determination that the mother has been the guiding force in the care, education, and discipline of the child and that, given the breakdown of the parties' marriage and its disruptive effect on the child's life, Arthur's best interests dictated placement in the custody of his mother. The choice in this case must be made among unsatis-

factory alternatives, but it does not turn upon a determination of which parent is more loving. It turns upon the best judgment possible as to which of two single-parent custodial arrangements will serve the child's best interests. The decision that Arthur's best interests demand that custody be awarded to the mother is not against the great weight of the evidence. The erroneous factual findings of the trial court regarding the validity of the *ex parte* interim order of custody and the trial court's obviously inadvertent misstatement of the child's age were not significant factors in the trial court's findings.

Affirmed.

Justice Williams, concurring, would affirm because of the disruption which the case has already caused in the life of the child, but he was not confident that the trial judge made the correct decision. It is not clear that the custodial environment with the mother would be better than that with the father. Further, he did not agree that the separation of the parents and the divorce destroyed the pre-separation environment. Certainly the child was affected, but his ties with the community remained and should not be cast aside lightly.

OPINION OF THE COURT

1. PARENT AND CHILD — CHILD CUSTODY ACT — APPEAL.

Review by the Supreme Court of the trial court's determination in a child custody case is *de novo,* but the Court is bound by the provisions of the Child Custody Act, and must affirm a judgment granting custody of a child to one of the parents unless it finds that the trial court committed clear legal error in making the decision, made findings of fact against the great weight of the evidence, or committed a palpable abuse of discretion (MCL 722.28; MSA 25.312[8]).

2. PARENT AND CHILD — CHILD CUSTODY ACT — LEGISLATIVE PURPOSE — CHANGE OF CUSTODY.

The Child Custody Act attempts to standardize the criteria for resolving child custody cases by declaring that the ultimate standard for the award of custody, *i.e.,* the best interest of the child, is to be determined by evaluation and consideration of ten specifically identified factors; the Legislature also intended to minimize the prospect of unwarranted and disruptive orders changing custody and to erect a barrier against removal of a child from an established custodial environment, except in the most compelling cases (MCL 722.21 *et seq.;* MSA 25.312[1] *et seq.).*

3. PARENT AND CHILD — CHILD CUSTODY ACT — CHANGE OF CUSTODY — BURDEN OF PROOF.

The Child Custody Act provides that an established custodial environment of a child may not be changed by the trial court unless there is presented clear and convincing evidence that the change is in the best interest of the child; absent a showing of an established custodial environment the trial judge is free to award custody of the child who was living with one parent at the time of trial either to his mother or his father simply by determining, upon a showing of a preponderance of the evidence, that the child's best interests called for a change of custody (MCL 722.27; MSA 25.312[7]).

4. PARENT AND CHILD — CHILD CUSTODY ACT — CUSTODIAL ENVIRONMENT — WORDS AND PHRASES.

An "established custodial environment" under the Child Custody Act depends on a custodial relationship of a significant duration in which the child is provided the parental care, discipline, love, guidance, and attention appropriate to his age and individual needs, and a relationship between the custodian and child which is marked by qualities of security, stability, and permanence (MCL 722.27; MSA 25.312[7]).

5. PARENT AND CHILD — CHILD CUSTODY ACT — CUSTODIAL ENVIRONMENT.

The contacts of a child with the community and familiar associations in the town in Michigan where he was raised by his mother and father with his sister are not sufficient to preserve the established custodial environment where the family is dissolved and the child enters into a new custodial relation with his father alone, with a radically altered life in a new home, after repeated changes in custody between the child's parents and changes of residence between Michigan and Colorado over a five-month period (MCL 722.27; MSA 25.312[7]).

6. PARENT AND CHILD — CHILD CUSTODY ACT — FINDINGS OF FACT — CUSTODIAL ENVIRONMENT.

The standards of the Child Custody Act for deciding a custody dispute, taken as a whole, fully embrace the significant long-term community contacts which the child has established during his life in a certain community and should be considered by the trial court (MCL 722.23; MSA 25.312[3]).

7. PARENT AND CHILD — CHILD CUSTODY ACT — FINDINGS OF FACT.

Neither the Child Custody Act nor the General Court Rules require a trial court deciding a child custody dispute to comment upon every matter in evidence or declare its acceptance

or rejection of every proposition argued by the parties (MCL 722.21 *et seq.;* MSA 25.312[1] *et seq.;* GCR 1963, 517.1).

8. PARENT AND CHILD — CHILD CUSTODY ACT — BEST INTEREST OF CHILD.

A trial court's determination in a divorce case that the best interest of a child of the parties required the award of custody to his mother rather than to his father is not against the great weight of the evidence where the court considered the factors required by the Child Custody Act to determine the custody dispute, decided to give the child's preference to live with his father little weight, finding that it was unduly influenced by the father and inconsistent with the child's best interest, and found that the mother had been the guiding force in the care, education and discipline of the child until the breakdown of the parties' marriage disrupted the child's life with repeated changes in custody and residence over a five-month period (MCL 722.23; MSA 25.312[3]).

DISSENTING OPINION BY WILLIAMS, J.

9. PARENT AND CHILD — CHILD CUSTODY ACT — CUSTODIAL ENVIRONMENT — WORDS AND PHRASES.

The ties which an 11-year-old child has with the community where he was raised, such as his school, playmates, family and participation in extra-curricular activities, are especially important in his life when his parents are separated or divorced; therefore, they should not be cast aside lightly by a trial court in deciding whether the child has an "established custodial environment" in that community under the Child Custody Act (MCL 722.27; MSA 25.312[7]).

Sumpter & Loznak, P.C. (by *Peter J. Riebschleger),* for plaintiff.

Gillard, Bauer & Mazrum for defendant.

RYAN, J. This is a child custody case whose subject is an 11-year-old boy, the son of divorced parents.

Our order granting leave to appeal obligates us to answer two questions:

1. Whether, on the facts of this case, there existed at the time of trial an established custodial

environment from which the trial court was by statute forbidden to remove the minor child, absent clear and convincing evidence that the child's best interests required a change of custody; and

2. "[W]hether, under the facts of this case, the trial court erroneously overlooked the importance of long-term community contacts as a factor contributing to a finding of 'custodial environment'." 407 Mich 947.

We answer both questions in the negative and affirm the judgment of the Court of Appeals which affirmed the decision of the trial court to award custody of the child of the parties to appellee.

Our decision involves consideration of the interplay of three provisions of the Child Custody Act:[1] §§ 3, 7(c) and 8.

It is important to note at the outset that while our review of the trial court's custody determination in this case is *de novo, Hensley v Hensley,* 357 Mich 3; 97 NW2d 615 (1959), we are nevertheless bound by § 8 of the Child Custody Act, which states:

> "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court *shall be affirmed on appeal* unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a *clear legal error* on a major issue."[2] (Emphasis added.)

We understand that provision to require us to affirm the trial judge's determination that on this record the best interests of the child involved

[1] MCL 722.21-722.29; MSA 25.312(1)-25.312(9). Subsequent to the trial in this case the Child Custody Act was amended by 1980 PA 161 and 1980 PA 434. The amendments do not affect this litigation.

[2] MCL 722.28; MSA 25.312(8).

would be best served by ordering him placed in the custody of appellee unless we find that the trial court committed clear legal error in making that order, made findings of fact against the great weight of the evidence, or committed a palpable abuse of discretion. For the reasons stated hereafter, we conclude he did not.

I

Appellee, Tanny Baker, was first married in November, 1967. A child, Sharyll Anne, was born of the marriage, which ended in divorce. Appellee then married appellant Phillip Baker and on August 5, 1970, a son, Arthur Lee, whose custody is at issue before us, was born of that marriage. Sharyll Anne was later adopted by appellant. From the time of Arthur's birth and until June, 1978, the two children lived with their parents in the marital home in the area of Alpena, Michigan.

On June 18, 1978, Mrs. Baker took the two children to Colorado for a vacation with her parents. One month later she and the children returned to Michigan, and she informed her husband that she wanted a divorce. On July 21, 1978, Mr. Baker filed a complaint for divorce in the Alpena Circuit Court. No order for custody of either of the children was entered at that time. Later, at an informal conference held at the office of the Friend of the Court, the parties agreed that Mrs. Baker and both children would return to Colorado where they would establish a new home. In accordance with that understanding, Mrs. Baker and the two children moved to Buena Vista, Colorado, on July 31, 1978, and took up residence.

On September 12, 1978, Mr. Baker appeared in Colorado unannounced, physically removed his son Arthur from Mrs. Baker's home and immediately

returned to Michigan with the child. He had not consulted the boy's mother in advance or advised her of his intention to remove the child from her custody. Sharyll Anne remained with her mother in Colorado.

On September 16, 1978, Mr. Baker obtained from the circuit court in Alpena an *ex parte* interim order for custody of Arthur. He made no request for custody of Sharyll Anne. After a contested hearing on October 3, 1978, the court ordered that custody with Mr. Baker be continued. Arthur remained in Alpena with his father until the trial.

The trial was held on November 2, 1978. At its conclusion the court granted a divorce and awarded custody of both children to the appellee. As part of the property division, the court directed appellant to repay the sum of $4,800 to appellee's parents for what was characterized as an "advancement" made to the parties during their marriage.[3]

II

For decades the trial and appellate judiciary of this state struggled with the delicate task of resolving child custody disputes, a task made both frustrating and unsatisfactory by the need to apply inexact standards of largely unproven significance to factual scenarios of limitless variation. Courts were required to evaluate a plethora of sociological, economic, and psychological data in an effort to reach custody decisions intended, in

[3] In his brief on appeal to this Court, appellant raises, for the first time, the issue whether the trial court had jurisdiction to order him to repay the $4,800 to appellee's parents. Because this issue was neither raised in the application for leave to appeal nor included within our order granting leave, we will not address it. GCR 1963, 853.2(1)(a).

the last analysis, to serve the affected child's best interests. Predictably, the myriad factors evaluated by trial courts in child custody disputes were given uneven consideration and only such significance as a particular judicial fact-finder deemed appropriate in the exercise of his own, virtually unfettered, discretion.[4] The standards for determining the child's best interests were essentially subjective.

By enacting the Child Custody Act of 1970, and particularly § 3 thereof, the Legislature attempted, among other things, to standardize the criteria for resolving child custody cases by declaring that the ultimate standard for the award of custody—the best interests of the child—is to be determined by evaluation and consideration of ten specifically identified factors.[5] In adopting § 7(c) of the act, the

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[4] MCL 722.541; MSA 25.311, first enacted in 1873 and repealed in 1970, provided:

"That in case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care and custody of all such children under the age of 12 years, and the father of such children shall be entitled to the care and custody of all such children of the age of 12 years or over: Provided, That any probate court or any court of competent jurisdiction, may, on petition and hearing thereof, make and enforce such order or orders as it may deem just and proper as to the care and custody of such minor children, excepting in cases where an order or decree may have been made by a court in chancery, regarding such children: And provided further, That nothing in this act shall prevent any court of competent jurisdiction from making and enforcing any such order or orders as it may deem just and proper as to the care and custody of such minor children in the same manner and with like effect as it could if this act had not been passed."

The provision of the statute giving a mother custody of a child under the age of 12 and the father custody of a child 12 and over was historically regarded as a mere guideline, in no way inhibiting the power of the court to make such award of custody as it deemed in the child's best interest. *Mault v Elliott,* 329 Mich 544; 46 NW2d 373 (1951). Just what constituted a child's "best interests" depended upon the individual fact-finder and varied from case to case.

[5] At the time of trial, MCL 722.23; MSA 25.312(3) provided:

" 'Best interests of the child' means the sum total of the following factors to be considered, evaluated and determined by the court:

Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an "established custodial environment", except in the most compelling cases. Section 7(c) provides:

"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. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in such environment for guidance, discipline, the necessities of life and parental comfort. The age of the child, the physical environment and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." (Emphasis added.)

Complementing the foregoing provision is § 8, quoted *supra,* which limits the power of an appellate court to disturb a trial court's custody decision

"(a) The love, affection and other emotional ties existing between the competing parties and the child.

"(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

"(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

"(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

"(e) The permanence, as a family unit, of the existing or proposed custodial home.

"(f) The moral fitness of the competing parties.

"(g) The mental and physical health of the competing parties.

"(h) The home, school and community record of the child.

"(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

"(j) Any other factor considered by the court to be relevant to a particular child custody dispute."

to those instances in which the "trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error".

III

Appellant claims the trial court committed clear legal error in failing to apply the clear and convincing evidence standard of § 7(c) to the determination whether, at the time of trial, young Arthur Baker's best interests required a change of custody to appellee. He also claims that even if the clear and convincing evidence standard of § 7(c) was not applicable in this case, the trial court's finding that the best interests of the child required a change of custody was nevertheless contrary to the great weight of evidence. Specifically, appellant argues that the evidence shows that from the time of Arthur's birth until the date of trial, November 2, 1978, with the exception of "two occasions of one and one and one-half months, respectively", the boy was living in an "established custodial environment" in Alpena within the meaning of § 7(c) of the act. Consequently, he maintains, the court was forbidden to order a change of custody to appellee unless it first found, by "clear and convincing" evidence, that the boy's best interests required that he be taken from his father's care and sent to live with his mother in Colorado.

Appellee contends, on the other hand, that the child was not living in an "established custodial environment" with appellant at any time, as that expression is used in § 7(c); that in resolving the custody dispute at trial the court was bound only to determine the child's best interests; and that the court's custody decision was factually and legally correct.

IV

It is clear that absent the existence of an "established custodial environment", the trial judge was free to award custody of the boy either to his mother or to his father simply by determining the child's best interests, as that standard is defined in § 3 of the act. Therefore, to determine whether the trial court's authority to order a change of custody in November, 1978, depended upon a showing by "clear and convincing evidence", as opposed to a mere preponderance of evidence that the child's best interests called for a change of custody, we must first decide whether the prerequisite "established custodial environment" existed.

We are provided a measure of legislative guidance as to the meaning of an "established custodial environment" by § 7(c) of the act which we repeat here for ease of reference:

> "The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in such environment for guidance, discipline, the necessities of life and parental comfort. The age of the child, the physical environment and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."

Certainly the orders of custody that entered on September 16 and October 3, 1978, did not, of themselves, establish the custodial environment with which we are concerned here. Such an environment depended instead upon a custodial relationship of a significant duration in which Arthur was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the

relationship between the custodian and the child is marked by qualities of security, stability and permanence.

Appellant argues that Arthur was living in just such a custodial environment in Alpena at the time of the trial and had been from the day he was born. Our attention is invited to the fact that in Alpena, unlike Colorado, Arthur's custodial environment included a number of long-term community contacts.

They included, among other things, attendance at a single school, association with familiar playmates in a familiar neighborhood, close familial ties, regular visits with grandparents, and continuing participation in the neighborhood hockey program. It is certainly true that these contacts and associations contributed importantly to the custodial environment in which Arthur lived with his parents and sister in the family home in Alpena. Moreover, there are indications in the record that such community contacts were fortified by an atmosphere in the home of love, guidance, discipline, parental comfort, psychological stability and a secure family life provided by two loving parents over an appreciable period of time.

That environment began to deteriorate, however, with the disruptive events of the summer of 1978, and it was ultimately destroyed by the breakup of the parents' marriage and the dissolution of the family.

The shifting back and forth between Buena Vista, Colorado, and Alpena, Michigan, during the five and one-half months from June to November, 1978, saw the child living with his mother in Colorado for one month, his mother and father in the family home in Alpena for a week, his mother in Colorado for six weeks, and his father in the

paternal grandparents' residence in Alpena for another seven weeks. Certainly those repeated custodial changes and geographical moves, with the necessarily attendant emotional implications, destroyed the previously established custodial environment in which the boy was living and precluded the establishment of a new one, at least until after the trial.

While it is true that on September 12, 1978, Arthur was returned to the Alpena area where he was born and raised and on September 16 was placed in his father's legal custody by an *ex parte* interim order, Arthur did not return to the home or the settled environment from which he was taken in June. Instead, he was introduced to a new living arrangement with his father, but not his mother and sister, and not in the home he left in June but in the home of his paternal grandparents. Furthermore, it was inevitable that, whatever the outcome of the custody dispute, another change of residence would be necessary because of appellant's stated intention to find a new residence for himself and the boy if he were awarded custody.[6]

Certainly, whatever significance Arthur's community contacts and familiar associations in Alpena may have had in contributing to his "established custodial environment" prior to June, 1978, they were not, by their nature, sufficient to preserve that environment once the family unit

[6] At the hearing on temporary custody, upon cross-examination by counsel for appellee, Mr. Baker testified as follows:

"*Q. [By Mr. Gillard]:* Mr. Baker, are you presently residing with your parents?

"*A.* On a temporary basis, yes.

"*Q.* Have you made any arrangements to establish your own residence?

"*A.* No. But I intend to establish residence as soon as a final decision is made on this custody situation."

dissolved and the boy entered into a new custodial relationship with his father alone, in a radically altered lifestyle in a new home.

We conclude that at the time of trial there had been no "appreciable time [during which] the child naturally look[ed]" to his father *alone* "for guidance, discipline, the necessities of life and parental comfort" in a stable, settled atmosphere in order that an "established custodial environment" within the meaning of § 7(c) could exist.

That being so, the trial court's custody decision was not governed by the "clear and convincing" evidence standard of § 7(c) but rather by the duty to decide, by a preponderance of the evidence, what custodial arrangement was dictated by the child's best interests as defined in § 3 of the act.

V

As is explained more fully in Part VI, *infra,* the trial judge, in his opinion concerning custody of Arthur, carefully tracked the litany of criteria described in § 3[7] of the custody act as mandatory considerations in determining the child's best interest and evaluated each of them separately. "Long-term community contacts" is not, in express terms, one of them. Nevertheless, the ten criteria, taken as a whole, fully embrace the more essential long-term community contacts to which the appellant's claim of error makes reference. Section 3(d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity"; § 3(e) addresses "[t]he permanence, as a family unit, of the existing or proposed custodial home"; and § 3(h) refers to

[7] See fn 5, *supra.*

"[t]he home, school and community record of the child".

It is evident that in addressing each of the foregoing factors, as well as the others listed in § 3 of the act, the trial court did not overlook the significant long-term community contacts this, then eight-year-old, child had established in Alpena.

Certainly there are other community contacts Arthur established which the trial court might have specifically addressed, as we have, such as attendance at the same school, contact with old playmates, the children's hockey program, visits to grandparents, and others. But the trial court's failure to speak to each of the myriad factors which could be characterized as community contacts does not suggest that all of them are relevant or that the relevant among them were overlooked.

Neither the mandate of the Child Custody Act nor our requirement that in non-jury cases the "court shall find the facts specially and state separately its conclusions of law thereon"[8] requires in cases involving child custody decisions that the court comment upon every matter in evidence or declare acceptance or rejection of every proposition argued. To the specific question whether, in deciding the custody issue, the trial judge "overlooked the importance of long-term community contacts as a factor contributing to a finding of 'custodial environment' ", we answer that he did not.

More important, for the reasons stated in Part IV, *supra,* we do not think those factors were determinative of the existence of the established custodial environment material to this case.

[8] GCR 1963, 517.1.

VI

Appellant contends that even if the trial court was not bound by the clear and convincing evidence standard of § 7(c), it erred in awarding custody of Arthur to appellee because the finding that the child's best interests required his placement in the custody of his mother was contrary to the great weight of the evidence.

In his written opinion, the trial judge acknowledged that determination of the child's best interests was governed by § 3.[9] He stated:

> "The Child Custody Act, [MCL 722.23;] MSA 25.312(3), is controlling. Section 3 defines best interests of children and lists those factors which a court must consider in deciding which of several competing custodial arrangements would best serve the interests of the children."

The trial judge then went on to address the requirements of the statute, making explicit reference to the factors described in subparagraphs (a), (c), (d), (f), (g) and (h) by letter name and discussing the fashion in which the evidence in the case related to each of the factors. While not specifically referring to subparagraphs (b), (e), (i) and (j) by name, the court nevertheless addressed the subject matter of each of those factors *seriatim* and articulated their application to the facts before the court.[10]

The trial court correctly observed that it was required to consider, evaluate and determine the factors delineated in subparagraphs (a) through (j) of § 3 in determining the child's best interests, as

[9] See fn 5, *supra*.

[10] Opinion of the trial court, reprinted in appellant's appendix, pp 35a-38a.

the governing standard for its custody order. While on *de novo* review we cannot say that the totality of the factors overwhelmingly indicated that the child's best interests required the award of custody to one parent rather than the other, we are persuaded that the court's determination of the child's best interests was fully supported in the evidence.

The main thrust of appellant's argument that the custody order was contrary to the great weight of the evidence is that the trial court summarily dismissed the child's preference to live with his father. We find, from a careful examination of the record, that the trial court did consider the child's preference but decided to give it little weight, finding that the boy's stated preference was unduly influenced by appellant and, in any case, inconsistent with his own best interests. That conclusion is one clearly within the discretion of the trial judge to make and is supported in the evidence.

We can find no grounds to disturb the determination that appellee has been the guiding force in the care, education and discipline of the child and that given the unfortunate breakdown of the marriage and its disruptive effect upon the child's life, Arthur's best interests dictated placement in the custody of his mother. That is not to deprecate in any way the love and concern of appellant for his son; nor do we suggest that he is not a fine and respectable father. But this is a custody struggle in which a choice must be made from among unsatisfactory alternatives. The decision does not turn upon a court's determination of which parent is the more loving. It turns upon the best judgment possible as to which of two single-parent custodial arrangements will, as between them, serve the

child's best interests. The trial court's determination that Arthur's best interests demand custody be awarded to appellee is not against the great weight of evidence.

VII

Appellant raises two additional arguments pertaining to the validity of custody award. We find that the erroneous factual findings regarding the validity of the *ex parte* interim order of custody and the trial court's obviously inadvertent misstatement of the child's age were not significant factors in the court's findings. The decision of the Court of Appeals is affirmed.

COLEMAN, C.J., and KAVANAGH, LEVIN, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with RYAN, J.

WILLIAMS, J. *(concurring).* In light of the disruption that this divorce and child custody case has already caused in the life of this 11-year-old child, I concur with my Brother, Justice RYAN. I would like to note, however, that I am far less confident than he that the trial judge made the correct decision in awarding custody to the mother.

First of all, I am not so sure that the environment surrounding the mother would be better than that surrounding the father. Second, I do not agree that the separation of the parents and ultimate divorce destroyed the pre-separation environment. The child was certainly affected by the separation of his parents, but his ties with the community remained, such as the same school, the same playmates, the same family ties and participation in extra-curricular activities. These factors are especially important in the life of a young child when his parents are separated or divorced and, therefore, should not be cast aside lightly.

WILSON v STILWILL

Docket No. 63782. Argued October 8, 1980 (Calendar No. 8).—Decided September 1, 1981.

Irving J. Wilson and Margaret D. Wilson brought an action for medical malpractice against George D. Stilwill, M.D., an orthopedic surgeon, and Edward W. Sparrow Hospital Association. The plaintiffs claimed that damage to Irving Wilson's arm, which is now paralyzed, was caused by a post-operative infection resulting from negligence. Counsel for Dr. Stilwill was permitted to cross-examine the plaintiffs' expert witness, over the plaintiffs' objection, about other medical malpractice trials in which he had testified, until the trial court sustained the plaintiffs' renewed objection. At the close of the plaintiffs' proofs the Ingham Circuit Court, Thomas L. Brown, J., directed a verdict for the defendant hospital, on the ground that there

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REFERENCES FOR POINTS IN HEADNOTES

[1] 81 Am Jur 2d, Witnesses § 472.

[2] 81 Am Jur 2d, Witnesses § 507.

[3, 4, 17] 31 Am Jur 2d, Expert and Opinion Evidence §§ 45, 48.

[4] 31 Am Jur 2d, Expert and Opinion Evidence § 46.

[5] 31 Am Jur 2d, Expert and Opinion Evidence § 50.
81 Am Jur 2d, Witnesses § 519.

[6, 12, 13] 31 Am Jur 2d, Expert and Opinion Evidence §§ 45, 48, 50.

[7, 8, 15, 16] 75 Am Jur 2d, Trial §§ 274, 305.

[9] 40 Am Jur 2d, Hospitals and Asylums § 41.
61 Am Jur 2d (Rev), Physicians, Surgeons, and Other Healers §§ 333, 335.
Res ipso loquitur in action against hospital for injury to patient. 9 ALR3d 1315.

[10] 40 Am Jur 2d, Hospitals and Asylums § 28.
61 Am Jur 2d (Rev), Physicians, Surgeons, and Other Healers §§ 286, 289, 333.

[11] 31 Am Jur 2d, Expert and Opinion Evidence § 148.
61 Am Jur 2d (Rev), Physicians, Surgeons, and Other Healers § 205.
Necessity of expert evidence to support action against hospital for injury to or death of patient. 40 ALR3d 515.

[14] 31 Am Jur 2d, Expert and Opinion Evidence § 50.
Cross-examination of expert witness as to fees, compensation, and the like. 33 ALR2d 1170.

was no evidence that the hospital's sterilization procedures were improper or caused the infection. Counsel for Dr. Stilwill argued to the jury that the defense had consulted physicians who were the best qualified in Michigan on the issues in this case rather than going to "professional witnesses". In rebuttal the plaintiffs' counsel argued, in effect, that the defense counsel's remark reflected unfairly on the plaintiffs' expert witness. The trial court denied the plaintiffs' request for a special cautionary instruction as to the remarks but gave a general instruction that the arguments, statements, and remarks of attorneys are not evidence and that the jury should disregard anything said by an attorney which is not supported by the evidence. The jury returned a verdict of no cause of action. The Court of Appeals, M. F. Cavanagh, P.J., and V. J. Brennan and Carroll, JJ., affirmed, after concluding that defense counsel's remarks fairly characterized the plaintiffs' witness (Docket No. 77-4333). Plaintiffs appeal.

In an opinion by Justice Moody, joined by Chief Justice Coleman and Justices Fitzgerald and Ryan, the Supreme Court *held:*

1. The scope and duration of cross-examination of witnesses rests in the sound discretion of the trial court. The exercise of that discretion will not be reversed absent a clear showing of abuse. The credibility of the expert witnesses is a primary question for consideration by the jury in a trial for medical malpractice because the primary issues in most such cases are the standard of care, breach, and proximate cause, and both parties call on experts to testify. The trial court must insure, in its discretion, that questions seeking to elicit evidence of the witness's bias, prejudice, or interest and inconsistent prior testimony or statements are not unduly limited or improvidently extended. The trial judge must also be alert to questions which harass, intimidate, or belittle a witness.

2. That a substantial part of the expert's medical practice involves evaluating disabilities and reporting his findings and conclusions for cases which may come to court is a proper subject for general limited inquiry on cross-examination because his experience may influence the manner in which he testifies. It is thus proper to bring out on cross-examination the number of times an expert witness testifies in court, or is involved in particular types of cases. Evidence that the expert had testified in other malpractice cases at the request of plaintiffs' counsel is a permissible subject of cross-examination for the purpose of attacking credibility. A pattern of testimony for a particular attorney raises a possible inference that the

expert witness has testified in such a manner that he would be hired in future cases. In response, additional inquiry is permissible to show that the witness had been called by numerous other lawyers on various issues over the years.

3. A pattern of testimony as an expert witness for a particular category of plaintiffs or defendants may suggest bias, but is only minimally probative of bias, and should be carefully scrutinized by the trial court. In this case the trial court did not commit reversible error, nor abuse its discretion, by permitting the cross-examination to continue within limited bounds, until the expert testified that he could not recollect any involvement in two of the other cases. Furthermore, the plaintiffs did not object until after he had described his involvement in malpractice cases and had testified as to his relationship with plaintiffs' counsel.

4. The statement by defense counsel in closing argument about "professional witnesses", assuming that it was directed toward the plaintiffs' expert, was not a fair characterization of the witness. The evidence merely showed that he had been involved in a few medical malpractice cases, and there was no evidence that he frequently testified. Sixty percent of his income was from the care of patients. However, the failure of the trial court to give the requested instruction to the jury does not require reversal and a new trial in this case. The unfair reference to the expert was indirect. The request for the cautionary instruction was made after the plaintiffs' lawyer had responded to the statement in his argument, and the trial court did instruct the jury that statements in closing argument are not evidence.

5. The conduct of defense counsel in cross-examining the expert and in arguing improperly to the jury did not deprive the plaintiffs of a fair trial under the circumstances of this case. It was not the type of egregious and repetitive conduct which requires a new trial. The record reflects no studied purpose to prejudice the jury. The cross-examination did not harass or belittle the witness. There were no accusations of lying. After the trial court sustained the plaintiffs' objection, the questioning stopped, and there was only one indirect improper comment in the argument to the jury.

6. The mere occurrence of the infection in Mr. Wilson's arm and the showing that the defendant hospital had a rate of postoperative infections well below the national average are not sufficient, under the doctrine of *res ipsa loquitur,* to establish an issue of the hospital's negligence for the jury to consider. Only when it is shown that the event is of the kind which

ordinarily does not occur in the absence of negligence is the burden placed upon the defendants to explain their conduct. The mere occurrence of a post-operative infection does not give rise to an inference of negligence when no more is shown than that an infection has occurred and that an infection is rare.

7. The argument that Dr. Stilwill was an agent of the hospital by estoppel is without merit. There was an independent physician-patient relationship prior to the treatment at the hospital, and the jury's verdict for defendant Stilwill prevents the imposition of liability on the hospital for Dr. Stilwill's actions. The only possible liability of the hospital would be if its ostensible agents or employees negligently failed to prevent the infection. Since the question of negligence concerning the infection was properly withdrawn from the consideration of the jury, it was also proper to withdraw any claim based on the doctrine of agency by estoppel.

8. Whether the hospital was negligent in failing to establish standards for care of patients which would require someone qualified to remain after surgery to ascertain if an infection would develop when the possibility was known or should have been known is not an issue which can be determined by common knowledge and experience of a jury, but raises a question of medical judgment. The plaintiffs failed to introduce any expert testimony to establish the standard of conduct. Review in the light most favorable to the plaintiffs of the testimony and the reasonable inferences from it shows that the trial judge properly granted a directed verdict for the defendant hospital.

The judgment of the Court of Appeals is affirmed.

Justice Levin, joined by Justices Kavanagh and Williams, dissenting, would reverse and remand for a new trial.

1. An expert's history as a witness for other litigants is not probative of interest or bias. Even if such a history has a modicum of probative value on the issue of credibility, inquiries of that sort should ordinarily be prohibited because of their potential for distracting the jury or creating collateral issues, as this case demonstrates.

2. The interaction of the rule in medical malpractice cases requiring that a violation of the standard of care be proved by expert testimony, the understandable reluctance of physicians to testify against other physicians, and the Court's decision in this case, produces a dilemma for injured plaintiffs. If they succeed in obtaining expert testimony, they face the prospect of having their witnesses belittled and their cases undermined by questions intended to insinuate that those physicians who do

testify are habitual accusers motivated by avarice or vengeance. Fairness requires that the plaintiff's expert witnesses not be impugned simply because they have testified for plaintiffs in other cases. It is sufficient that the defendant be permitted to show that the witness has received a fee for his services.

3. The suggestion by defense counsel in closing argument that the plaintiffs had employed "professional witnesses" magnified the error introduced by the earlier line of questioning. It cannot be said with assurance that the combination of questioning and argument which injected a false issue in this case did not deny the plaintiffs a fair trial. Even if it is fair comment to label an expert who derives all or the great bulk of his income from giving testimony and the attendant preparation a "professional witness", Dr. Badgley, who testified that he derives 60% of his income from caring for patients, cannot fairly be characterized as a "professional witness".

4. The inquiry regarding the number of times an expert witness has testified for other plaintiffs should generally be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Adoption of a rule generally barring such inquiry would be to do no more for the plaintiff in a medical malpractice case than has been done for defendants by the Michigan Rules of Evidence where relevant evidence, *e.g.*, subsequent remedial measures, offers of compromise, payment of medical expenses, and liability insurance, has been generally barred to protect the rights of defendants to a fair trial.

5. The defendant should not be permitted to exploit unfairly the rule requiring, for the defendant's protection, expert testimony, and the reluctance of physicians to testify against another member of their profession. However, if the objected-to inquiry is permissible, then plaintiffs should be able to respond with expert testimony and other evidence tending to show the difficulty of obtaining expert medical testimony on behalf of a plaintiff. If the defendant can charge the plaintiff with offering manufactured testimony, the plaintiff should be able to show why a physician who is willing to testify for a plaintiff may be called upon to do so with some frequency.

92 Mich App 227; 284 NW2d 773 (1979) affirmed.

OPINION OF THE COURT

1. WITNESSES — CROSS-EXAMINATION — DISCRETION.

The scope and duration of cross-examination of witnesses rests in

the sound discretion of the trial court; the exercise of that discretion will not be reversed absent a clear showing of abuse.

2. WITNESSES — CROSS-EXAMINATION — DISCRETION.

The trial court must insure, in its discretion, that questions on cross-examination seeking to elicit evidence of the witness's bias, prejudice, or interest and inconsistent prior testimony or statements are not unduly limited or improvidently extended; the trial court must also be alert to questions which harass, intimidate, or belittle a witness.

3. WITNESSES — EXPERT WITNESSES — CROSS-EXAMINATION.

That a substantial part of the medical practice of an expert witness in a trial for medical malpractice involves evaluating disabilities and reporting his findings and conclusions for cases which may come to court is a proper subject for general limited inquiry on cross-examination; it is also proper to bring out on cross-examination the number of times an expert witness testifies in court, or is involved in particular types of cases.

4. WITNESSES — EXPERT WITNESSES — CROSS-EXAMINATION.

Evidence that an expert witness in a trial for medical malpractice had testified at the request of the plaintiffs' counsel in other malpractice cases is a permissible subject of cross-examination, in the trial court's discretion, for the purpose of affecting his credibility by raising a possible inference that the witness has testified in such a manner that he would be hired in future cases; in response, additional inquiry would be permissible to show that the witness had also been called by many other lawyers to testify on various issues over the years.

5. WITNESSES — EXPERT WITNESSES — IMPEACHMENT — BIAS.

A pattern of testifying as an expert witness for a particular category of plaintiffs or defendants is only minimally probative of bias, and impeachment by such evidence should be carefully scrutinized by the trial court.

6. WITNESSES — EXPERT WITNESSES — CROSS-EXAMINATION — PHYSICIANS AND SURGEONS — MALPRACTICE.

Permitting cross-examination of an expert medical witness as to his pattern of testifying for plaintiffs in actions for medical malpractice was not reversible error where the trial court limited the cross-examination by sustaining an objection after the witness testified that he could not recollect any involvement in two cases in which plaintiffs' counsel was apparently not involved.

7. WITNESSES — ARGUMENT OF COUNSEL — IMPROPER COMMENT — INSTRUCTIONS TO JURY — EXPERT WITNESSES.

Failure in a trial for medical malpractice to give a special instruction to the jury to disregard an unfair remark by defense counsel in closing argument about the use of "professional witnesses" does not require reversal of the verdict of no cause of action and a new trial where the unfair reference to the plaintiffs' expert witness was indirect, the request for the cautionary instruction was made after the plaintiffs' lawyer had responded to the statement in his argument, and the trial court did instruct the jury that statements of counsel made in argument are not in evidence.

8. WITNESSES — ARGUMENT OF COUNSEL — IMPROPER COMMENT — EXPERT WITNESSES.

The conduct of counsel for a defendant physician in cross-examining the plaintiffs' expert medical witness as to his pattern of involvement in actions for medical malpractice and in unfairly arguing to the jury about the use of "professional witnesses" did not deprive the plaintiffs of a fair trial for medical malpractice where the attorney's conduct was not egregious and repetitive, the record reflects no studied purpose to prejudice the jury, the cross-examination did not harass or belittle the witness, there were no accusations of lying, after the trial court sustained the plaintiffs' objection the questioning stopped, and there was only one indirect improper comment in defense counsel's argument.

9. HOSPITALS — MALPRACTICE — NEGLIGENCE — INFERENCES — POST-OPERATIVE INFECTION.

The mere occurrence of a post-operative infection and a showing that a defendant hospital had a rate of post-operative infection well below the national average are not sufficient, under the doctrine of *res ipsa loquitur,* to establish an issue for the jury of the hospital's negligence in an action for medical malpractice.

10. HOSPITALS — MALPRACTICE — PHYSICIANS AND SURGEONS — VICARIOUS LIABILITY — AGENCY — ESTOPPEL.

A claim against a defendant hospital of medical malpractice based on the doctrine of agency by estoppel was without merit where there was an independent relation between the defendant physician and the plaintiff patient before the treatment by the physician in the hospital and its operating room which allegedly resulted in plaintiff's post-operative injury, there was a verdict of no cause of action for the defendant physician, there was no testimony that the hospital's operating room or

its surgical materials were unclean, the only possible liability of the hospital would be if its ostensible agents or employees failed to prevent a post-operative infection, and the question of negligence in failing to prevent a post-operative infection was properly withdrawn from consideration by the jury.

11. HOSPITALS — MALPRACTICE — PHYSICIANS AND SURGEONS — STANDARD OF CARE — WITNESSES — EXPERT WITNESSES.

A directed verdict of no cause of action for a defendant hospital was proper in an action for medical malpractice on a theory that the hospital negligently failed to establish standards for the care of patients after surgery where the plaintiffs failed to introduce any expert testimony to establish the standard of conduct; the issue presented is not within the common knowledge and experience of a jury, but raises a question of medical judgment which, as a general rule, requires expert testimony.

DISSENTING OPINION BY LEVIN, J.

12. WITNESSES — EXPERT WITNESSES — CROSS-EXAMINATION.

An expert's history as a witness for other litigants is not probative of interest or bias, and even if it has a modicum of probative value on the issue of credibility, inquiries of that sort should ordinarily be prohibited because of their potential for distracting the jury or creating collateral issues about the use of "professional witnesses".

13. WITNESSES — EXPERT WITNESSES — CROSS-EXAMINATION — PHYSICIANS AND SURGEONS — MALPRACTICE.

Defendant's counsel in actions for medical malpractice should not be permitted to turn the practical difficulties that plaintiffs encounter in obtaining expert testimony to the defendant's advantage by questions intended to insinuate that those physicians who do testify are habitual accusers motivated by avarice or vengeance.

14. WITNESSES — EXPERT WITNESSES — CROSS-EXAMINATION — PHYSICIANS AND SURGEONS — MALPRACTICE.

The plaintiff's expert witnesses in an action for medical malpractice should not be impugned simply because they have testified for plaintiffs in other cases; it is sufficient that the defendant be permitted to show that a witness has received a fee for his services.

15. WITNESSES — ARGUMENT OF COUNSEL — IMPROPER COMMENT — EXPERT WITNESSES.

Cross-examining the plaintiffs' expert medical witness as to his

pattern of involvement in actions for medical malpractice and unfairly arguing to the jury about the use of "professional witnesses" cannot be said with assurance not to have denied the plaintiffs a fair trial in an action for medical malpractice.

16. WITNESSES — ARGUMENT OF COUNSEL — IMPROPER COMMENT — EXPERT WITNESSES.

An expert medical witness who testified that he derived 60% of his income from caring for patients cannot fairly be characterized by counsel in arguing to the jury as a "professional witness", even if it is fair comment to label an expert who derives all or the great bulk of his income from giving testimony and the attendant preparation a "professional witness".

17. WITNESSES — EXPERT WITNESSES — CROSS-EXAMINATION.

Inquiry regarding the number of times an expert witness has testified for other plaintiffs should generally be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury (MRE 403).

Reid, Reid, Mackay, Emery & DeVine, P.C., for plaintiffs.

Fraser, Trebilcock, Davis & Foster, P.C. (by *Everett R. Trebilcock, Eugene F. Townsend* and *C. Mark Hoover),* for defendant Stilwill.

Kitch, Suhrheinrich, Smith, Saurbier & Drutchas, P.C. (by *David L. Moffitt),* for defendant Edward W. Sparrow Hospital Association.

BLAIR MOODY, JR., J. Plaintiffs in this medical malpractice case appeal from a jury verdict of no cause of action for the defendant George D. Stilwill, M.D., and a directed verdict for the defendant Edward W. Sparrow Hospital Association. Three issues are raised by the plaintiffs on appeal:

(1) Whether the trial court committed reversible error by permitting the plaintiffs' expert witness to be cross-examined about his involvement in other medical malpractice cases.

(2) Whether the remarks during closing argument by counsel for the defendant doctor indicating that his client did not utilize "professional witnesses" deprived plaintiffs of a fair trial and required a new trial.

(3) Whether the trial court committed reversible error by granting the defendant hospital's motion for a directed verdict.

The Court of Appeals answered these questions in the negative and affirmed the jury verdict and the directed verdict. We agree, although in part for different reasons. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTS

The plaintiff, Irving J. Wilson, experienced some problems and difficulty with his right arm. In November, 1970, he contacted the defendant Dr. Stilwill, an orthopedic surgeon. Dr. Stilwill diagnosed the problem to be the result of a non-union of an old fracture. Dr. Stilwill advised Mr. Wilson that he could perform a compression-plating procedure by which the non-union could be corrected.

Surgery was performed on December 11, 1970, at the defendant Edward W. Sparrow Hospital. Following surgery Mr. Wilson experienced difficulty moving the fingers of his right hand. Signs of infection developed. Five days after the operation culture and sensitivity tests were ordered by Dr. Stilwill. The infection was identified and treated with antibiotics. Following his release from Sparrow Hospital, Mr. Wilson complained of pain, swelling, and a discharge from his arm. Additional tests indicated the presence of different bacteria. Subsequently, a number of additional surgical pro-

cedures were performed at the hospital. Mr. Wilson's right arm is now paralyzed.

Mr. and Mrs. Wilson brought this action against Dr. Stilwill and Edward W. Sparrow Hospital for malpractice. At the close of the plaintiffs' proofs the trial court directed a verdict for the hospital. The jury returned a verdict of no cause of action for the defendant Dr. Stilwill. The trial court denied the plaintiffs' motion for new trial. The Court of Appeals affirmed. 92 Mich App 227; 284 NW2d 773 (1979). We granted leave to appeal. 408 Mich 898 (1980).

II. CROSS-EXAMINATION

The first issue pertains to a line of questioning on cross-examination directed to the plaintiffs' expert witness, W. O. Badgley, M.D., by counsel for the defendant Dr. Stilwill. Responding to inquiries as to whether he was still actively treating patients, Dr. Badgley testified that 40% of his practice had to do with disability evaluation. He stated: "Sixty percent comes from the care of patients." The doctor explained that attorneys referred patients to him for disability evaluation and reports as to the extent of their injuries. Dr. Badgley confirmed the fact that he gives testimony or his opinions concerning the evaluations. He also testified that he had not been involved in more than two or three cases in which there was alleged malpractice. In two cases the attorney for the plaintiffs was the same attorney representing the plaintiffs in the instant case. When questioned about a third malpractice case, Dr. Badgley stated that he did not recall that case and that he had never testified.

At that point, plaintiffs' counsel objected. The trial court permitted the questioning to continue.

Dr. Badgley then recalled that he had been asked his opinion on that case, but that he had nothing to do with the case. After he testified that he had no recollection of two other cases, the plaintiffs' attorney again objected. The objection was sustained. There was no motion to strike any testimony, nor any request for a curative or limiting instruction.

The plaintiffs contend that the trial court erred when it initially overruled the objections of plaintiffs' counsel and that in any event the evidence introduced deprived the plaintiffs of a fair trial. It is the claim of the plaintiffs that the cross-examination of Dr. Badgley was calculated to convey to the jury the innuendo that there was complicity between the expert witness and the plaintiffs' attorney. Plaintiffs urge that this line of questioning was intended to improperly divert the attention of the jury from the issues of malpractice and to focus upon the credibility of the witness in an effort to prejudice the jury.

In response, the defendant doctor asserts that the scope of cross-examination is subject to the trial court's discretion. In this case, defense counsel was attempting to impeach the expert witness by showing that he was involved in more than two or three malpractice cases. Furthermore, the inquiry was also designed, within proper bounds, to elicit testimony indicative of bias or prejudice. Defense counsel sought to establish that Dr. Badgley had previously testified in malpractice suits at the request of plaintiffs' attorney and that the witness had almost always been involved in cases on behalf of a plaintiff. This background information, defendant urges, is appropriate for the jury to evaluate in weighing the import of the expert opinion.

The scope and duration of cross-examination of witnesses rests in the sound discretion of the trial court. The exercise of this discretion will not be reversed absent a clear showing of abuse. See, *e.g., People v Taylor,* 386 Mich 204; 191 NW2d 310 (1971). See also *Hayes v Coleman,* 338 Mich 371; 61 NW2d 634 (1954) (broad scope of cross-examination to show bias or prejudice). There is "a general canon that on cross-examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very liberal*". 3A Wigmore, Evidence (Chadbourn Rev), § 944, p 778.

The primary issues in most medical malpractice cases are: what is the appropriate standard of care, whether there was a breach of this standard of care and whether the breach was a proximate cause of plaintiff's injuries. Both parties in most cases call upon expert witnesses to testify on these issues. In this "battle of experts" credibility is a primary question for consideration by the jury.

The trial judge is charged with the responsibility, in his or her discretion, of permitting and limiting attacks on credibility. He or she must insure that questions seeking to elicit evidence indicating bias, prejudice or interest and inconsistent testimony or statements are not unduly limited or improvidently extended. The trial judge also must be alert to questions which harass, intimidate or belittle a witness.

The fact that a substantial part of Dr. Badgley's practice involves giving disability evaluations and preparing reports of his findings and conclusions is not an improper subject for general limited inquiry. An expert witness's experience testifying in court may influence the manner in which he or she testifies. The same is true for experience in evaluating cases which may come to court. It is

thus proper to bring out on cross-examination the number of times a witness testifies in court, or is involved in particular types of cases. See *Rumptz v Leahey,* 26 Mich App 438; 182 NW2d 614 (1970).

In *DeHaan v Winter,* 262 Mich 192; 247 NW 151 (1933), *(After Remand)* 265 Mich 101; 251 NW 391 (1933), our Court held that permitting cross-examination of an expert witness concerning his interest in the event of suit was not error. *DeHaan* is a medical malpractice case. The expert medical witness and the defendant doctor belonged to the state medical society. A small portion of the society's dues went to the defense of malpractice suits for members.

> "For the purpose of affecting credibility of the witness, he may be cross-examined as to his interest in the event of suit, including contribution to the expense of it." *DeHaan,* 262 Mich 195.

Evidence concerning the fact that Dr. Badgley had testified at the request of the plaintiffs' counsel in other malpractice cases, like the testimony in *DeHaan,* is a permissible subject of cross-examination for the purpose of affecting credibility. The cross-examination of Dr. Badgley minimally concerned possible bias or prejudice. See *Ager v Baltimore Transit Co,* 213 Md 414; 132 A2d 469 (1957). A showing of a pattern of testimony for a particular attorney in past cases raises a possible inference that the witness has testified in such a manner that he would be hired in future cases.[1] See

[1] This Court does not suggest that Dr. Badgley's testimony has ever been influenced by his relationship with the plaintiffs' counsel. The Court's close analysis of the transcript reveals Dr. Badgley to be a concerned and dedicated physician. Furthermore, we recognize that expert witnesses, particularly in medical malpractice cases, furnish testimony that is essential to the truth-seeking trial process. Nevertheless, when permitted by the trial court, the jury may evaluate

Collins v Wayne Corp, 621 F2d 777, 784 (CA 5, 1980). See also *Treece v The Greyhound Bus Co,* 63 Mich App 63, 66; 234 NW2d 404 (1975); *Gutowski v M & R Plastics & Coating, Inc,* 60 Mich App 499, 505, fn 2; 231 NW2d 456 (1975). In response, additional inquiry would be permissible to show that the witness had been called by many other lawyers on various issues over the years. The jury, in the trial court's discretion, may hear and evaluate evidence affecting credibility.

Counsel for the plaintiffs first raised an objection to the cross-examination when questions were raised concerning Dr. Badgley's involvement in malpractice cases as a witness for the injured party where it did not appear that plaintiffs' counsel was involved. The trial court initially permitted the questioning to continue. When Dr. Badgley could not recollect any involvement in two cases, plaintiffs' counsel objected and the objection was sustained.

A pattern of testifying as an expert witness for a particular category of plaintiffs or defendants may suggest bias.[2] However, such testimony is only minimally probative of bias and should be carefully scrutinized by the trial court.[3]

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such relationships and "dedication cannot insulate anyone from the suggestions of bias that a cross-examiner brings out when he plays his role in a trial". *Collins v Wayne Corp,* 621 F2d 777, 784, fn 5 (CA 5, 1980).

[2] 3 Kramer, Medical Malpractice (New York: Matthew Bender, 1980), ¶ 29.08, pp 29-76 to 29-77. See also Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest,* 53 Ind L J 35 (1977).

Attorneys representing injured persons advocate cross-examining a defendant's expert witness concerning the frequency of testifying in previous medical malpractice cases. See Kramer, *Cross-Examination of the Medical Expert,* 13 Trial 26, 27 (Dec, 1977).

[3] The Michigan Rules of Evidence, adopted after the trial in the instant case, confer reasonable discretion upon the trial judge to admit or exclude evidence and to control the cross-examination of witnesses. This discretion includes, *inter alia,* decisions to permit

In the instant case the trial court did not commit reversible error, nor abuse its discretion, by permitting the cross-examination covering these areas of inquiry to continue within limited bounds. Furthermore, an objection was not raised until after Dr. Badgley had described his involvement in malpractice cases and had testified as to his relationship with the plaintiffs' counsel.

III. CLOSING ARGUMENT

Plaintiffs contend that their expert, Dr. Badgley, was characterized as a "professional witness" by counsel for Dr. Stilwill in his closing argument and that this statement denied plaintiffs a fair trial. In his closing argument defendant Dr. Stilwill's counsel stated:

"In an attempt, ladies and gentlemen, to find out the most probable cause of Mr. Wilson's injury we went to the two largest at least *[sic]* medical institutions in the State of Michigan. We went to the University of Michigan and we went to Henry Ford Hospital. And we got there, and we went to the sub-department of internal medicine, the medical practice of infectious diseases.

questions concerning a witness's history of testifying in court and the problems, if any, in securing the necessary expert testimony.

MRE 403 supplies sufficient guidance:

"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 611 provides in part:

"(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

"(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."

We did not go to professional witnesses; we went to professional physicians qualified better than any other man *[sic]* in the State of Michigan, to the best of our knowledge, to determine the answers to the questions. What caused the infection; and, secondly, could the infection work so fast as to cause paralysis in Mr. Wilson's hand which was evidenced by the time he regained full consciousness? We gave them all of the facts, and in Cox's [one of the defendant doctor's experts] hypothetical we used facts most favorable to the plaintiff, and he said there was no evidence of malpractice."

In his rebuttal argument plaintiffs' counsel stated:

"[A]s a matter of fact, when you go into the jury room, if there is any inference that [Dr. Badgley] is a bad person for coming in here and testifying, there is a bill in here from Dr. Badgley; he examined the man [in] November of 1975, and it is Exhibit No. 24, and he charged $100.20. I asked him about that. Do you really think that Dr. Badgley came in here and testified for $100.20?

* * *

"I think you should settle back and listen to what he said, not try to talk about professional witnesses and the like because it is unfair, unjust to my client to say that."

When the jury was excused after closing arguments, counsel for the plaintiffs requested the trial court to instruct the jury to disregard defense counsel's "professional witness" statement or, in the alternative, to give a cautionary instruction.

Defendant doctor's counsel attempted to explain that his comment did not refer to Dr. Badgley, plaintiffs' expert witness. It was argued that the statement about professional witnesses was based upon defense counsel's concern about any unfavor-

able inference that the experts called by the defendant doctor were professional witnesses because these expert witnesses were not from the immediate area.

The trial court did not recall any specific reference to Dr. Badgley, and even if there was, the trial court indicated the statement might have constituted fair comment under all the circumstances of the case. The trial court denied the request for a special instruction. The trial court's instructions to the jury did include, however, the general instruction that arguments, statements and remarks of attorneys are not evidence and that the jury should disregard anything said by an attorney which is not supported by evidence.

The Court of Appeals agreed with the trial court's ruling and concluded that even if the statement was directed toward plaintiffs' expert, the statement was a reasonable inference from the testimony and amounted to a fair characterization of the witness. The Court of Appeals opinion referred to the testimony of plaintiffs' expert that approximately 40% of his income was derived from the evaluation of medical disability cases and that he had been involved in a number of medical malpractice cases.

We do not agree with the conclusion that the "professional witness" statement, assuming it was directed toward Dr. Badgley, was a fair characterization of the witness. The evidence merely showed that Dr. Badgley had been involved in a few medical malpractice cases. There was no evidence indicating that the doctor frequently testified. Furthermore, Dr. Badgley derived 60% of his income from the care of patients.

However, the failure of the trial court to give the requested instruction does not require reversal

and a new trial in this case.[4] The reference to Dr. Badgley was indirect. The request for an instruction was made after the plaintiffs' lawyer had responded to the statement in his rebuttal argument. The trial court did instruct the jury that statements in closing argument are not evidence. Furthermore, the conduct of the defendant doctor's counsel in questioning Dr. Badgley and in arguing to the jury did not deprive plaintiffs of a fair trial under the circumstances of this case.

This Court has not hesitated to require a new trial when attorneys, through questioning and argument, have shown a studied purpose to prejudice the jury.

In *Wayne County Board of Road Comm'rs v GLS LeasCo,* 394 Mich 126, 139; 229 NW2d 797 (1975), this Court ordered a new trial because the board's attorney repeatedly belittled and harassed witnesses and opposing counsel even after objections were sustained. Witnesses were accused of lying and of fabricating evidence. The board's lawyer suggested that opposing counsel and LeasCo executives "bought" testimony.

> "A substantial doubt regarding the fairness of the trial has been raised by the egregious and repetitive nature of the misconduct of the board's lawyer."

In *Kern v St Luke's Hospital Ass'n of Saginaw,* 404 Mich 339, 354; 273 NW2d 75 (1978), counsel for the defendants

> "continuously raised the groundless charge, by direct attack and innuendo, that the 'bought' testimony of plaintiffs' out-of-state expert witnesses was collusive and untrue."

[4] GCR 1963, 529.1.

Defense counsel in *Kern* improperly and repeatedly attempted to show a conspiracy to render false testimony. Defense counsel referred to one of plaintiffs' experts as " 'the fellow that came in here to do my client in' ". *Kern,* 351. The conduct of defense counsel in *Kern* was perceived as "a studied purpose to prejudice the jury". *Kern,* 354.

The conduct of the attorney for the defendant doctor in the instant case was not the type of egregious and repetitive conduct that was present in *LeasCo* and *Kern.* The record reflects no studied purpose to prejudice the jury. The questioning on cross-examination of Dr. Badgley did not harass or belittle the witness. There were no accusations of lying. After the trial court sustained the objection by plaintiffs' attorney, the questioning stopped. There was only a single and indirect improper comment in closing argument.

We therefore conclude that neither the questioning on cross-examination of Dr. Badgley, nor the closing argument of the defendant doctor's counsel warrant setting aside the jury's verdict in this case.

IV. DIRECTED VERDICT

A

At the close of the plaintiffs' proofs the trial court directed a verdict for the defendant hospital. Plaintiffs contend that the case should have been submitted to the jury under the doctrine of *res ipsa loquitur,* as the mere occurrence of the infection in Mr. Wilson's arm is sufficient to establish an issue for the jury to consider.

Plaintiffs rely upon four conditions for the application of *res ipsa loquitur* set forth in *Gadde v*

Michigan Consolidated Gas Co, 377 Mich 117, 124; 139 NW2d 722 (1966):[5]

"1. The event must be of a kind which ordinarily does not occur in the absence of someone's negligence.

"2. The event must have been caused by an agency or instrumentality within the exclusive control of the defendant.

"3. The event must not have been due to any voluntary action or contribution on the part of the plaintiff.

"4. Evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff." (Emphasis deleted.)

The Court of Appeals, relying upon another infection case, *Rohdy v James Decker Munson Hospital,* 17 Mich App 561; 170 NW2d 67 (1969), *lv den* 383 Mich 756 (1969), rejected the plaintiffs' argument. We agree with the Court of Appeals.

The threshold question with respect to this issue is whether an infection ordinarily does not occur in the absence of negligence.

The testimony showed that the defendant hospital had a post-operative infection rate well below the national average. At least three physicians who testified indicated that infections which are not the result of any breach of due care can and do occur during surgery. There was no testimony to the contrary. Plaintiffs' expert witness described proper sterilization procedures which were consistent with the testimony given for the defendants. Furthermore, there was no testimony suggesting a break in sterile technique.

The plaintiffs suggest that the low incidence of

[5] Michigan has not formally adopted the doctrine of *res ipsa loquitur.* However, the underlying concepts of *res ipsa loquitur,* which are circumstantial evidence and negligence concepts, have been applied in Michigan. *Gadde v Michigan Consolidated Gas Co,* 377 Mich 117; 139 NW2d 722 (1966).

infection at the defendant hospital means that infection does not ordinarily occur. From this statement they seek to apply *res ipsa loquitur.* Although it is true that statistically infections did not ordinarily occur at the defendant hospital, this fact does not suggest that when an infection does occur, it is the result of negligence.

"The requirement that the occurrence be one which ordinarily does not happen without negligence is of course only another way of stating an obvious principle of circumstantial evidence: that the event must be such that in the light of ordinary experience it gives rise to an inference that some one must have been negligent.

* * *

"In the usual case the basis of past experience from which the conclusion may be drawn that such events usually do not occur without negligence is one common to the whole community, upon which the jury are simply permitted to rely. Even where such a basis of common knowledge is lacking, however, expert testimony may provide a sufficient foundation; and by the same token it may destroy an inference which would otherwise arise." Prosser, Torts (4th ed), § 39, pp 214, 217.

The mere occurrence of a post-operative infection is not a situation which gives rise to an inference of negligence when no more has been shown than the facts that an infection has occurred and that an infection is rare. See, *e.g., Shurpit v Brah,* 30 Wis 2d 388; 141 NW2d 266 (1966); *McCall v St Joseph's Hospital,* 184 Neb 1; 165 NW2d 85 (1969); *Contreras v St Luke's Hospital,* 78 Cal App 3d 919; 144 Cal Rptr 647 (1978).

Since we have determined that plaintiffs have not met the threshold requirement for an inference of negligence, their reliance upon *Ybarra v Spangard,* 25 Cal 2d 486; 154 P2d 687 (1944), as

authority for placing the burden upon the defendants to explain their conduct is inapposite. The *Ybarra* court concluded that the event must be of the kind which ordinarily does not occur in the absence of negligence. Only when this initial point is shown would the burden be placed upon the defendants to explain their conduct.

B

The plaintiffs also contend that the trial court erred by directing a verdict for the hospital because they were prevented from arguing agency by estoppel as set forth in *Howard v Park,* 37 Mich App 496; 195 NW2d 39 (1972), *lv den* 387 Mich 782 (1972). The Court of Appeals did not address this issue. The defendant hospital argues that this issue was not preserved for appeal.

The plaintiffs' complaint alleged that the hospital, through its agents and employees, allowed the operating room and the materials used during surgery to be unclean, which caused the post-operative infection. In the Court of Appeals the plaintiffs argued that Dr. Stilwill was an agent by estoppel of the hospital. Even if properly preserved, we conclude that the issue is without merit.

In *Grewe v Mount Clemens General Hospital,* 404 Mich 240; 273 NW2d 429 (1978), we held that, under the doctrine of agency by estoppel, or ostensible agency, a hospital may be held liable for the acts of medical personnel who were its ostensible agents although the named defendant physician is not found liable. In *Grewe,* as in *Howard v Park,* the plaintiff looked to the hospital for treatment of his physical ailments and did not merely view the hospital as the situs where his physician would treat him. In neither of these cases did the plain-

tiffs have an independent relationship with the allegedly negligent physician prior to admission to the hospital.

In the instant case there was an independent physician-patient relationship prior to the hospital treatment. Furthermore, as to the claim that Dr. Stilwill was an agent of the hospital, the jury's determination of no cause of action for defendant Dr. Stilwill prevents imposing liability upon the hospital for Dr. Stilwill's actions. See *Lamb v Oakwood Hospital Corp,* 41 Mich App 287; 200 NW2d 88 (1972).

We have determined that the mere occurrence of the post-operative infection is insufficient to establish an issue for consideration by the jury. There is no testimony to indicate that the operating room or surgical materials were unclean. The only possibility for imposing liability upon the hospital would be if one or more of its ostensible agents or employees acted negligently by failing to prevent the infection. Since the question of negligence concerning the infection was properly withdrawn by the trial court from consideration by the jury, it was also proper to withdraw any claim based upon the doctrine of agency by estoppel.

C

The plaintiffs further argue that the jury should have been permitted to consider their claim that the hospital was negligent by failing to establish standards of conduct which would have required doctors or other qualified personnel to remain in attendance on Mr. Wilson after surgery to ascertain if an infection would develop, when they knew or should have known of the possibility. The trial court directed a verdict on this claim for the hospital because the plaintiffs failed to introduce

any expert testimony to establish the standard of conduct.

The plaintiffs contend that this case presents a question of ordinary negligence and that no expert testimony was necessary. With respect to this assertion, it seems evident that whether a hospital's negligence must be shown by expert testimony depends on the circumstances of the particular case. The plaintiffs rely on two cases in support of their theory. *Fogel v Sinai Hospital of Detroit,* 2 Mich App 99; 138 NW2d 503 (1965), clearly involved a case of ordinary negligence. Fogel had warned a nurse's aide that one aide was not capable alone of helping her get to the bathroom. The aide could not hold her and she fell and fractured her hip. *Gold v Sinai Hospital of Detroit, Inc,* 5 Mich App 368; 146 NW2d 723 (1966), also held that a patient's fall in a hospital was a matter of ordinary negligence. However, these cases presented issues which are within the common knowledge and experience of a jury.

In contrast to *Fogel* and *Gold,* the instant case presents a standard of conduct issue which cannot be determined by common knowledge and experience, but rather raises a question of medical judgment. If questions regarding this standard were presented in a malpractice case involving a physician or dentist, expert testimony would be required to establish the standard. See, *e.g., Lince v Monson,* 363 Mich 135; 108 NW2d 845 (1961); *Roberts v Young,* 369 Mich 133; 119 NW2d 627 (1963); *Wrobel v Cotman,* 372 Mich 383; 126 NW2d 723 (1964). Similarly, when a medical malpractice action not involving ordinary negligence is brought against a hospital, as a general rule, expert testimony is required. See, *e.g., Bivens v Detroit Osteopathic Hospital,* 77 Mich App 478;

258 NW2d 527 (1977), *rev'd on other grounds* 403 Mich 820 (1978); *Brandon v Art Centre Hospital (Osteopathic),* 366 F2d 369 (CA 6, 1966).

We have reviewed the testimony in the light most favorable to the plaintiffs and have drawn the reasonable inferences therefrom which are in their favor. *Dodd v Secretary of State,* 390 Mich 606, 612; 213 NW2d 109 (1973). We conclude that the trial judge properly granted the directed verdict for the hospital.

The trial judge did not commit reversible error. The plaintiffs were not denied a fair trial.

Accordingly, we affirm the judgment of the Court of Appeals. Costs to the defendants.

COLEMAN, C.J., and FITZGERALD and RYAN, JJ., concurred with BLAIR MOODY, JR., J.

LEVIN, J. *(dissenting).* Plaintiffs' expert witness at trial was Dr. W. O. Badgley, an orthopedic surgeon who had long been on the staff at Sparrow Hospital.

On cross-examination, Badgley testified that he derived 40% of his income from disability evaluations and 60% from the care of patients. Defense counsel inquired whether Badgley was "frequently referred patients such as Mr. Wilson by attorneys such as Mr. Mackay", and, when Badgley responded that he had not been involved "in more than two or three cases in which there was suspected malpractice", asked whether he had been involved in a number of specific cases, including two handled by the same plaintiffs' attorney. Plaintiffs' relevancy objection was at first overruled but was ultimately sustained.

During closing argument, the lawyer for defendant Dr. Stilwill said:

"In an attempt, ladies and gentlemen, to find out the most probable cause of Mr. Wilson's injury we went * * * to the University of Michigan and we went to Henry Ford Hospital. * * * We did not go to *professional witnesses;* we went to professional physicians qualified better than any other man *[sic]* in the State of Michigan, to the best of our knowledge, to determine the answers to the questions." (Emphasis supplied.)

Following oral argument, plaintiffs' lawyer requested a curative instruction. The judge denied the request, saying that although he had "discerned that that [reference to Dr. Badgley] was the implication" of the remarks, it was "not certain that they wouldn't have constituted fair comment under all of the circumstances".

I

The Court of Appeals said:

"In the present case no error was committed below by the elicitation from plaintiffs' expert testimony concerning his involvement in other malpractice cases. This testimony was probative on the question of weight to be given by the trier of fact."

The Court of Appeals relied on *Treece v Greyhound Bus Co,* 63 Mich App 63, 66; 234 NW2d 404 (1975), where the panel said without analysis that several questions posed to a physician witness about his relationship with plaintiffs' counsel, including the number of times he had testified for clients of the attorney, "were probative of the weight which should have been given to the doctor's testimony by the jury".

Limited research has disclosed disagreement among the few authorities which have addressed the propriety of cross-examining a physician called

as an expert witness about his appearance as a witness in other cases. The practice was approved "as tending to show bias and interest and thereby affecting the credibility of the witness" in *Lammert v Wells,* 321 Mo 952, 954; 13 SW2d 547, 548 (1929). See, also, *Ager v Baltimore Transit Co,* 213 Md 414; 132 A2d 469 (1957), *Russell v Young,* 452 SW2d 434 (Tex, 1970), and *Barrios v Davis,* 415 SW2d 714 (Tex Civ App, 1967). In *Murero v Reinhart Lumber Co,* 85 Cal App 385; 259 P 494 (1927), the court declared that evidence that a physician had frequently been called as an expert witness did not show or tend to show "his interest" but went on to observe that such evidence would have fortified the qualifications of the witness had the trial court not sustained an objection to the cross-examination. In *McNenar v New York, C & S L R Co,* 20 FRD 598 (WD Pa, 1957), the court excused a doctor from answering interrogatories which would have required him to state the number of cases in which he had made medical examinations for the purpose of testifying as a medical expert for other litigants represented either by McNenar's attorney or by other counsel, and the number of such cases in which he had given testimony. The court deemed such inquiry "far too broad and extensive, productive of collateral issues and obstructing the expeditious administration of justice".[1]

All the foregoing cases were personal injury actions, not medical malpractice suits.

This Court recognized "the practical difficulty in

[1] Compare *Zamsky v Pittsburgh Public Parking Authority,* 378 Pa 38; 105 A2d 335 (1954), holding that cross-examination, in condemnation proceedings, as to fees condemner's expert witness had received for services rendered in the acquisition of other property and as to expert's estimated future compensation from condemner, was prejudicial error.

obtaining experts to testify in malpractice cases" in deciding that authoritative medical texts could be used to cross-examine expert witnesses. *Jones v Bloom,* 388 Mich 98, 117; 200 NW2d 196 (1972).

An expert's history as witness, as distinguished from his professional experience or credentials, is not probative of interest or bias. Even if such history has a modicum of probative value on the issue of credibility, inquiries of this sort should ordinarily be prohibited because of their potential for distracting the jury or creating collateral issues, as this case demonstrates.

The significance of evidence that an expert witness has testified in other cases is particularly diminished where the witness testifies to the malpractice of a fellow physician. We should not permit defendants' counsel to turn the practical difficulties that plaintiffs' counsel encounter in obtaining expert testimony to establish a violation of the standard of care in medical malpractice cases —the understandable reluctance of physicians to testify against other physicians—to the defendants' advantage by questioning intended to insinuate that those physicians who do testify are habitual accusers motivated by avarice or vengeance.

The interaction of the rule requiring that a violation of the standard of care be proved by expert testimony, the reluctance of physicians to testify against other physicians, and the court's decision in the instant case produces a dilemma for injured plaintiffs. They may not be able to prove their cases without expert medical testimony; yet, if they succeed in obtaining testimony from one or more of the limited number of physicians willing to give such testimony, they face the prospect of having their witnesses belittled and their cases undermined.

Fairness to physicians requires the rule requiring expert testimony, but fairness to injured persons requires that the plaintiff's expert witnesses not be impugned simply because they have testified for plaintiffs in other cases.

It is sufficient that the defendant be permitted to show that the witness has received a fee for his services.

II

Defense counsel's suggestion that the plaintiffs had employed "professional witnesses" magnified the error introduced by his earlier line of questioning. In *Kern v St Luke's Hospital Ass'n of Saginaw,* 404 Mich 339; 273 NW2d 75 (1978), this Court recognized that a defense strategy of portraying the physicians testifying for plaintiffs as "professional experts" whose testimony had been purchased was so prejudicial as to require a new trial. While counsel's injection of a false issue in this case was not so egregious or pervasive, we cannot say with assurance that the combination of questioning and argument did not deny plaintiffs a fair trial.

Even if it is fair comment to label one who admittedly derives all or the great bulk of his income from giving testimony and the attendant preparation a "professional witness", Dr. Badgley, who testified that he derived 60% of his income from caring for patients, cannot fairly be characterized as a "professional witness".

III

All relevant evidence is not perforce admissible. The Rules of Evidence provide that 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" (MRE 403). In the application of that principle a trial judge may exclude relevant evidence, and as a matter of discretion the judge who tried this case could have barred the objected-to inquiry in this case.

We would, for the reasons stated, exclude the inquiry in every case absent a showing, out of the presence of the jury, by the defendant that the integrity of the plaintiff's expert witness can be legitimately challenged on some basis other than his history of testifying for plaintiffs.

The Rules of Evidence reflect a number of instances where, in the particular application of the general principle set forth in MRE 403, relevant evidence is excluded as a matter of law so as not to prejudice the defense, *e.g.,* the rules excluding evidence of subsequent remedial measures (MRE 407), of compromise and offers to compromise (MRE 408), of payment of medical and similar expenses (MRE 409), and of liability insurance (MRE 411).

Adoption of a rule generally barring inquiry regarding the number of times a witness has testified for other plaintiffs would be to do no more for the plaintiff in a medical malpractice case than has been done for defendants generally in the situations referred to where relevant evidence has been barred to protect the rights of defendants to a fair trial.

To allow the defendant to challenge a plaintiff's expert witness simply because he testifies for plaintiffs with some frequency is to permit the defendant to exploit unfairly the rule requiring, for defendant's protection, expert testimony, and

the reluctance of physicians to testify against another member of their profession.

If the objected-to inquiry is permissible, then plaintiffs should be able to respond with expert testimony and other evidence tending to show the difficulty in obtaining expert medical testimony on behalf of a plaintiff. The defendant could of course respond. A collateral issue, to be sure, but if the defendant can charge the plaintiff with offering manufactured testimony, plaintiff should be able to show why it is that a physician willing to testify for a plaintiff may be called upon to do so with some frequency.

We would reverse and remand for a new trial.

KAVANAGH and WILLIAMS, JJ., concurred with LEVIN, J.

ANDERSON v GREAT LAKES DREDGE & DOCK COMPANY

Docket No. 64927. Argued June 2, 1981 (Calendar No. 5).—Decided September 1, 1981.

Willie L. Anderson brought an action in Wayne Circuit Court against his employer, Great Lakes Dredge and Dock Company, under the Jones Act and general maritime law, for injuries he suffered in the course of his employment on the defendant's offshore dredge in Miami, Florida. The plaintiff resides in Florida. The defendant is a New Jersey corporation with headquarters and principal place of business in Chicago, Illinois; it has a resident agent in Michigan and occasionally conducts dredging in this state. The defendant moved to dismiss on the ground of *forum non conveniens,* and agreed to waive any defenses under the applicable statutes of limitations so that the matter could be tried in a federal or state court in Florida. The Wayne Circuit Court, James Montante, J., denied the defendant's motion to dismiss on the ground that the defendant had failed to show that trial of the case in Michigan would subject it to special hardship. The Court of Appeals, T. M. Burns, P.J., and Bronson, J. (R. M. Maher, J., dissenting), affirmed, holding that the trial court had not abused its discretion (Docket No. 78-3843). The defendant appeals.

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

The doctrine of *forum non conveniens* is applicable to cases under the Jones Act which are commenced in a Michigan state court. In this case, it was an abuse of discretion to deny the defendant's motion to dismiss the action.

1. The Jones Act grants to seamen the same rights as those available to railroad employees under the Federal Employers Liability Act and venue in the federal courts lies wherever the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4, 5] 2 Am Jur 2d, Admiralty §§ 27-29.
20 Am Jur 2d, Courts § 172 *et seq.*
32 Am Jur 2d, Federal Employers' Liability and Compensation Acts § 62.
[3] 20 Am Jur 2d, Courts § 176.
[6] 20 Am Jur 2d, Courts §§ 173, 176.

defendant is doing business. The plaintiff may choose to sue in either a state or federal court. The plaintiff argues that because the policy of the Jones Act is to give plaintiff seamen wide latitude in their choice of forum the doctrine of *forum non conveniens* ought not apply. However, the Supreme Court of the United States has held that a state court may decline to exercise jurisdiction in such cases so long as it neither discriminates against suits under the Federal Employers Liability Act nor discriminates along lines of state citizenship, although residence may be taken into account.

2. A state is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the federal courts will transfer cases under the Jones Act and the Federal Employers Liability Act from one federal district court to another for the convenience of parties and witnesses, in the interest of justice. The federal transfer statute, in applying to "any action", implicitly recognizes that a suit under the Jones Act or the Federal Employers Liability Act may be brought in an inappropriate forum. Therefore, there are no clear federal concerns which would be disparaged by including Jones Act cases within the application of the doctrine of *forum non conveniens.*

3. The facts that seamen regularly move from job to job, and state to state, and that the situs of the accident is usually on a ship are among the circumstances which should be considered in a case-by-case application of the doctrine of *forum non conveniens.* There is no reason to adopt, as a matter of judicial policy, a rule to foreclose the possibility of dismissal of any case under the Jones Act on the ground of *forum non conveniens.*

4. A plaintiff's selection of a forum is ordinarily accorded deference, but where the plaintiff's interest in the chosen forum is slight, the choice is entitled to much less weight than where there exists a significant nexus between the litigation and the chosen forum. In this case, neither the plaintiff nor any witnesses to the accident reside in Michigan, and the accident occurred in another state. Further, although the defendant does business in Michigan, the litigation is unrelated to that business, and the defendant neither is incorporated nor has its principal place of business in Michigan. The only apparent connections between the litigation and Michigan are that the plaintiff's counsel is located here and that there may be testimony at trial from an expert witness who resides here. The convenience of counsel and that of expert witnesses may be of some importance in conjunction with other factors, but they

are entitled to little weight when they alone are advanced as favoring the chosen forum.

5. Balanced against the plaintiff's slight interest in having a trial in Michigan is the inconvenience it would cause the defendant. Most of the potential witnesses, including the physicians who treated the plaintiff, have last known addresses in Florida or nearby southern states or in Puerto Rico. Considering the costs, *e.g.,* transportation of witnesses to Michigan, and the likelihood that the attendance of some witnesses could not be procured, the defendant may be forced to conduct a trial by depositions, if even that is possible. There is no need for the defendant to prepare extensively for trial in order to show exactly how inconvenient a trial in Michigan would prove to be.

6. The public interest also favors declining jurisdiction in this case because it is essentially "imported litigation". Administrative difficulties follow for courts when litigation is piled up in congested centers, such as the Wayne Circuit Court, instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. The burden on the crowded civil dockets in this state and upon the defendant's ability to prepare a defense greatly outweighs the remote interest which the plaintiff has shown in conducting the trial in Michigan. No significant nexus between the litigation and Michigan has been demonstrated, and there is an appropriate forum available to the plaintiff in the state or federal courts in Florida. Therefore, it was an abuse of discretion to deny the defendant's motion to dismiss the action.

Reversed.

96 Mich App 194; 292 NW2d 177 (1980) reversed.

1. COURTS — JURISDICTION — *FORUM NON CONVENIENS* — SEAMEN — JONES ACT.

A plaintiff seaman may choose to bring an action under the Jones Act for injuries suffered in the course of his employment in a state court, and there may be a federal policy of allowing plaintiffs a choice among many possible forums, but there are no clear federal concerns which would be disparaged by application of the doctrine of *forum non conveniens* to Jones Act cases (46 USC 688).

2. COURTS — JURISDICTION — *FORUM NON CONVENIENS* — SEAMEN — JONES ACT.

The facts that seamen regularly move from job to job, and state

to state, and that the situs of an accident in the course of a seaman's employment is usually on a ship are among the circumstances which should be considered in a case-by-case application of the doctrine of *forum non conveniens* to Jones Act cases, but there is no reason under the doctrine of *forum non conveniens* to adopt, as a matter of judicial policy, a rule to foreclose the possibility of dismissal of any case brought by a plaintiff seaman for injuries in the course of his employment (46 USC 688).

3. COURTS — JURISDICTION — *FORUM NON CONVENIENS.*

If the plaintiff has chosen a forum where none of the parties or witnesses reside, where the law of the forum does not apply, and where none of the operative facts have occurred, that choice of forum is entitled to much less weight under the doctrine of *forum non conveniens* than where there exists a significant nexus between the litigation and the chosen forum.

4. COURTS — JURISDICTION — *FORUM NON CONVENIENS* — SEAMEN — JONES ACT.

Under the doctrine of *forum non conveniens,* it was an abuse of discretion for a circuit court in Michigan to decline to dismiss an action by a plaintiff seaman for injuries in the course of his employment in Florida where the only apparent nexus between the litigation and Michigan was that plaintiff's counsel was located in Michigan and that there might have been testimony from an expert witness who resides there; the convenience of counsel and of expert witnesses is entitled to little weight when it alone is advanced as favoring the chosen forum (46 USC 688).

5. COURTS — JURISDICTION — *FORUM NON CONVENIENS.*

There is no need, under the doctrine of *forum non conveniens,* for the defendant to prepare extensively for trial in order to show exactly how inconvenient a trial in the chosen forum might prove to be where no significant nexus between the litigation and the forum state has been demonstrated, and there is an appropriate forum available to the plaintiff in the state or federal courts of another state.

6. COURTS — JURISDICTION — *FORUM NON CONVENIENS* — PUBLIC POLICY.

The public interest favors a decision by a Michigan court to decline to assert jurisdiction, under the doctrine of *forum non conveniens,* in a case which is essentially "imported litigation" from another jurisdiction where the burden on the crowded

civil dockets in Michigan and upon the defendant's ability to prepare a defense greatly outweighs the remote interest the plaintiff shows in conducting the trial in Michigan.

The Jaques Admiralty Law Firm, P.C., for plaintiff.

Ivin E. Kerr and *Mark D. Willmarth* for defendant.

COLEMAN, C.J. *(to reverse).* The question presented in this case is whether the circuit court abused its discretion in declining to apply the doctrine of *forum non conveniens* to dismiss an action based on an incident which occurred in Florida and which is brought by a Florida plaintiff against a defendant which, although doing business in Florida and Michigan, neither is incorporated nor has its principal place of business in this state. The Court of Appeals affirmed the circuit court. We reverse.

I

Plaintiff alleges that he was injured while employed as a crew member on one of defendant's dredges. While he was working on the dredge, or on a spill barge related to the dredge's operation, a frayed cable that plaintiff was handling allegedly fell on his foot. He contends that a strand of the cable became imbedded in his toe and caused an infection that later required the toe to be amputated. Plaintiff filed suit in the Wayne Circuit Court claiming that the defendant was negligent under the Jones Act, 46 USC 688, and that the dredge was unseaworthy under general maritime law.

Plaintiff is allegedly a lifelong resident of Florida. The alleged incident occurred in Florida on

December 22, 1975. Defendant is a New Jersey corporation with its principal place of business in Chicago, Illinois. Defendant maintains an agent in Detroit because it occasionally does business in Michigan. It also does business in Florida. Defendant filed an answer and special defenses. It asked that the case be dismissed on grounds of *forum non conveniens.* Defendant asserted that the appropriate place for trial would be in Florida. In addition to plaintiff's residence in Florida, the incident occurred in a harbor in Miami, Florida; most of the witnesses are from Florida, with a few possibly in nearby southern states or in Puerto Rico; and the plaintiff received medical treatment in Florida. The defendant is subject to suit in Federal or state court in Florida and has agreed, if the case is dismissed, to waive any statute of limitation defenses that might be applicable there.

The circuit court denied defendant's motion to dismiss. The Court of Appeals granted leave to appeal from the order of the circuit court and affirmed its decision. *Anderson v Great Lakes Dredge & Dock Co,* 96 Mich App 194; 292 NW2d 177 (1980).

On appeal to this Court, defendant contends, first, that the trial court applied an improper test by requiring the defendant to show that the trial of the case in Michigan would subject it to special hardship, and second, that the decision to retain jurisdiction was an abuse of discretion. In response, plaintiff argues that Jones Act cases deserve special consideration and as a rule ought to be exempt from the application of the doctrine of *forum non conveniens.* Plaintiff further argues that, in any event, the circuit court did not abuse its discretion by retaining jurisdiction.

II

Plaintiff's argument that *forum non conveniens*

is inapplicable to Jones Act cases relies on the Federal policy underlying the act. The policy, he asserts, is that of giving Jones-Act plaintiffs latitude in their choice of forum. Since the doctrine of *forum non conveniens* would at times deprive a plaintiff of that choice, plaintiff argues that the doctrine ought to be inapplicable.

The Jones Act, 46 USC 688, which was passed in 1920, granted to seamen the same rights as those available to railroad employees under the Federal Employers Liability Act (FELA), 45 USC 51 *et seq.* *Mitchell v Trawler Racer, Inc,* 362 US 539; 80 S Ct 926; 4 L Ed 2d 941 (1960). A provision of the Jones Act phrased in terms of "jurisdiction" has been interpreted as referring only to venue, *Panama R Co v Johnson,* 264 US 375; 44 S Ct 391; 68 L Ed 748 (1924), and venue in the Federal courts lies wherever the defendant is doing business. *Pure Oil Co v Suarez,* 384 US 202; 86 S Ct 1394; 16 L Ed 2d 474 (1966). The plaintiff may choose to sue in either state or Federal court, and the decision to sue in state court, in Jones Act as in FELA cases, cannot be defeated by removal to Federal court.[1]

Although, as plaintiff contends, there may be a Federal policy, as illustrated by the cases above, to allow plaintiffs in Jones Act or FELA cases a choice among many possible forums, it is important to note that this Court is under no Federal compulsion to exempt Jones Act or FELA cases from the application of this state's doctrine of *forum non conveniens.* In *Missouri ex rel Southern R Co v Mayfield,* 340 US 1; 71 S Ct 1; 95 L Ed 3 (1950), the United States Supreme Court held that state courts may decline to exercise jurisdiction in

[1] See *Engel v Davenport,* 271 US 33, 37-38; 46 S Ct 410; 70 L Ed 813 (1926); *Preston v Grant Advertising, Inc,* 375 F2d 439 (CA 5, 1967).

FELA suits so long as their application of the doctrine of *forum non conveniens* neither discriminates against FELA suits nor discriminates along lines of state citizenship, though residency may permissibly be taken into account. In a concurring opinion, Justice Jackson noted that the Court had previously held in *Ex parte Collett,* 337 US 55; 69 S Ct 944; 93 L Ed 1207 (1949), that FELA actions in the Federal courts could be transferred under 28 USC 1404(a). *Mayfield, supra,* 5 (Jackson, J., concurring). He concluded, "[c]ertainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case." *Id.,* 6.

The fact that the Federal courts will transfer FELA or Jones Act cases[2] is pertinent to a consideration of any Federal policies that may be involved. Plaintiffs in Jones Act or FELA cases have latitude in the initial choice of a forum. However, the fact that the transfer provision of 28 USC 1404(a) applies to "any civil action"—including a Jones Act or FELA case, see *Ex parte Collett, supra*—demonstrates implicit Federal recognition that a Jones Act or FELA suit, like other types of actions, may be initiated in an inappropriate forum. Therefore, we see no clear Federal concerns which would be disparaged by including Jones Act cases within this state's application of its doctrine of *forum non conveniens.*

III

Apart from any Federal policies, the plaintiff

[2] See, *e.g., Wilson v Ohio River Co,* 211 F Supp 666 (WD Pa, 1962); *Mitchell v Farrell Lines, Inc,* 350 F Supp 1325 (ED Pa, 1972); *Bishop v Ashland Oil, Inc,* 394 F Supp 203 (WD Pa, 1975).

urges that the unique nature of a seaman's employment merits this Court's adoption of its own policy of nonapplication of the doctrine to Jones Act cases. On behalf of this argument, plaintiff notes how seamen are regularly moving from job to job and state to state. Further, the situs of Jones-Act incidents would normally be on a ship, which because of its mobility could frequently make a view by the jury impossible. Therefore, plaintiff argues, it often may be difficult for a plaintiff to identify a particularly appropriate forum, either for the parties or for the witnesses.

These circumstances, however, are all factors that may and should be considered in a case-by-case application of the doctrine. As stated in *Gulf Oil Corp v Gilbert,* 330 US 501, 508; 67 S Ct 839; 91 L Ed 1055 (1947), "[w]isely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy." Quoted in *Cray v General Motors Corp,* 389 Mich 382, 395; 207 NW2d 393 (1973). We see no reason, therefore, to adopt a rule that would foreclose the possibility of any Jones Act case being dismissed on the ground of *forum non conveniens.*

IV

The question remains whether the facts of this case warranted and required its dismissal.

In *Cray v General Motors, supra,* this Court found the doctrine of *forum non conveniens* to be applicable in Michigan. Each case consolidated for decision in *Cray* involved an incident occurring in another state. The plaintiffs and witnesses to the incident in each case were nonresidents of Michigan and none of the witnesses were subject to

Michigan's subpoena power. General Motors, a defendant in each of the cases, had its principal place of business in Detroit. Plaintiffs contended that considerable discovery would be necessary with respect to materials and experts in Michigan for negligent acts that allegedly occurred here. This Court held that the retention of jurisdiction of the various cases did not constitute an abuse of discretion.

In the present case, as in *Cray,* neither the plaintiff nor any witnesses to the incident reside in Michigan, and the incident occurred in another state. Unlike General Motors, the defendant neither is incorporated nor has its principal place of business here. Although it does business in Michigan—at this writing, it is engaged in a dredging operation in the Saginaw area—this litigation is unrelated to that business. The fact that Michigan courts have jurisdiction over the defendant through the business it does here is immaterial to *forum non conveniens* considerations because the application of the doctrine assumes that two courts, the one the plaintiff has chosen and the one the defendant argues would be more appropriate, can obtain jurisdiction. *Gilbert, supra,* 330 US 504; *Adkins v Chicago, R I & P R Co,* 54 Ill 2d 511; 301 NE2d 729 (1973).

A plaintiff's selection of a forum is ordinarily accorded deference. The United States Supreme Court, describing this deference in *Gilbert,* stated, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". 330 US 508. Various factors, such as those outlined in *Cray, supra,* 396-397, are to be considered in determining whether the balance strongly favors the defendant. In balancing these factors, one of the considerations is the

plaintiff's interest in the chosen forum. When this interest is slight—as when the plaintiff has chosen a forum where none of the parties or witnesses reside, where Michigan law does not apply and where none of the operative facts have occurred—the choice is entitled to much less weight than where there exists a significant nexus between litigation and the chosen forum.[3] The balance will generally swing strongly in favor of the defendant when plaintiff's "choice of forum [is] supported only by the fact that it was chosen". *Pacific Car & Foundry Co v Pence,* 403 F2d 949, 955 (CA 9, 1968).

In this case, there is minimal nexus between the litigation and this state. The only apparent connections of any kind are that plaintiff's counsel is located here and that there *may* be testimony at trial from some experts who reside here. Plaintiff has only named one such witness and defendant contends he has since moved out of the state.

While the convenience of counsel and of expert witnesses may be of some importance in conjunction with other factors, it is entitled to little weight when it alone is advanced as favoring the

[3] See *Pacific Car & Foundry Co v Pence,* 403 F2d 949 (CA 9, 1968); *Curtin v Litton Systems, Inc,* 365 F Supp 489 (ED Pa, 1973); *Mitchell v Farrell Lines, Inc,* 350 F Supp 1325 (ED Pa, 1972). These cases apply the statutory provision 28 USC 1404(a), which provides for the transfer of cases from one Federal district court to another "[f]or the convenience of parties and witnesses, in the interest of justice * * *". The standard employed in determining whether such transfers should be granted differs somewhat from the doctrine of *forum non conveniens. Norwood v Kirkpatrick,* 349 US 29; 75 S Ct 544; 99 L Ed 789 (1955). Nevertheless, the principle that a plaintiff's choice of forum is entitled to less weight when the chosen forum has no significant connection to the litigation seems equally sound under the common-law doctrine. *Cf. Adkins, supra* (in which "[t]he only connection Illinois had with the lawsuit was that the railroad does business [there.]" 54 Ill 2d 515); *Semanishin v Metropolitan Life Ins Co,* 46 NJ 531; 218 A2d 401 (1966) (the litigation's only connection with the state was that the defendant was licensed to do business and could be served with process there).

chosen forum. If such factors were to be deemed sufficient, a plaintiff could assure a forum in any state in which jurisdiction could be obtained simply by employing counsel and a witness there.

Balanced against plaintiff's slight interest in having a trial in Michigan is the inconvenience it would cause the defendant. Miami, Florida, where the incident occurred, is approximately 1500 miles from Wayne County, where this action was commenced. Although the parties disagree as to how many witnesses there were to the incident, most of the potential witnesses have last known addresses in Florida, with others having addresses in Georgia, North Carolina and Puerto Rico. The physicians who treated the plaintiff are also located in Florida. For those witnesses whose attendance at trial the defendant would be able to procure, the cost of transportation would be significant. Considering such costs and the likelihood that the attendance of some witnesses could not be procured, the defendant may be forced to conduct a trial by depositions, if even that is possible.

V

The plaintiff, however, contends that because the defendant has not clearly specified either the course of litigation it intends to follow or the witnesses it intends to use, the doctrine of *forum non conveniens* should not apply because any inconvenience to the defendant is speculative. Certainly, when the plaintiff has a significant interest in the chosen forum, the defendant should outline the intended course of litigation in order for the balance to be struck in favor of another forum. Where, as here, there is little nexus between the litigation and the forum, there is no need for the defendant to prepare extensively for trial in order

to show exactly how inconvenient a trial in Michigan would prove to be. The fact that virtually all the witnesses to the incident are apparently residents of Florida or nearby southern states reveals a likelihood that the defendant will suffer considerable difficulty in preparing any defense and is sufficient to overcome plaintiff's slight interest in having a trial in Michigan.

VI

Matters of public interest additionally favor declining jurisdiction for the essentially "imported litigation" that this case represents. As stated in *Gilbert, supra:*

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." 330 US 508-509.

The Wayne Circuit Court, where this action was filed, has the most crowded civil docket of any court in the state. The burden on our courts and upon the defendant's ability to prepare a defense greatly outweighs the remote interest the plaintiff has shown in behalf of conducting this trial in Michigan.

VII

The doctrine of *forum non conveniens* is applicable to Federal Jones Act cases commenced in a Michigan state court. Although the plaintiff's choice of forum is afforded appropriate weight, no significant nexus between the litigation and this

state has been demonstrated. The "choice of forum [is] supported only by the fact that it was chosen". *Pence, supra.* All significant factors as set forth above weigh heavily in favor of the defendant. There is an appropriate forum available to plaintiff in the state or Federal courts in Florida. Defendant has agreed to waive any statute of limitations defenses applicable in Florida. Therefore, we find that it was an abuse of discretion for the trial court to have denied defendant's motion to dismiss.

Reverse and remand for proceedings consistent with this opinion.

KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with COLEMAN, C.J.

MILLER v AUTO-OWNERS INSURANCE COMPANY

Docket No. 63808. Argued November 13, 1980 (Calendar No. 2).—Decided September 1, 1981.

Richard J. Miller brought an action against his no-fault automobile insurer, Auto-Owners Insurance Company, for personal protection insurance benefits for injuries arising out of the maintenance of a motor vehicle when his automobile fell on his chest while he was replacing shock absorbers. The insurer defended on the ground that the vehicle was "parked" when the injury occurred, and that the statutory exclusion of parked vehicles applied. The Ingham Circuit Court, Jack W. Warren, J., granted partial summary judgment for the plaintiff on the issue of liability, holding that the injury arose out of the maintenance of the automobile, and that it was not "parked" within the meaning of the statutory exclusion. The parties then stipulated the amount of damages and judgment was entered for the plaintiff. The Court of Appeals, Maher, P.J., and Kelly and Walsh, JJ., reversed, holding that the vehicle was "parked", and remanded for a determination whether the plaintiff fell within one of the exceptions to the exclusion (Docket No. 78-3028). The plaintiff appeals.

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

Miller's injury clearly involved the maintenance of his vehicle as a motor vehicle, and compensation is required by the no-fault act without regard to whether the vehicle might be considered "parked" at the time of injury. The policy of the parked vehicle exclusion does not apply to the injury in this case.

1. There is an apparent tension between the section of the no-fault act requiring compensation for injuries incurred in the maintenance of a vehicle and the section excluding injuries

REFERENCES FOR POINTS IN HEADNOTES

[1] 7 Am Jur 2d (Rev), Automobile Insurance §§ 34, 194, 341.
Validity and construction of "no-fault" automobile insurance plans. 42 ALR3d 229.

[2, 3, 5, 6] 7 Am Jur 2d (Rev), Automobile Insurance §§ 137, 194.

[4] 7 Am Jur 2d (Rev), Automobile Insurance §§ 34, 136.

incurred in the maintenance of a parked vehicle with three stated exceptions. Since most, if not all, maintenance is done while the vehicle is parked, and the three exceptions are not related to normal maintenance situations, there appears to be a conflict. This apparent conflict should not be resolved solely by focusing on the term "parked", but through an assessment of the policies appearing from the requirement of coverage and the exception from the required coverage for parked vehicles.

2. The phrase "arising out of the ownership, maintenance or use" of a vehicle appeared in automobile liability insurance policies long before no-fault, and was apparently used in the no-fault act in awareness of its history. The maintenance aspect of the phrase covers the act of repairing the covered automobile. The policy embodied in the requirement of the no-fault act that coverage extend to injury arising out of the maintenance of a motor vehicle as a motor vehicle thus is to provide compensation for injuries, such as those here, incurred in the course of repairing a vehicle.

3. The policy underlying the parking exclusion is not so obvious but is comparably definite. Injuries involving parked vehicles do not normally involve the vehicle as a motor vehicle, but in much the same way as any other stationary object would be involved. The stated exceptions to the exclusion clarify and reinforce this construction because each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle, characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident as a motor vehicle, and it is therefore inappropriate to compensate injuries arising from its non-vehicular involvement within a system designed to compensate injuries involving motor vehicles as motor vehicles.

4. The policies underlying the two sections of the no-fault act are thus complementary rather than conflicting. Nothing of the policy behind the parking exclusion, to exclude injuries not resulting from involvement of a motor vehicle as a motor vehicle, conflicts with the policy of compensating injuries incurred in the course of maintaining a motor vehicle. Miller's injury while replacing his shock absorbers clearly involved the maintenance of his vehicle as a motor vehicle, and compensation is thus required by the no-fault act without regard to whether his vehicle might be considered "parked" at the time of injury.

Reversed.

92 Mich App 263 (1979) reversed.

1. INSURANCE — NO-FAULT INSURANCE — AUTOMOBILES — MAINTENANCE — PARKED VEHICLES — STATUTORY CONSTRUCTION.

The apparent tension between the personal protection insurance section of the no-fault insurance act requiring compensation for injuries incurred in the maintenance of a vehicle and the section excluding injuries incurred in the maintenance of a parked vehicle with three stated exceptions should not be resolved solely by focusing on the term "parked", but through an assessment of the policies appearing from the requirement of coverage and the exclusion from the required coverage for parked vehicles (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106).

2. INSURANCE — NO-FAULT INSURANCE — AUTOMOBILES — MAINTENANCE — WORDS AND PHRASES.

The phrase in the no-fault insurance act, "arising out of the ownership, maintenance or use" of a vehicle, appeared in automobile liability insurance policies long before no-fault, and was apparently used in the no-fault act in awareness of its history; the maintenance aspect of the phrase covers the act of repairing the covered automobile (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106).

3. INSURANCE — NO-FAULT INSURANCE — AUTOMOBILES — MAINTENANCE — STATUTES — PUBLIC POLICY.

The policy embodied in the personal protection insurance requirement of the no-fault act that coverage extend to injury arising out of the maintenance of a motor vehicle as a motor vehicle is to provide compensation for injuries incurred in the course of repairing a vehicle (MCL 500.3105[1]; MSA 24.13105[1]).

4. INSURANCE — NO-FAULT INSURANCE — AUTOMOBILES — PARKED VEHICLES — STATUTES — PUBLIC POLICY.

The underlying policy of the exclusion of parked vehicles from the operation of the no-fault insurance act is that, except in three general types of situations, a parked car is not involved in an accident as a motor vehicle but as a stationary object, and that it is therefore inappropriate to compensate for injuries arising from its non-vehicular involvement within a system designed to compensate for injuries involving motor vehicles as motor vehicles (MCL 500.3106; MSA 24.13106).

5. INSURANCE — NO-FAULT INSURANCE — AUTOMOBILES — MAINTENANCE — PARKED VEHICLES — STATUTES — PUBLIC POLICY.

Nothing of the policy behind the parked-vehicle exclusion of the

no-fault insurance act, to exclude injuries not resulting from involvement of a motor vehicle as a motor vehicle, conflicts with the policy of compensating for injuries incurred in the course of maintaining a motor vehicle under the personal protection insurance provision of the no-fault act (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106).

6. INSURANCE — NO-FAULT INSURANCE — AUTOMOBILES — MAINTENANCE.

An injury which a plaintiff suffered when his automobile fell on his chest while he was replacing its shock absorbers clearly involved the maintenance of his vehicle as a motor vehicle, and compensation is thus required by the no-fault insurance act without regard to whether his vehicle might be considered "parked" at the time of injury (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106).

Sinas, Dramis, Brake, Boughton, McIntyre & Reisig, P.C. (by *George T. Sinas),* for plaintiff.

Fraser, Trebilcock, Davis & Foster, P.C. (by *C. Mark Hoover),* for defendant.

LEVIN, J. Richard J. Miller was severely injured when his automobile fell on his chest while he was attempting to replace a pair of shock absorbers. The repair was being done in the parking lot of Miller's apartment building.

Miller sought personal protection insurance benefits from his no-fault insurance carrier, defendant Auto-Owners Insurance Company, alleging that payment of such benefits is required by the no-fault motor vehicle liability act:

"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." MCL 500.3105(1); MSA 24.13105(1) (emphasis supplied).

Auto-Owners defended on the grounds that Miller's car was "parked" at the time of his injury, and that the obligation to pay benefits imposed by § 3105(1) was thus qualified by the "parked vehicle" exception found in § 3106 of the no-fault act:

> "Accidental bodily injury does not arise out of the ownership, operation, maintenance or use of a *parked* vehicle as a motor vehicle unless any of the following occur:
>
> "(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> "(b) The injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> "(c) The injury was sustained by a person while occupying, entering into or alighting from the vehicle." MCL 500.3106; MSA 24.13106 (emphasis supplied).

The trial court granted Miller's motion for partial summary judgment on the issue of liability, holding that Miller was maintaining the vehicle under § 3105, and that it was not parked within the meaning of § 3106. The parties then stipulated to the amount of damages and a judgment was entered for Miller. The Court of Appeals reversed, holding that the vehicle was parked, and remanded for a determination whether Miller's injury fell within one of the three classes of injury enumerated in clauses (a)-(c) of § 3106 as arising out of the ownership, operation, maintenance or use of a parked vehicle as a motor vehicle. We reverse and remand to the trial court for further proceedings not inconsistent with this opinion.

There is an apparent tension between these two sections of the no-fault act: requiring, on the one hand, compensation for injuries incurred in the

maintenance of a vehicle but not requiring, on the other hand, compensation for injuries incurred in the maintenance of a *parked* vehicle, with three exceptions. Since most, if not all, maintenance is done while the vehicle is parked, and since the three exceptions appear addressed to circumstances unrelated to normal maintenance situations, a conflict appears.

It would perhaps be possible, as argued by Auto-Owners, to distinguish among parked vehicles according to whether they were parked involuntarily, as when a driver pulls onto the shoulder to repair a flat tire, or voluntarily, as in Miller's case. Such a distinction, however, would often be difficult to draw. What of a car which is obviously malfunctioning but which the driver is able to nurse home to his or her garage, where the tools necessary for the repair are available? What of a car which is voluntarily parked in one's driveway but which, after a cold Michigan night, becomes involuntarily parked? Would an injury from a battery explosion while trying to jump-start the car be covered? We do not think that a nebulous distinction between voluntarily and involuntarily parked-for-repair vehicles was intended.

This apparent conflict should not be resolved solely by focusing on the term "parked" but, rather, through an assessment of the respective policies appearing from the requirement of coverage in § 3105(1) and the exclusion from that required coverage for parked vehicles in § 3106 as they bear upon the scope of coverage intended by the Legislature.

The phrase "arising out of the ownership, maintenance or use" of a vehicle has commonly been used in automobile insurance policies, and was apparently used in the no-fault act in awareness of that history.

"Long prior to the no-fault movement the term 'arising out of the ownership, maintenance, or use' of a motor vehicle appeared in automobile liability insurance policies. This term has been adopted as the basic causal relation test in all no-fault auto insurance plans. Like its counterpart in workers' compensation, it has been the subject of dispute, but unlike the workers' compensation situation of commencing with a new test, no-fault automobile insurance will have the benefit of the body of case law construing the term under the liability system." O'Connell & Henderson, Tort Law, No-Fault and Beyond (1975), p 362.

The meaning of the term "maintenance", in addition to appearing from the common sense of the word, has been established in the case law: "The 'maintenance' aspect of the 'ownership, maintenance, use' clause covers the act of repairing the covered automobile." 12 Couch on Insurance (2d ed), § 45:63, p 152. The policy embodied in the requirement of § 3105(1) that coverage extend to "injury arising out of the * * * maintenance * * * of a motor vehicle as a motor vehicle" thus is to provide compensation for injuries, such as Miller's, incurred in the course of repairing a vehicle.

The policy underlying the parking exclusion is not so obvious but, once discerned, is comparably definite. Injuries involving parked vehicles do not normally involve the vehicle *as a motor vehicle.* Injuries involving parked vehicles typically involve the vehicle in much the same way as any other stationary object (such as a tree, sign post or boulder) would be involved. There is nothing about a parked vehicle *as a motor vehicle* that would bear on the accident.[1]

The stated exceptions to the parking exclusion clarify and reinforce this construction of the exclu-

[1] Similarly, § 3123 of the act excludes damage to motor vehicles from the statutory obligation to pay benefits for damage to property,

sion. Each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle—characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents.

Section 3106(a), which excepts a vehicle parked so as to create an unreasonable risk of injury, concerns the act of parking a car, which can only be done in the course of using the vehicle as a motor vehicle, and recognizes that the act of parking can be done in a fashion which causes an unreasonable risk of injury, as when the vehicle is left in gear or with one end protruding into traffic.

Section 3106(b) recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle.

Section 3106(c) provides an exception for injuries sustained while occupying, entering or alighting from a vehicle, and represents a judgment that the nexus between the activity resulting in injury and the use of the vehicle as a motor vehicle is sufficiently close to justify including the cost of coverage in the no-fault system of compensating motor vehicle accidents.

Each of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a

unless the motor vehicle is parked in a manner so as not to cause an unreasonable risk of the damage that occurs. MCL 500.3123(1)(a); MSA 24.13123(1)(a). A properly parked motor vehicle is thus treated under the act as non-vehicular property for purposes of the payment of property protection insurance benefits.

motor vehicle. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident *as a motor vehicle.* It is therefore inappropriate to compensate injuries arising from its non-vehicular involvement in an accident within a system designed to compensate injuries involving motor vehicles as motor vehicles.

The policies underlying § 3105(1) and § 3106 thus are complementary rather than conflicting. Nothing of the policy behind the parking exclusion —to exclude injuries not resulting from the involvement of a vehicle as a motor vehicle—conflicts with the policy of compensating injuries incurred in the course of maintaining (repairing) a motor vehicle. The terms of the parking exclusion should be construed to effectuate the policy they embody and to avoid conflict with another provision whose effect was intended to be complementary.

Miller's injury while replacing his shock absorbers clearly involved the maintenance of his vehicle as a motor vehicle. Compensation is thus required by the no-fault act without regard to whether his vehicle might be considered "parked" at the time of injury.

The judgment of the Court of Appeals is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred with LEVIN, J.

LOCAL 1383, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO v CITY OF WARREN

Docket No. 63227. Argued April 15, 1980 (Calendar No. 5).—Decided November 2, 1981.

Local 1383, International Association of Fire Fighters, AFL-CIO, brought an action for declaratory judgment against the City of Warren and its Police and Fire Civil Service Commission, claiming that the parties' collective-bargaining agreement concerning seniority and promotions of employees of the city's fire department, which was negotiated under the public employment relations act, should prevail over conflicting provisions of the statute concerning civil service for police and fire departments and of the Warren City Charter. The Macomb Circuit Court, Walter P. Cynar, J., granted summary judgment for the defendants. The Court of Appeals, M. F. Cavanagh, P.J., and D. E. Holbrook, Jr., and N. J. Kaufman, JJ., affirmed, holding that the Constitution of 1963 requires approval of the voters of the municipality to discontinue or modify a statutory merit system for municipal employees (Docket No. 77-5147). Plaintiff appeals. *Held:*

The contractual provision governing promotions in the Warren Fire Department, which was made under the public employment relations act, is valid and enforceable. It sets forth the promotional system for employees in the Local 1383 bargaining unit, notwithstanding the conflicting provisions of the statute concerning civil service for police and fire departments and of the Warren City Charter.

1. The Constitution of 1963 specifically authorized the Legislature to enact laws governing public employment. Pursuant to that authority the public employment relations act was enacted

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REFERENCES FOR POINTS IN HEADNOTES

[1-3, 6, 7] 48A Am Jur 2d, Labor and Labor Relations § 1770.

Bargainable or negotiable issues in state public employment labor relations. 84 ALR3d 242.

[4, 8, 11] 48A Am Jur 2d, Labor and Labor Relations § 1764 *et seq.*

[5-7, 9, 12] 48A Am Jur 2d, Labor and Labor Relations § 1771.

[8] 16 Am Jur 2d, Constitutional Law § 81.

[10] 48A Am Jur 2d, Labor and Labor Relations § 1764.

to provide public employees the right to form and join labor organizations and to negotiate in good faith with public employers regarding "wages, hours, and other terms and conditions of employment". In federal labor law, seniority, promotions, and promotional criteria are among the "other terms and conditions of employment" under the National Labor Relations Act. The phrase is a technical one in labor relations law which has a specific meaning. In adopting the same language, the Legislature must have intended to include in the public employment relations act a meaning similar to that given by the federal interpretations. Accordingly, seniority, promotions, and promotional criteria are included within the statutory phrase; thus, these matters are mandatory subjects of collective bargaining.

2. When the Constitutional Convention of 1961 authorized the Legislature to enact laws "providing for the resolution of disputes concerning public employees", it must have perceived that the Legislature would thereby have the power to enact laws governing the resolution of disputes regarding as vital a concern as promotion and seniority. The right to bargain and the duty to bargain in good faith specifically permit representatives of public employees to negotiate for changes in the conditions of employment, and public employers may resist the proposed changes during negotiations. The parties are free, for instance, to adopt substantive provisions of the statute concerning civil service for police and fire departments without change. It is the collective-negotiation system that the Legislature has determined to be the appropriate method for public employers and their employees to develop and specify terms and conditions of employment. The statutory procedure of the police and fire civil service statute does not address a collective-negotiation method for determining employment conditions.

3. The Supreme Court has consistently held that the public employment relations act prevails over conflicting legislation, charters, and ordinances in the face of challenges by cities, counties, public universities, and school districts. The same conclusion is mandated in this case by the reasoning of the Court's prior decisions. To decide this case in conformity with prior decisions, the public employment relations act must be viewed as the dominant law regulating labor relations in public employment. If the public employer and the union agree to a change in the system of promotions, the collective-bargaining agreement controls. The mandatory duty to bargain and the need for uniform treatment of all questions of labor relations in public employment, when contrasted with the permissive nature of the statute concerning civil service for police and fire

departments, lead to the conclusion that the Legislature intended the duty to bargain under the public employment relations act to prevail over the police and fire civil service act.

4. The system of promotions in the police and fire civil service act will continue to have effect in municipalities that adopt the civil service system of the act, unless a different system or plan is incorporated in a collective-bargaining agreement. The original authority and duties of the defendant Police and Fire Civil Service Commission, as provided in the statute, were diminished *pro tanto* by the public employment relations act to the extent that the free administration of collective bargaining requires it.

5. The defendants assert that the Constitution of 1963 provides that a collective-bargaining agreement cannot modify an existing civil service system unless the modification is approved by a majority of the electors. The Court has decided in other cases that action by a public employer which is otherwise within its constitutional authority is subject to the obligation to bargain collectively under the public employment relations act because of the fundamental purpose of the constitutional provision which provides for the Legislature to enact laws for the resolution of disputes concerning public employees. The power of the Legislature is limited only where the disputes are in the state classified civil service. Therefore, it covers disputes arising in municipalities, which are merely permitted by the constitution to establish civil service systems. There is no suggestion in the constitutional provision for the adoption of civil service merit systems in local political subdivisions that a local civil service system must prevail when it conflicts with a collective-bargaining contract or bargaining obligations imposed by a general state law, nor does it hint that it was intended to limit the provision for the Legislature to enact laws for the resolution of disputes concerning public employees, nor indicate that it was intended to control collective bargaining conducted pursuant to such a law. The public policy of the state as to labor relations in public employment is for legislative determination. To require approval of a collective-bargaining agreement by the voters would hinder and frustrate the free administration of the public employment relations act.

6. The constitution authorizes the Legislature to enact statewide laws regulating disputes concerning public employees. The primary purposes of the constitutional provision permitting local civil service systems were to allow them to be adopted without the express approval of the Legislature, to prohibit local political officials from unilaterally changing the merit

system, and to protect local public employees from political purges. Where collective bargaining reaches the issues covered by local civil service systems, the restraint on the power of local public officers is inherent within the collective-bargaining process. If the Legislature were not free to provide for free and full collective bargaining in local civil service systems, the public employment relations act, a uniform state-wide law, would be converted into a local-option law. Each local government would have a wide choice in the subjects of collective bargaining, and local public employers could opt out of the statutory scheme for the resolution of disputes involving mandatory subjects of bargaining, such as promotions and seniority. That would severely erode the sound policies which lead to the conclusion that the public employment relations act is the dominant law governing disputes concerning public employees.

Reversed and remanded to the circuit court for entry of a summary judgment for the plaintiff.

Justice Ryan, joined by Chief Justice Coleman, dissented because the decision denigrates the paramount authority conferred by the Constitution of 1963 on the citizens of the City of Warren to determine the kind of public employment system by which they will be served. If the conflict were solely between the statutory provisions in this case, the provisions of the collective-bargaining agreement on seniority and promotions might prevail over conflicting local civil service guidelines. However, the collective-bargaining agreement cannot modify or alter an existing local civil service system under the Constitution of 1963.

89 Mich App 135; 279 NW2d 556 (1979) reversed.

OPINION OF THE COURT

1. LABOR RELATIONS — PUBLIC EMPLOYMENT — COLLECTIVE BARGAINING — CONDITIONS OF EMPLOYMENT.

Seniority, promotions, and promotional criteria for public employees are "other terms and conditions of employment" under the public employment relations act and, thus, are mandatory subjects of collective bargaining (MCL 423.215; MSA 17.455[15]).

2. LABOR RELATIONS — PUBLIC EMPLOYMENT — RESOLUTION OF DISPUTES — CONSTITUTIONAL LAW.

The constitutional power of the Legislature to enact laws providing for the resolution of disputes concerning public employees must fairly be construed to include disputes regarding promotion and seniority (Const 1963, art 4, § 48).

3. LABOR RELATIONS — PUBLIC EMPLOYMENT — COLLECTIVE BARGAINING — CONDITIONS OF EMPLOYMENT.

The Legislature has determined that collective negotiation is the appropriate method for public employers and employees to develop and specify terms and conditions of employment; once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject, and neither party may take unilateral action on the subject absent an impasse in negotiations (Const 1963, art 4, § 48; MCL 423.215; MSA 17.455[15]).

4. LABOR RELATIONS — PUBLIC EMPLOYMENT — CONSTITUTIONAL LAW — STATUTES.

The public employment relations act prevails over conflicting legislation, municipal charters, and ordinances regarding public employers' powers; it must be regarded as the dominant law regulating labor relations in public employment (Const 1963, art 4, § 48; MCL 423.201 *et seq.;* MSA 17.455[1] *et seq.).*

5. LABOR RELATIONS — PUBLIC EMPLOYMENT — LOCAL CIVIL SERVICE — COLLECTIVE BARGAINING — CONDITIONS OF EMPLOYMENT.

A collective-bargaining agreement under the public employment relations act concerning seniority and promotions of employees of a city's fire department is valid and enforceable, and prevails over the statute concerning civil service for police and fire departments; the statutory authority and duties of a city's police and fire civil service commission are diminished *pro tanto* to the extent required for the free administration of mandatory collective bargaining under the public employment relations act (Const 1963, art 4, § 48; MCL 38.501 *et seq.,* 423.201 *et seq.;* MSA 5.3351 *et seq.,* 17.455[1] *et seq.).*

6. LABOR RELATIONS — PUBLIC EMPLOYMENT — COLLECTIVE BARGAINING — CONDITIONS OF EMPLOYMENT.

The public employment relations act requires a public employer to bargain in good faith about seniority and promotions, but does not require the public employer to agree to a proposal made by its employees (MCL 423.215; MSA 17.455[15]).

7. LABOR RELATIONS — PUBLIC EMPLOYMENT — LOCAL CIVIL SERVICE — SENIORITY — PROMOTIONS.

The system of promotions in the statute concerning civil service for police and fire departments continues to have effect in municipalities that adopt the civil service system of the statute unless a different system or plan is incorporated into a collective-bargaining agreement under the public employment rela-

tions act (MCL 38.501 *et seq.*, 423.201 *et seq.*; MSA 5.3351 *et seq.*, 17.455[1] *et seq.*).

8. LABOR RELATIONS — PUBLIC EMPLOYMENT — CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — LOCAL CIVIL SERVICE.

The Constitution of 1963 authorizes the Legislature to enact state-wide laws regulating disputes concerning local public employees; therefore, the collective-bargaining system mandated by the public employment relations act, which was enacted under the constitutional provision, when read together with the constitutional provision requiring the voters to approve a local civil service system should not unnecessarily hinder the free administration of mandatory collective bargaining under the public employment relations act (Const 1963, art 4, § 48; art 11, § 6; MCL 423.201 *et seq.*; MSA 17.455[1] *et seq.*).

9. LABOR RELATIONS — PUBLIC EMPLOYMENT — CONSTITUTIONAL LAW — LOCAL CIVIL SERVICE.

To require an affirmative vote of the electorate to permit a collective-bargaining agreement entered under the public employment relations act to modify a local civil service system would unduly hinder and frustrate the free administration of the public employment relations act, which the Legislature has determined to be the public policy of the state as to labor relations in public employment (Const 1963, art 4, § 48; art 11, § 6; MCL 423.201 *et seq.*; MSA 17.455[1] *et seq.*).

10. LABOR RELATIONS — CONSTITUTIONAL LAW — LOCAL CIVIL SERVICE.

The primary purposes of the constitutional provision permitting local civil service systems were to allow them to be adopted without the express approval of the Legislature, to prohibit local political officials from unilaterally changing the merit system, and to protect local public employees from political purges; its purpose was not to diminish the Legislature's power to enact laws for the resolution of disputes concerning public employees (Const 1963, art 4, § 48; art 11, § 6).

11. LABOR RELATIONS — PUBLIC EMPLOYMENT — CONSTITUTIONAL LAW — LOCAL CIVIL SERVICE.

The home-rule power of local public employers is subject to collective bargaining under the public employment relations act, and the constitutional provision for local civil service systems was not intended to preclude the application of the public employment relations act to provide for free and full collective bargaining on the subjects of promotions and senior-

ity of employees in a city's fire department (Const 1963, art 4, § 48; art 11, § 6; MCL 423.201 *et seq.*; MSA 17.455[1] *et seq.*).

DISSENTING OPINION BY RYAN, J.

12. LABOR RELATIONS — PUBLIC EMPLOYMENT — LOCAL CIVIL SERVICE — COLLECTIVE BARGAINING — CONSTITUTIONAL LAW.

A collective-bargaining agreement under the public employment relations act concerning seniority and promotions of employees of a city's fire department cannot alter or modify conflicting local civil service system provisions for police and fire departments in the statute and city charter because the Constitution of 1963 confers the paramount authority on the citizens of the city to determine the kind of public employment system by which they will be served (Const 1963, art 11, § 6; MCL 38.501 et seq., 423.201 et seq.; MSA 5.3351 et seq., 17.455[1] et seq.).

Gregory, Van Lopik, Korney & Moore (by *J. Douglas Korney)* for plaintiff.

W. Thomas Marrocco, Jr., City Attorney, and *John J. Murray,* Chief Assistant City Attorney, for defendants.

Amici Curiae:

Zwerdling & Maurer (by *George B. Washington)* for Council No. 25, AFSCME.

Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C. (by *Theodore Sachs, Ronald R. Helveston,* and *John R. Runyan, Jr.),* for Michigan State Fire Fighters Union.

BLAIR MOODY, JR., J. Plaintiff, Local 1383 of the International Association of Fire Fighters (Local 1383), appeals from a Court of Appeals decision affirming a summary judgment in favor of defendants, the City of Warren and the Police and Fire Civil Service Commission for the City of Warren (Civil Service Commission). 89 Mich App 135; 279 NW2d 556 (1979).

The question presented is whether a collective-bargaining agreement's provision concerning promotions, which is entered into under the public employment relations act (PERA), is valid and enforceable when it conflicts with provisions of a city charter and the fire and police civil service act, 1935 PA 78 (Act 78). MCL 423.201 *et seq.;* MSA 17.455(1) *et seq.;* MCL 38.501 *et seq.;* MSA 5.3351 *et seq.* The circuit court and Court of Appeals held the promotional system in the collective-bargaining agreement between Local 1383 and the City of Warren void. We granted leave to appeal. 407 Mich 897 (1979).

We hold that the contract provision governing promotions entered into under PERA is valid and enforceable. We also hold that this provision sets forth the promotional system for employees in the Local 1383 bargaining unit, notwithstanding conflicting provisions in Act 78 or the Warren Charter. Accordingly, we reverse the Court of Appeals decision.

I

There is no material dispute as to the facts in this case. The provisions of Act 78 set forth a civil service merit appointment and promotional system for fire fighters and police officers which may be adopted by local municipalities. The authority and duties of a municipal civil service commission governing these occupations are also explicitly detailed in the act. The terms of Act 78 were incorporated by reference into the Warren Charter by an amendment approved by the electorate in 1961. Warren Charter § 7.18.

Local 1383 is the recognized and exclusive collective-bargaining representative of all Warren Fire

Department employees, except the Fire Commissioner and civilian employees. Local 1383 and the City of Warren executed a collective-bargaining agreement concerning wages, hours, and conditions of employment. The agreement provided in pertinent part:

"*Article 12—Seniority.*

"(a) Seniority and its application shall be governed by the provisions of Act 78, Public Acts of 1935, except as provided in Section (b) below.

"(b) It is agreed that the promotional system for employees in the Local 1383 bargaining unit shall provide for promotions based upon seniority and reasonable qualifications as may be determined by the Fire Department after consultation with the Union."

Attached to the collective-bargaining agreement was a letter of understanding between Local 1383 and the City of Warren. The letter provided that if the Civil Service Commission refused to implement Article 12(b) of the agreement, the City of Warren would be held in violation of that provision only if the city failed to implement the new procedure after final judicial determination of its validity.

The Fire Commissioner informed the Civil Service Commission that, pursuant to Article 12(b), the Fire Department was in the process of qualifying persons for promotions and would submit a list of names from which the department would make promotions. The Civil Service Commission took the position that it was the body which determined qualifications, through competitive examinations, for promotion of Fire Department employees under Act 78. It also said that it was unaware of any election in which the electors of the City of Warren had voted to rescind or repeal the adoption of the civil service system of the act.

Local 1383 brought this action seeking a declaratory judgment that the terms of the collective-bargaining agreement prevail over any contrary provisions of Act 78, and any rules or regulations adopted by the Civil Service Commission pursuant to the act. Both parties filed motions for summary judgment. The circuit court granted summary judgment in favor of defendants. The Court of Appeals affirmed.

II

The critical question posed by this case is whether a normal and vital subject of bargaining can be removed from the public bargaining table by local charter provisions.

In 1963, the people adopted a new constitution which specifically authorized the Legislature to enact laws governing public employment. Article 4, § 48 of the constitution provides:

> "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."

Acting pursuant to this explicit constitutional authorization, PERA was enacted by the Legislature in 1965. This basic law provided public employees the right to form and join labor organizations and to negotiate in good faith with public employers regarding "wages, hours, and other terms and conditions of employment".

Accordingly, the duty of the City of Warren to bargain collectively with Local 1383 is set forth in § 15 of PERA, which reads:

> "A public employer shall bargain collectively with the representatives of its employees as defined in sec-

tion 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." MCL 423.215; MSA 17.455(15).

This Court has repeatedly recognized that § 15 of PERA was patterned after § 8(d) of the National Labor Relations Act (NLRA). 29 USC 158(d). The language of these PERA and NLRA sections is virtually identical. Consequently, when defining the scope of bargaining, Michigan cases have followed Federal decisions and have adopted a broad and expansive interpretation of "wages, hours, and other terms and conditions of employment". See, *e.g., Central Michigan University Faculty Ass'n v Central Michigan University,* 404 Mich 268; 273 NW2d 21 (1978); *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44; 214 NW2d 803 (1974); *Detroit Police Officers Ass'n v Detroit,* 61 Mich App 487; 233 NW2d 49 (1975), *lv den* 395 Mich 756 (1975).

In Federal labor law, seniority, promotion, and promotional criteria are among other terms and conditions of employment under NLRA § 8(d).[1] In a

[1] See *Ford Motor Co v Huffman,* 345 US 330; 73 S Ct 681; 97 L Ed 1048 (1953); *National Labor Relations Board v Century Cement Manufacturing Co, Inc,* 208 F2d 84 (CA 2, 1953); *Rapid Roller Co v National Labor Relations Board,* 126 F2d 452 (CA 7, 1942). See also *Inland Steel Co v National Labor Relations Board,* 170 F2d 247, 251 (CA 7, 1948); *Detroit Police Officers Ass'n v Detroit,* 61 Mich App 487; 233 NW2d 49 (1975).

technical sense, the meaning of the phrase "other terms and conditions of employment" has developed to include seniority, promotion, and promotional criteria. In fact, seniority is so clearly a mandatory subject of bargaining that there is little litigation concerning this concept. Morris, ed, The Developing Labor Law (Washington, DC: Bureau of National Affairs, Inc, 1971), p 406.

A rule of statutory construction adopted by the Legislature states:

> "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a; MSA 2.212(1).

"[O]ther terms and conditions of employment" is a technical phrase in labor relations law. That phrase has a specific meaning. We are convinced that the Legislature, by using the phrase in PERA, intended to include a meaning similar to that afforded by Federal interpretations.

Accordingly, our Court has recognized that seniority, promotion, and promotional criteria are included within the phrase "other terms and conditions of employment". We have concluded that these matters are mandatory subjects of collective bargaining. *CMU, supra; DPOA, supra,* 391 Mich 44.[2]

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[2] *Detroit Police Officers Ass'n v Detroit,* 61 Mich App 487; 233 NW2d 49 (1975), held that standards and criteria for promotion are a mandatory subject of bargaining. The DPOA bargaining unit did not represent the supervisory officers whose qualifications would be the subject of collective bargaining. Promotions are such an important topic of employment relations that even promotions out of a bargaining unit are mandatory subjects. In the instant case the "supervisory" employees of the Fire Department, other than the Fire Commissioner,

"The subjects included within the phrase 'wages, hours, and other terms and conditions of employment' are referred to as 'mandatory subjects' of bargaining. Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject, and neither party may take unilateral action on the subject absent an impasse in negotiations." (Citations omitted.) *CMU,* 277.

It may also be fairly deduced that when the Constitutional Convention authorized the Legislature to enact laws "providing for the resolution of disputes concerning public employees", Const 1963, art 4, § 48, it must have perceived that the Legislature would thereby have the power to enact laws governing the resolution of disputes regarding so vital a concern as promotion and seniority.

The right to bargain and the duty to bargain in good faith specifically permit employees' representatives to engage in negotiations for the purpose of changing conditions of employment. Public employers may resist the proposed changes during negotiations. The parties are free, for instance, to adopt substantive provisions of Act 78 without change. It is the collective-negotiation system that the Legislature has determined to be the appropriate method for public employers and their employees to develop and specify terms and conditions of employment. Collective negotiation is the proper procedure for changing employment conditions once the exclusive representative of the employees has been selected. MCL 423.215; MSA 17.455(15). The Act 78 procedure neither addresses nor focuses upon a collective-negotiation method for determining employment conditions.[3]

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are within the same bargaining unit. See MCL 423.213; MSA 17.455(13).

[3] Compare MCL 123.841; MSA 5.3331 which regulates the maximum hours of fire department employees. MCL 123.842(e); MSA

Following the mandate of PERA and the case law interpreting § 15, the City of Warren and Local 1383 bargained about the mandatory subjects and executed a collective-bargaining agreement incorporating a promotion system.

III

This Court has consistently held that PERA prevails over conflicting legislation, charters, and ordinances in the face of contentions by cities, counties, public universities and school districts that other laws or the constitution carve out exceptions to PERA.[4] That same conclusion is man-

5.3332(e) exempts from the maximum-hours requirements of the previous section, "any municipality which, by agreement with the collective bargaining agent representing affected employees, does not require its employees engaged in fire fighting or subject to the hazards thereof, to be on duty more than 40 hours in any consecutive 7-day period".

[4] In some instances the judiciary has been excepted from the duty to bargain under PERA. *In the Matter of the Petition for a Representation Election Among Supreme Court Staff Employees,* 406 Mich 647; 281 NW2d 299 (1979); *Council No 23, Local 1905, AFSCME v Recorder's Court Judges,* 399 Mich 1; 248 NW2d 220 (1976). The result in *Council No 23* consisted of two opinions. The opinions agreed that the probation officer removal statute, MCL 771.10; MSA 28.1140, which insures employees a full hearing before a court may recommend removal of the officer, prevails over a collective-bargaining provision for binding arbitration of employees' grievances. The opinion of Justice LINDEMER concluded that the Legislature did not mean to encumber the judicial process in adopting § 15 of PERA. His opinion expressed the concern that binding arbitration could result in the reinstatement of a probation officer, whose duties are central to the administration of criminal justice, after the court could no longer trust the officer or have confidence in him or her. *Council No 23,* 7. Justice WILLIAMS' opinion expressed concerns regarding the legislative intent under PERA to delegate to an arbitrator the power to reinstate "so sensitive a judicial official as a probation officer". *Council No 23,* 9.

Cf. Livingston County v Livingston Circuit Judge, 393 Mich 265; 225 NW2d 352 (1975) (circuit court is public employer under PERA); *Judges of the 74th Judicial Dist v Bay County,* 385 Mich 710; 190 NW2d 219 (1971) (district court is public employer; unfair labor practice charge under PERA may be asserted against a judge).

dated in the instant case by the reasoning employed in our prior decisions.

An apparent conflict between PERA and the county civil service act, MCL 38.401 *et seq.;* MSA 5.1191(1) *et seq.,* was before this Court in *Wayne County Civil Service Comm v Board of Supervisors,* 384 Mich 363; 184 NW2d 201 (1971). Discussing the purpose of the county civil service act, 1941 PA 370, this Court concluded that the concept of public employees' collective bargaining could not have been in the minds of the legislators in 1941.

Under the county civil service act, a county civil service commission has an extensive, if not exclusive, role in the control of employment relations within the county. This Court concluded that PERA and the county civil service act could not be harmonized, and that the civil service commission "has no lawful part in the administration, directly or indirectly, of the act of 1965 [PERA]". *Wayne County Civil Service Comm,* 376.

This Court held:

> "[T]he act of 1965 [PERA] operates, *'to the extent of the repugnancy,'* as a partial repeal of the act of 1941 [county civil service act]; but no more than that. In short shrift this means that the purposed thrust of the act of 1965, that of prohibiting strikes by public employees and providing collective bargaining, negotiation and enforced mediation of labor disputes arising out of public employment coming within the scope of the act, must be implemented and administered exclusively as provided therein. Hence, the original authority and duty of the plaintiff civil service commission was diminished *pro tanto,* by the act of 1965, to the extent of free administration of the latter according to its tenor." *Wayne County Civil Service Comm,* 374.

The defendant County Board of Supervisors con-

tended that PERA "to the extent that it places rates of pay, hours of work and other conditions of employment * * * into the area of collective bargaining supersedes *pro tanto* those provisions or parts of [the county civil service act] dealing with the same subject matters". This Court agreed with the supervisors' contentions. *Wayne County Civil Service Comm,* 371.

The state universities have argued that constitutional and statutory grants of authority alter the scope of collective bargaining and the duty to bargain under PERA. In *Board of Control of Eastern Michigan University v Labor Mediation Board,* 384 Mich 561; 184 NW2d 921 (1971), it was determined that the university is a public employer and subject to PERA. Our Court again emphasized the public policy of the predominance of PERA by the succinct statement:

> "The public policy of this state as to labor relations in public employment is for legislative determination. The sole exception to the exercise of legislative power is the state classified civil service, the scheme for which is spelled out in detail in Article 11 of the Constitution of 1963." *EMU,* 566.

In another case where the university's existence was specifically provided for by the constitution, we determined that PERA was superimposed upon and limited the constitutional authority of the University of Michigan Board of Regents. Responding to the university's contention that student interns and residents were not employees within PERA we stated:

> "If the Legislature had intended to exclude students/employees from the operation of PERA, they could have written such an exception into the law." *Regents of the*

University of Michigan v Employment Relations Comm, 389 Mich 96, 110; 204 NW2d 218 (1973).

Our holding in *CMU* specifically included the subject of promotional criteria within the scope of mandatory bargaining under PERA. It was urged that since Central Michigan University derives its existence from constitutional authority, PERA did not have full application to university employees. After explaining that PERA was intended to cover all public employees except for those in the state classified civil service, we reasoned that

> "PERA was intended by the Legislature to supersede conflicting laws and is superimposed even on those institutions which derive their powers from the Constitution itself.
>
> * * *
>
> "[T]he unique status accorded state universities by constitutional and statutory authority does not alter the scope of their collective bargaining obligation under the PERA. If university professors are truly unique and thus different from other public employees, the Legislature must carve out an exception to the PERA. This Court cannot." *CMU,* 279, 281.

Conflicting provisions of PERA and the teachers' tenure act, MCL 38.71 *et seq.;* MSA 15.1971 *et seq.,* were before this Court in *Rockwell v Crestwood School Dist Board of Education,* 393 Mich 616; 227 NW2d 736 (1975). Section 6 of PERA provides that public employees disciplined for striking are entitled, upon request, to a determination whether their actions violated the anti-strike provisions of PERA. The request is to be made after the discipline has been imposed. MCL 423.206; MSA 17.455(6). The teachers' tenure act requires a hearing prior to discharge or demotion

of tenured employees, MCL 38.101; MSA 15.2001. The *Crestwood* Court reviewed our decisions which "consistently construed the PERA as the dominant law regulating public employee labor relations". *Crestwood,* 629. Our Court reasoned:

> "The 1937 Legislature in enacting the teachers' tenure act could not have anticipated collective bargaining or meant to provide for the resolution of labor relations disputes in public employment." *Crestwood,* 630.

The apparent intent of the Legislature that PERA be the governing law for public employment relations and disputes; the consistent holdings of this Court that PERA is the dominant law regulating public employment relations; and the need for uniform treatment of all public employment relations questions resulted in this Court concluding that PERA prevailed over the teachers' tenure act.

Of particular significance are the holdings of this Court involving charter provisions. In two pertinent cases, it was determined that collective-bargaining obligations under PERA, in effect, prevailed over charter enactments otherwise lawful under article 7, § 22 of the 1963 Constitution. In *DPOA* we concluded that the incorporation of a pension and retirement plan in a city charter did not obviate the duty under PERA to bargain in good faith about pension plans. PERA was compared with the home-rule cities act. MCL 117.1 *et seq.;* MSA 5.2071 *et seq.*

We stated:

> "On the one hand the Legislature has adopted PERA which * * * foreseeably placed retirement plan issues on the collective bargaining table. On the other hand, it has allowed cities under the home rule cities act to incorporate the substance of their retirement plans into

their city charters and to make those plans amendable only by a popular vote." *DPOA,* 391 Mich 64.

This Court, however, avoided finding a complete conflict between PERA and the home-rule cities act. The statutes were reconciled by interpreting the latter to permit a city charter to incorporate only the general outline of a retirement plan. The substantive details and terms of the plan were required to be left to collective negotiation under PERA. The Detroit Charter's substantive detail of a retirement plan was held to have gone beyond the requirement of the home-rule cities act and conflicted with PERA. It was reasoned that the city was required to bargain under PERA about the details of the plan since MCL 117.36; MSA 5.2116 of the home-rule cities act states:

"No provision of any city charter shall conflict with or contravene the provisions of any general law [PERA] of the state."

Furthermore, we rejected the contentions of the City of Detroit that approval by the voters is required under the home-rule cities act to change the substantive details of Detroit's retirement plan.

The civilian trial board provision of the Pontiac Charter was reviewed by this Court in *Pontiac Police Officers Ass'n v Pontiac (After Remand),* 397 Mich 674; 246 NW2d 831 (1976). The City of Pontiac refused to bargain with the association about grievance procedures, invoking the charter which provided that a trial board would review police misconduct charges and impose discipline.

The Court of Appeals decision in *Pontiac* held, *inter alia,* that the charter provision for a trial board was valid and not a mandatory subject of

bargaining under PERA. *Pontiac Police Officers Ass'n v Pontiac,* 50 Mich App 382; 213 NW2d 217 (1973), *lv gtd and vacated* 391 Mich 814; 216 NW2d 759 (1974), *(Supplemental Opinion),* 54 Mich App 282; 220 NW2d 794 (1974), *(After Remand),* 397 Mich 674; 246 NW2d 831 (1976). The rationale of the first Court of Appeals decision, adhered to in the *Supplemental Opinion,* was based upon its interpretation of statutory law and the Michigan Constitution.

The Court of Appeals, citing the home-rule provision of the constitution,[5] stated that the management, operation, and control of a city's police department, including discipline of police officers by a trial board, is a municipal concern. Relying upon Act 78 and its authorization to municipalities to create police and fire civil service commissions, the Court of Appeals concluded that "the Legislature has recognized that the management, operation and control of these departments is a matter of local concern". *Pontiac,* 50 Mich App 382, 385. These interpretations formed the basis of the holding that the charter provision for a trial board was not a mandatory subject of bargaining under PERA.

Although three separate opinions were written in *Pontiac (After Remand),* all of the participating justices agreed that grievance and disciplinary procedures are mandatory subjects of bargaining under PERA. Furthermore, all concurred that

[5] Const 1963, art 7, § 22 provides:

"Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."

PERA's duty to bargain collectively prevails over conflicting provisions of a home-rule city's charter. Five justices specifically agreed that the duty "to perform in accordance with the terms of a collective bargaining agreement prevails over conflicting [charter] provisions". *Pontiac (After Remand),* 677, 685. It is clear that this Court rejected the Act 78 local concerns analysis of the Court of Appeals and its municipal concerns exception to PERA.

IV

To decide the present case in conformity with the consistent prior determinations of this Court, PERA must be viewed as the dominant law regulating public employment relations. Although this Court has not previously had occasion to consider the conflicting requirements of the fire and police civil service act in contrast with PERA, our previous decisions compel a conclusion that the provisions of PERA control.

The same policy considerations which have led this Court to conclude that PERA repealed by implication conflicting provisions of the county civil service act in *Wayne County Civil Service Comm,* that it diminished *pro tanto* the teachers' tenure act in *Crestwood,* that it governed promotional criteria in *CMU,* that it controlled university labor negotiations in *EMU* and *U of M* and that it prevailed over charter provisions permitted by the constitution in *DPOA* and *Pontiac (After Remand),* guide us to the conclusion that PERA also governs the instant dispute.

PERA requires a public employer to bargain about promotions, but does not require the public employer to agree to a proposal about promotions made by its employees. MCL 423.215; MSA 17.455(15). If the employer and the union agree to

a change in the promotion system, the collective-bargaining agreement controls promotions. The mandatory bargaining duty of PERA and the need for uniformity, contrasted with the permissive nature of Act 78, lead us to determine that in enacting PERA the Legislature intended the bargaining duty to prevail over Act 78. The promotion system in Act 78 will continue to have effect in municipalities that adopt the civil service system of the act, unless a different system or plan is incorporated in a collective-bargaining agreement.

The original authority and duties of the Police and Fire Civil Service Commission outlined in Act 78 were "diminished *pro tanto*" by PERA "to the extent of free administration" of PERA in the same manner that county civil service commissions had their authority diminished. *Wayne County Civil Service Comm,* 374. The "free administration" of collective bargaining can only be achieved when all subjects of bargaining are included in the collective-negotiation process.

V

The defendants urge, and the Court of Appeals held, that Article 12 of the collective-bargaining agreement was void and unenforceable. Their rationale is based upon what is perceived to be a conflict between the collective-bargaining agreement authorized by PERA and the local civil service provision of the Michigan Constitution. Const 1963, art 11, § 6 provides:

"By ordinance or resolution of its governing body which shall not take effect until approved by a majority of the electors voting thereon, unless otherwise provided by charter, each county, township, city, village, school district and other governmental unit or author-

ity may establish, modify or discontinue a merit system for its employees other than teachers under contract or tenure. The state civil service commission may on request furnish technical services to any such unit on a reimbursable basis."

Defendants assert that the agreement cannot modify an existing civil service system.

In addition, the defendants argue, and the Court of Appeals determined, that the intent underlying this constitutional provision was to insure that no civil service system for public employees could be modified without a vote of the electorate of the political entity involved. Hence, defendants conclude that a conflict between article 11, § 6 and the collective-bargaining contract must be determined pursuant to that constitutional mandate. We disagree with both conclusions.

In this case, as in other cases that have been decided by this Court with reference to PERA, the public employer premised its claimed exemption from bargaining on some constitutional provision. The basic point of these prior consistent determinations was precisely that action which is otherwise within the authority granted by the constitution is subject to the bargaining obligation under PERA. PERA itself is authorized by article 4, § 48 of the constitution. In view of the fundamental purpose of this constitutional provision which provides for the *Legislature* to enact laws for the resolution of disputes concerning public employees, in each instance when a conflict arose PERA, from its constitutional base, predominated over the conflicting charter, ordinance, or statute and its constitutional foundation.[6]

In this regard, it is significant to note that article 4, § 48 couched in sweeping language the

[6] See the discussion of the exception in fn 4, *supra*.

power of the Legislature to enact laws regarding public employees' disputes. That power is limited in only one particular. The only disputes excepted are "those in the *state* classified civil service". (Emphasis added.) In contrast, article 11, § 6 is a provision that simply permits the establishment, modification, or discontinuance of civil service merit systems in *local political subdivisions* of the state. The scope of article 4, § 48 covers disputes arising in local municipalities, yet the two constitutional provisions may be reconciled.

By its terms, article 11, § 6 does not suggest that a local civil service system must prevail when it conflicts with a collective-bargaining contract or bargaining obligations imposed by a general state law. There is no hint that the scope of article 11, § 6 was intended to limit article 4, § 48 and the applicability of the governing law for public employment relations enacted by the Legislature to resolve public employees' disputes. Nor is there an indication that article 11, § 6 was intended to control collective-bargaining negotiations conducted pursuant to such a law.

In a statutory context, we have mentioned that the Legislature may not have been fully conscious of the need to harmonize collective-bargaining procedures with an established civil service system. Nevertheless, this Court concluded that the purposes of collective bargaining required that the power of civil service be diminished *pro tanto. Wayne County Civil Service Comm, supra.* In a like manner, the Constitutional Convention and the people may not have been fully aware of all the possible conflicts between article 4, § 48 and article 11, § 6 of the constitution. For the same reasons, the collective-bargaining system mandated by PERA under article 4, § 48 should be

held to prevail "to the extent of free administration * * * according to its tenor". *Wayne County Civil Service Comm,* 374. "The public policy of this state as to labor relations in public employment is for legislative determination." *EMU,* 566.

We are not persuaded that the purpose of article 11, § 6 was to prohibit, without an affirmative vote of the electorate, the modification of a local civil service system by a collective-bargaining agreement. Article 4, § 48 and PERA do not require approval by the voters of collective-bargaining contracts. To require it would hinder and frustrate the free administration of PERA.

Clearly, the constitution authorized the Legislature to enact state-wide laws regulating disputes regarding public employees. With regard to local civil service systems, we are convinced a primary purpose of article 11, § 6 was to allow local governments to adopt merit principles by a vote of their electorate without express authorization of or approval by the state Legislature. In addition, this provision would block local political officials from unilaterally changing merit systems and at the same time would protect local employees from political purges. See 1 Official Record, Constitutional Convention 1961, pp 1749-1760.

The purpose of article 11, § 6 is not directed toward the broad power delegated to the Legislature for the resolution of disputes concerning public employees. This Court has uniformly concluded that the home-rule power of public employers is subject to collective bargaining. *Pontiac (After Remand), supra; DPOA, supra.* Where collective bargaining does not exist or where an agreement does not reach issues covered by civil service systems, article 11, § 6 provides a check by the people on the powers of elected officials. However, where

collective bargaining reaches the issues covered by local civil service systems, the restraint on the power of local officials is inherent within the collective-bargaining process.

We are satisfied that the local civil service section of the constitution was not intended to preclude the Legislature from enacting PERA to provide for free and full local collective bargaining, including the vital concerns of promotions and seniority. If this were not the case, PERA, a uniform state-wide law, would be converted into a local-option law. Each locality would cut a wide swath in determining what would be a subject of bargaining in the heart of the bargaining process. In place of the specific exemption of only one group of public employees, the state classified civil service, numerous local public employers would be allowed to opt out of the scheme promulgated by PERA for the resolution of disputes involving mandatory subjects of bargaining, such as promotions and seniority. This would severely erode the sound policies which have led this Court to conclude that PERA and its constitutional source should be the dominant authority governing disputes concerning public employees. *CMU, supra; Crestwood, supra.*

VI

It is consistent with the tradition of determinations in this state that PERA, promulgated in response to specific constitutional authorization, should take precedence over Act 78 and the Warren City Charter. The scope of article 4, § 48 covers public employment disputes arising in local municipalities. Article 11, § 6 permits the establishment of civil service systems in political subdivisions of the state. A conflict between these two

provisions is reconciled by acknowledging that the public policy of this state as to public employment relations is ultimately for legislative determination. PERA is the product of that determination. Therefore, PERA is the dominant law governing public employment negotiations.

We therefore conclude that Article 12(b) of the collective-bargaining agreement between Local 1383 and the City of Warren is valid. The seniority and promotional provision of the collective-bargaining agreement governs promotions in the Warren Fire Department. Accordingly, we reverse the decisions of the Court of Appeals and circuit court, and remand to the circuit court for entry of summary judgment in favor of plaintiff Local 1383.

No costs, a public question being involved.

KAVANAGH, WILLIAMS, LEVIN, and FITZGERALD, JJ., concurred with BLAIR MOODY, JR., J.

RYAN, J. *(dissenting).* I dissent from the Court's opinion because, in my view, it erroneously denigrates the constitutionally assured[1] paramount authority of the citizens of the City of Warren to determine at the ballot box, as indeed they have, the kind of public employment system by which they wish to be served.

I adopt as though it were my own the succinct and persuasively sound statement of the Honorable DONALD E. HOLBROOK, JR., who, writing for the Court of Appeals in this case, declared:

"Were the instant conflicts solely between the statutory provisions of PERA and Act 78, we would probably find *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44; 214 NW2d 803 (1974), controlling so as to require a

[1] Const 1963, art 11, § 6.

finding that the provisions of the collective bargaining agreement prevailed over conflicting Civil Service Commission promotional guidelines. However, in the face of conflict with Const 1963, art 11, § 6, we hold that the provisions of the collective bargaining agreement cannot modify or alter an existing civil service system." 89 Mich App 135, 143; 279 NW2d 556 (1979).

COLEMAN, C.J., concurred with RYAN, J.

DUEWEKE v MORANG DRIVE GREENHOUSES, INC

Docket No. 63973. Argued November 17, 1980 (Calendar No. 11).—Decided November 2, 1981.

Eric Dueweke applied for unemployment compensation benefits after he voluntarily quit his employment with Morang Drive Greenhouses, Inc., on May 16, 1975, for "personal reasons". The Employment Security Commission decided that he had left his employment without good cause attributable to the employer and that he was disqualified for six weeks under the Employment Security Act. Plaintiff reapplied for benefits six weeks later, and the Employment Security Commission sent him to his former employer, who had notified the commission that the plaintiff's job was still available. It is undisputed that the employer offered Dueweke the job which he had quit and that he did not accept. The Employment Security Commission, its hearing referee, and the Employment Security Appeal Board decided that the plaintiff was disqualified for refusing suitable work without good cause. The Wayne Circuit Court, Charles Kaufman, J., reversed on the ground that an offer of the same job is not the equivalent of suitable work as a matter of law. The Court of Appeals, Beasley, P.J., and Allen and D. C. Riley, JJ., reversed the judgment of the circuit court, holding that an offer of the same job could constitute an offer of suitable work, and that the plaintiff's reasons for the refusal were personal and thus not good cause (Docket No. 78-2487). Plaintiff appeals.

In an opinion by Justice Kavanagh, joined by Justices Williams, Levin, and Moody, the Supreme Court *held:*

An offer of former work can be an offer of suitable work; the reasons for refusing to return to work, including the fact that the claimant quit the job offered, go to the question of good cause for refusing the offer. Personal reasons for refusing may constitute good cause under the Employment Security Act.

1. In 1965, the Employment Security Act was amended to

REFERENCES FOR POINTS IN HEADNOTES

[1-9] 76 Am Jur 2d, Unemployment Compensation §§ 59, 68.

[6] Harassment or other mistreatment by employer or supervisor as "good cause" justifying abandonment of employment. 76 ALR3d 1089.

provide a penalty period and a reduction in benefits, instead of the former total disqualification, for persons who were voluntarily unemployed, so that they might become qualified. The plaintiff argues that once a claimant has been disqualified for voluntarily quitting a job and becomes requalified the claimant should not be disqualified for refusing to return to the same work. The Employment Security Appeal Board must decide the suitability of the work and separately assay the reasonableness of a claimant's refusal. The Court declined to hold that the former work can never be suitable because, in most instances, the former work would probably meet the statutory criteria for suitable work. The claimant's reasons for refusing to return to the work, including the fact that he previously quit the job, go to the question of good cause for refusing the offer. The record does not show that the Employment Security Commission ever considered the applicable statutory criteria in determining whether Dueweke refused an offer of suitable work, and accordingly, the matter is remanded to the Employment Security Commission for that consideration.

2. The Employment Security Commission must consider the evidence regarding the plaintiff's allegation of illegal overtime payment procedures in determining the suitability of the work. It is implicit in the Employment Security Act that an offer of work involving working conditions which are illegal would render the work unsuitable.

3. The hearing referee in this case concluded that, although the claimant had good personal reasons, the reasons were not sufficient good cause for the claimant to refuse an offer of suitable work. "Good cause" as used in the Employment Security Act means nothing more than good reasons—a substantial reason—for refusing to accept the proffered employment. A cause personal to the employee can be good cause. An employee, having been separated from his job, rejects other tendered employment for good cause where his reason for such rejection would be deemed valid by reasonable men and women and not indicative of an unwillingness to work.

Reversed and remanded to the Employment Security Commission for reconsideration.

Chief Justice Coleman, joined by Justices Fitzgerald and Ryan, agreed that an offer of the same job as the one that was voluntarily abandoned can qualify as suitable work but disagreed with the standard of "good cause" adopted by the majority opinion.

1. The statute lists the circumstances which make work unsuitable as a matter of law and does not include former

work. The inclusion of express criteria in the statute implies the exclusion of other factors. Former work is not unsuitable work as a matter of law; each case must be evaluated on the facts presented. That conclusion is consistent with the case law and with the decisions of the Employment Security Commission, which are accorded great weight in construing the statute. If the conditions listed in the statute are to be enlarged, the Legislature should make the change.

2. In this case, the plaintiff testified that he quit because of a "personality conflict" and because there was no room for advancement. He did not mention any of the reasons listed in the statute as good cause for refusing the offer of his former job. The plaintiff testified that he would not return to his old job unless he received a raise of $20 per week. Failure to receive the increase in pay did not make the work unsuitable and was not good cause to refuse the offer.

3. The plaintiff testified that he was not aware of the possibility of illegal overtime payment procedures when he quit his job and he failed to mention it to his employer or to claim it at the hearing as a reason for refusing the offer of work. His testimony that he would return to work if he received a raise of $20 per week indicates that his refusal was not based on any perception of illegality of the offer. No claim was made or evidence introduced showing that the work offered was on conditions substantially less favorable than those prevailing for similar work in the locality. Therefore, the conclusion by the hearing referee that the work offered was suitable under the statute is not reversible error.

4. The standard adopted by the Court, that "good cause" is what reasonable persons would believe it to be and that a cause personal to the employee can be good cause, is too broad because it focuses on the personal concerns of one party with no provision for balancing the obligations of the other parties. The employer is required to pay unemployment benefits in situations over which it would have no control. The Employment Security Act provides for more than consideration of the needs of the employee seeking unemployment compensation. The weight to be given the effects of the statute on the parties is a legislative decision, and the Legislature did not intend to make such a broad extension of the Employment Security Act. The concerns of an employee about remuneration and the failure to receive a raise do not alone constitute good cause to refuse an offer of the same work. It is unnecessary to reach the question whether the case law should be modified under other circumstances.

91 Mich App 27; 282 NW2d 823 (1979) reversed.

OPINION OF THE COURT

1. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — VOLUNTARY UNEMPLOYMENT — SUITABLE WORK.

A claimant who has been disqualified for unemployment benefits because he left work voluntarily without good cause attributable to the employer and who serves the applicable requalification period and reapplies for benefits may subsequently be disqualified for refusing, without good cause, to return to the same work when offered by the employer where the former work meets the statutory criteria for "suitable work" (MCL 421.29; MSA 17.531).

2. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — VOLUNTARY UNEMPLOYMENT — SUITABLE WORK.

The Employment Security Appeal Board must decide the suitability of the work offered to a claimant and separately assay the reasonableness of the claimant's refusal of suitable work; the claimant's reasons for refusing an offer to return to his former employment, including the fact that he previously quit the job, go to the question of good cause for refusing the offer (MCL 421.29; MSA 17.531).

3. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — SUITABLE WORK.

The Employment Security Commission must consider, on the record, the express statutory criteria in determining the issue of the suitability of work offered to a claimant in order to disqualify the claimant for refusing the offer (MCL 421.29; MSA 17.531).

4. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — SUITABLE WORK — ILLEGAL WORKING CONDITIONS — MINIMUM WAGE.

An offer of work involving working conditions which are illegal would render the work unsuitable; therefore, the Employment Security Commission in determining the suitability of work offered must consider an allegation by the claimant that the offer would result in an illegal overtime payment procedure (MCL 421.29; MSA 17.531).

5. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — SUITABLE WORK — GOOD CAUSE — WORDS AND PHRASES.

"Good cause" as used in the disqualification provision of the Employment Security Act means nothing more than good reason—a substantial reason—for refusing to accept the prof-

fered employment, and a cause personal to the employee can be good cause (MCL 421.29; MSA 17.531).

6. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — SUITABLE WORK — GOOD CAUSE.

The Employment Security Commission in considering whether a claimant had good cause for refusing to return to his former employment without an increase in pay because of a "personality conflict" between the claimant and the employer's general manager, if it finds the claimant's former job to be suitable work under the Employment Security Act, should determine whether the claimant's reasons would be deemed valid by reasonable men and women and not indicative of an unwillingness to work (MCL 421.29; MSA 17.531).

DISSENTING OPINION BY COLEMAN, C.J.

See headnotes 1, 3.

7. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — VOLUNTARY UNEMPLOYMENT — SUITABLE WORK.

A claimant is disqualified for unemployment benefits for refusing to return to his former employment where the claimant testified that he had quit because of a "personality conflict" between him and the employer's general manager and because there was no room for advancement in the job, and that he would not return to his old job unless he received a raise of $20 per week; the failure to receive an increase in pay did not make the work unsuitable and was not good cause to refuse the work (MCL 421.29; MSA 17.531).

8. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — SUITABLE WORK — GOOD CAUSE — WORDS AND PHRASES.

A standard that "good cause" as used in the disqualification provision of the Employment Security Act is what reasonable persons would believe it to be and that a cause personal to the employee can be good cause is too broad because it focuses on the personal concerns of one party with no provision for balancing the obligations of the other parties; the weight to be given the effects of the Employment Security Act on the parties is a legislative decision, and the Legislature did not intend to make such a broad extension of unemployment benefits (MCL 421.29; MSA 17.531).

9. UNEMPLOYMENT COMPENSATION — DISQUALIFICATION — SUITABLE WORK — GOOD CAUSE.

The concerns of an employee about remuneration and failure to

receive desired raises do not alone constitute "good cause" under the disqualification provision of the Employment Security Act to refuse an offer of former employment (MCL 421.29; MSA 17.531).

Wayne County Neighborhood Legal Services (by *Jeanne Mirer* and *Robert F. Gillett)* for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *David A. Voges* and *Edward Jan Setlock,* Assistants Attorney General, for defendant Michigan Employment Security Commission.

Amici Curiae:

Jordan Rossen, Associate General Counsel, and *Rothe, Mazey, Mazey & Hamburger, P.C.,* for International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America.

Michigan Legal Services (by *Charlene Snow).*

Clark, Klein & Beaumont (by *Dwight H. Vincent, J. Walker Henry,* and *John R. Spreitzer)* for Michigan Manufacturers Association and Employers Unemployment Compensation Council.

KAVANAGH, J. This appeal involves the construction and application of § 29(1)(e)[1] of the Michigan Employment Security Act (MESA) in a situation where a claimant refuses an offer of the same job he previously quit, having served a disqualification

[1] MCL 421.29(1)(e); MSA 17.531(1)(e), provided that an individual shall be disqualified in all cases in which he "[h]as failed without good cause to accept suitable work when offered him, or to return to his customary self-employment, if any, when so directed by the employment office or the commission".

under § 29(1)(a)[2] of the MESA for such voluntary quit. The pertinent issues raised on appeal are (1) whether, as a matter of law, a claimant who has voluntarily separated from an employer, and has requalified under § 29(3) of the MESA, may be further disqualified under § 29(1)(e) for refusing to accept an offer of his former job under the same working conditions, and (2) assuming such an offer is suitable work, whether the claimant had good cause to refuse the offer.

We reverse and remand to the Michigan Employment Security Commission (MESC) for reconsideration in accordance with this opinion.

On May 16, 1975, the plaintiff-appellant, Eric Dueweke, voluntarily terminated his employment relationship with Morang Drive Greenhouses, Inc., and applied for benefits. The MESC determined that he had left his employment without good cause attributable to the employer and imposed a disqualification under § 29(1)(a) of the MESA.

After the plaintiff-appellant served a six-week requalification period, he refiled his application for benefits and was sent by the MESC to his former employer who had notified the commission that "[c]laimant's position with us is still open". Although there is a dispute as to what transpired between Mr. Dueweke and his former employer during their meetings, it is undisputed that the employer indicated on an MESC form that Mr. Dueweke was reoffered the job he had already quit and that he did not accept it.

The MESC then ruled that plaintiff-appellant was disqualified under § 29(1)(e) of the MESA for

[2] MCL 421.29(1)(a); MSA 17.531(1)(a), provided that an individual shall be disqualified in all cases in which he "[h]as left work voluntarily without good cause attributable to the employer or employing unit".

refusing to accept suitable work without good cause. The referee and the appeal board affirmed.

On appeal to the Wayne Circuit Court, the appeal board's decision was reversed, but in turn the Court of Appeals reversed the circuit court.

The basic purpose of the MESA is to provide relief to the unemployed worker and his family from the burden of involuntary unemployment. MCL 421.8(2); MSA 17.508(2). As originally enacted, the MESA totally disqualified an individual who was voluntarily unemployed from receiving unemployment benefits. In 1965, the act was amended to provide for a penalty period and a reduction in benefits rather than total disqualification[3] to individuals who were voluntarily unemployed so that such individuals might requalify and come within the purpose of the MESA.

The plaintiff-appellant asks us to hold that once a claimant has been disqualified under § 29(1)(a) and requalified, he or she cannot subsequently be disqualified under § 29(1)(e) for refusing to return to the same work. We refuse to do so.

The board must pass on the suitability of the work, and also (and separately) assay the reasonableness of a claimant's refusal of it. We decline to hold that the former work can never be suitable work, for in most instances the former work would probably meet the statutory criteria for suitable work. However, the reasons for refusing to return to the work, including the fact that claimant previously quit the job offered, go to the question of good cause for refusing the offer.

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[3] 1965 PA 281. A 1975 amendment to the act changed the requalifying period from 6 weeks to 13 weeks for claimants covered by § 29(1)(a). 1975 PA 110. 1980 PA 358 reinstates the total disqualification for a worker who has left work voluntarily without good cause attributable to the employer or employing unit with one exception. These amendments were enacted after the instant case arose.

The MESA, as it read before the 1980 amendment, sets forth criteria for determining whether work is suitable in § 29(6): "[T]he commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence." MCL 421.29(6); MSA 17.531(6).

The record does not show that these criteria were ever considered in determining whether Mr. Dueweke refused an offer of suitable work. Accordingly, we remand to the MESC to consider the express statutory criteria in determining the issue of suitability.

The plaintiff-appellant alleges that the offer of work contains conditions that would result in an overtime payment procedure which violates the Federal Fair Labor Standards Act, 29 USC 207(a)(1), and the Michigan Minimum Wage Law of 1964, as amended, MCL 408.384a; MSA 17.255(4a). We direct the MESC to consider the evidence regarding this allegation in arriving at its determination of suitability. We find it implicit in the statute that an offer of work involving working conditions which are illegal would render the work unsuitable.

The plaintiff-appellant contends that, assuming an offer of suitable work was made, he had good cause to refuse the offer and is therefore entitled to unemployment benefits.

The referee's opinion states

"that although claimant had good personal reasons for not wishing to return to the involved employer without an increase in pay, said reasons were not of such a nature as to show good cause for refusing to

accept suitable employment under [§§] 29(1)(e), 29(6) and 29(7)(b) of the act."

It further states "that the personality conflict between the claimant and the general manager of the employer and the question of additional pay, beyond $180 per week, was not sufficient good cause for the claimant to refuse an offer of suitable work".

The Court of Appeals applied the rule in *Losada v Chrysler Corp,* 24 Mich App 656, 660; 180 NW2d 844 (1970), which held that personal reasons were not good cause under the statute. *Losada* was followed by a split decision in *Keith v Chrysler Corp,* 41 Mich App 708; 200 NW2d 764 (1972), in which the majority agreed with the *Losada* rule. The decision was affirmed by an equally divided Supreme Court. *Keith v Chrysler Corp,* 390 Mich 458; 213 NW2d 147 (1973).[4]

We conclude that personal reasons may constitute good cause under § 29(1)(e) of the MESA. In doing so, we adopt the rationale and standard of good cause set forth in Justice (then Judge) LEVIN'S dissenting opinion in *Keith,* 41 Mich App 708, 712-715.[5]

If the MESC finds the plaintiff-appellant's former job to be suitable according to the criteria set forth in the statute and in this opinion, it should evaluate Mr. Dueweke's reasons for refusing the work to determine whether his reasons for such

[4] Justice LEVIN did not participate because he was a member of the Court of Appeals panel that originally decided the *Keith* case. As a member of that panel, he dissented from the majority's application of the rule of *Losada.*

[5] We recognize that *Keith* involved § 29(1)(d) (refusal without good cause to report within a reasonable time for an interview concerning available suitable work) and that the instant case is a § 29(1)(e) case. We do not find this distinction important for the purposes of our analysis.

rejection would be deemed valid by reasonable men and women and not indicative of an unwillingness to work.

Reversed and remanded to the Michigan Employment Security Commission for reconsideration in accordance with this opinion.

WILLIAMS, LEVIN, and BLAIR MOODY, JR., JJ., concurred with KAVANAGH, J.

COLEMAN, C.J. *(to affirm).* We disagree, in part, with the opinion of the Court and would affirm the decision of the Court of Appeals.[1]

The central legal issue is whether an offer of the same employment to an employee who has voluntarily quit cannot, as a matter of law, constitute an offer of suitable work so as to disqualify the employee from unemployment benefits pursuant to MCL 421.29(1)(e); MSA 17.531(1)(e).

We agree that an offer of the same job as that voluntarily abandoned can qualify as "suitable work".

However, we would not remand to the Michigan Employment Security Commission (MESC) for reconsideration in light of statutory criteria and a standard adopted from a Court of Appeals dissent in *Keith v Chrysler Corp,* 41 Mich App 708, 714; 200 NW2d 764 (1972).

First, a reading of the transcript persuades us that the statutory criteria already have been considered. There is competent and material evidence to support the conclusion that plaintiff refused suitable work without good cause attributable to the employer.

Second, we cannot subscribe to the "good cause"

[1] *Dueweke v Morang Drive Greenhouses, Inc,* 91 Mich App 27; 282 NW2d 823 (1979).

standard stated in the *Keith* dissent. Although *Keith* does not concern a case of voluntary quitting, it is argued that the standard set forth in the dissent should be adopted in this situation. The opinion quotes from *In the Matter of Watson,* 273 NC 629, 635; 161 SE2d 1 (1968), stating:

> "[W]e conclude that an employee, having been separated from his job through no fault of his own, rejects other tendered employment for 'good cause' when his reason for such rejection would be deemed by reasonable men and women valid and not indicative of an unwillingness to work."

Although we disagree, the record supports the decision of the referee even under that standard stated in the dissent in *Keith.*

I

The history of the case, now six years after plaintiff quit voluntarily on May 16, 1975, after 10-1/2 months of work as a *full-time salaried supervisor* in Morang Drive Greenhouses, Inc., is revealing.

1. After quitting, plaintiff was disqualified from receiving unemployment benefits for six weeks, MCL 421.29(1)(a); MSA 17.531(1)(a).

2. Defendant then was notified by MESC and plaintiff presented a form for verification of availability to employers (MESC Form No. 1323) to the employer, who completed it, saying that there was work available consisting of the "same job he left", but that the employee "refused [the] job due to [a] personality conflict with [the] general manager after leaving". However, in the hearing on the claim, plaintiff said, "[L]et me state that I believe this whole question of personality conflict has been

a bit overblown". He said he never at any time had made a statement that he would not return for that reason. When asked by the referee, "Would you have gone back to Morang regardless of the conflict * * * in personality?", plaintiff answered "Yes".

3. On November 12, 1975, MESC determined that plaintiff had failed without good cause to accept suitable work when it was offered.

4. Plaintiff protested and MESC issued a redetermination. The result was the same.

5. Plaintiff appealed to a referee, who, after a full hearing, affirmed MESC.

6. Plaintiff appealed to the Employment Security Appeal Board, which affirmed on June 9, 1977.

7. Appeal then was taken to the Wayne Circuit Court which reversed the decision of MESC on May 25, 1978, finding in effect that the period of disqualification was a penalty to be served and that an offer of the same work after serving the penalty was not an offer of "suitable work".

8. Appeal was taken to the Court of Appeals, which reversed the circuit court on June 20, 1979, finding that plaintiff refused suitable work without good cause.

9. This Court would remand to MESC for reconsideration (again) in light of the statutory criteria and the newly added criteria.

This case should be ended and I see no reason to start once more the ascent from MESC.

II

MCL 421.29; MSA 17.531 provided in part:

"(1) An individual shall be disqualified for benefits in all cases in which he:

* * *

"(e) Has failed without good cause to accept suitable work when offered him, or to return to his customary self employment, if any, when so directed by the employment office or the commission, * * *

* * *

"(6) In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

"(7) Notwithstanding any other provisions of this act, no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout or other labor dispute; (b) if the remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." 1965 PA 281.

III

We agree with the opinion of the Court that former work is not, as a matter of law, unsuitable work.

First, § 29(7) lists those factors which make work unsuitable as a matter of law and does not include "former work". The inclusion of express criteria in the statute implies the exclusion of other factors. *Alan v Wayne County,* 388 Mich 210; 200 NW2d 628 (1972). If the conditions listed in § 29(7) are to

be enlarged, the Legislature should make the adjustment.

The conclusion that the Legislature did not intend former work to be unsuitable as a matter of law is consistent with decisions from this Court, courts in other jurisdictions, and the MESC.

In *Bingham v American Screw Products Co,* 398 Mich 546; 248 NW2d 537 (1976), this Court decided that former work may not be suitable if the distance from the individual's residence is too great. If former work was unsuitable as a matter of law, the Court would not have needed to address the individual factors listed in § 29(6) to resolve *Bingham.*

In *S S Kresge Co v Unemployment Compensation Comm,* 349 Mo 590, 595-596; 162 SW2d 838 (1942), the Court addressed 1939 Mo Rev Stat, § 9431,[2] stating:

"We perceive nothing inconsistent between the provisions of Subsecs I and III [These subsections are the Missouri clauses on voluntary quitting and refusal to accept suitable work without good cause that are almost identical to the Michigan clauses]. * * * A myriad of reasons may be advanced by different employees and a given employee may have a number of reasons for quitting work. Some may be based on objections to the work. Others may be based on reasons not connected with the work. There is no provision in the law upon which to plant a ruling that the former work or that new work is or is not suitable. In given instances new work may be less suitable than the former work, and for employees, skilled in a particular line of work, the former work may be the most acceptable or, in conceivable instances, the only acceptable available work for the given employee. Being less suitable does not make the work not suitable. The argument, advanced by the Commission, that a ruling that the former work may be

[2] See Mo Rev Stat § 288.050.1, subds (1) and (2).

'suitable work' within the provisions of Subsec III permits the employer to arbitrarily wipe out the employee's benefit rights under the law begs the question, and the other extremity that it is the employee who determines the work is not suitable finds no support in the law. Arbitrary standards having no foundation in the specific provisions of law are not to be set up. Each individual case must rest upon its own facts."[3]

Finally, the MESC has made a similar construction of the statute. Section 76.131 of the Precedent Manual issued by the MESC provides:

"*Refusal Following a Prior Disqualification With Same Employer.* Situations will occur where an employer will protest a claimant's right to benefits because the claimant has failed to apply for, accept, or report to a former employer concerning, available suitable work and where there has been a prior adjudication on a previous offer, or where there has been a prior adjudication under other disqualifying provisions of § 29 of the act, such as voluntary leaving.

"The Commission cannot refuse to impose a disqualification for a subsequent refusal of work merely because the claimant had already been disqualified for quitting, or for refusing a previous offer, with the same employer.

* * *

"It is recognized that adjudication of distinct acts, separations or discharges involving the same employer may result in the claimant being disqualified more than

[3] Other jurisdictions have reached similar resolutions of this issue, see *California Appeal Board Benefit Decision No 4666,* 2 Unemployment Ins Rep (CCH), Cal ¶ 1965.933, *Stensvad v Industrial Comm,* 167 Colo 140; 445 P2d 898 (1968), *Wilson v Review Board of Employment Security Division,* — Ind App —; 369 NE2d 675 (1977), *vacated* — Ind App —; 373 NE2d 331 (1978), *Massachusetts Board of Review Decision No 37,* 6 Unemployment Ins Rep (CCH), Mass ¶ 1965.581, *Lewis v Minneapolis Moline, Inc,* 288 Minn 432; 181 NW2d 701 (1970), *Russell v Catherwood,* 33 AD2d 592; 304 NYS2d 415 (1969), *Unemployment Compensation Board of Review v Lowell,* 24 Pa Commw Ct 309; 355 A2d 616 (1976), *Allen-Bradley Co v Dep't of Industry, Labor & Human Relations,* 58 Wis 2d 1; 205 NW2d 129 (1973).

once, *e.g.,* under the voluntary leaving and suitable work provisions of the act. However, if the proper application requires a disqualification based on the issue at hand, then such disqualification must be made."

This construction of the statute by those charged with its administration is accorded great weight, *Magreta v Ambassador Steel Co,* 380 Mich 513; 158 NW2d 473 (1968), and is consistent with the interpretation applied in many jurisdictions.

We hold that former work is not unsuitable work as a matter of law. Each case must be evaluated on the facts presented.

IV

However, we would affirm the decision of the MESC rather than remand. After reviewing the statutory criteria, the evidence presented, and the referee's opinion, we must conclude that the referee considered whatever evidence was presented and find that his opinion is not so inadequate as to preclude effective judicial review.

Plaintiff testified that he terminated his employment because of a personality conflict[4] and because there was no room for advancement. Although plaintiff had worked at the same job previously, he did not mention any of the factors listed in § 29(6) as a reason for refusing the offered work. No testimony was introduced indicating that the work involved any risk to plaintiff's health, safety or morals or that it was not within his physical

[4] Plaintiff said that the general manager's wife was more loyal to her husband than to him on the occasions she was under his supervision. She filled in for absentees or when extra help was needed in the various greenhouse components, sometimes working in defendant's area of responsibility. However, defendant denied that refusal of work was based on that "conflict".

ability or experience. Plaintiff was unemployed for over five months when he was offered his former job. He testified that he would not return to his old job unless he received a raise of $20 per week.

Plaintiff's testimony and prior performance and experience while employed in the same capacity, plus his failure to claim or mention any of the factors listed in § 29(6) as a reason for refusing the offered work belie any contention that he refused the work because it was unsuitable under § 29(6).

The referee's opinion underscores this conclusion. The opinion states:

> "[A]lthough claimant had good personal reasons for not wishing to return to the involved employer *without an increase in pay,* said reasons were not of such a nature as to show good cause for refusing to accept *suitable employment* under [§§] 29(1)(e), 29(6) and 29(7)(b) of the act." (Emphasis added.)

The evidence supports this conclusion. Plaintiff testified that he believed defendant promised him a raise after six months but he never received the raise. The employer testified that he agreed to review plaintiff's rate of pay after six months. In this case, the failure to receive a pay increase did not make the work unsuitable and was not "good cause" to refuse suitable work.

The opinion of the Court also directs the MESC to consider evidence regarding allegations that the overtime wage scale may have violated federal and state laws.[5] However, plaintiff testified that he was not aware of this possibility when he quit and failed to mention it either to his employer or at the hearing as one of his reasons for refusing the

[5] See Federal Fair Labor Standards Act, 29 USC 207(a)(1); Michigan Minimum Wage Law of 1964, as amended, MCL 408.384a; MSA 17.255(4a). See also 29 USC 213(a)(1).

offer of work. His testimony that he would return to work if he received a $20 per week raise indicates that his refusal to accept the offered work was not based on any perception of illegality. Assuming, *arguendo,* that the law had been violated, plaintiff could have filed suit for back pay and other relief pursuant to 29 USC 216(b), MCL 408.393; MSA 17.255(13). The Commissioner of Labor or the courts provide a more appropriate forum for resolving these complex claims.

No claim was made or evidence introduced showing that the work offered was on conditions substantially less favorable than those prevailing for similar work in the locality. The referee's conclusion that the work offered was suitable under § 29(6) is not reversible.

V

When considering the policy underlying the MESA, we cannot subscribe to the *Keith, supra,* standard adopted by the majority, that "good cause" is what reasonable persons believe it to be, although personal in nature and not attributable to the employer.

That standard is so broad as to be no standard within the concept of unemployment compensation. It focuses upon personal concerns of one party with no provision for balancing the obligations of the others governed by MESA.

The employer is required to pay benefits through contributions in situations over which it would have no control. In *Ohio Bureau of Employment Services v Hodory,* 431 US 471, 490; 97 S Ct 1898; 52 L Ed 2d 513 (1977), the United States Supreme Court stated:

"The unemployment compensation statute, however,

touches upon more than just the recipient. It provides for the creation of a fund produced by contributions from private employers. The rate of an employer's contribution to the fund varies according to benefits paid to that employer's eligible employees. Ohio Rev Code § 4141.25. Any action with regard to disbursements from the unemployment compensation fund thus will affect both the employer and the fiscal integrity of the fund. Appellee in effect urges that the Court consider only the needs of the employee seeking compensation. The decision of the weight to be given the various effects of the statute, however, is a legislative decision * * *."

We conclude that the Legislature did not intend such an extension of MESA.

VI

The holding in *Losada v Chrysler Corp,* 24 Mich App 656; 180 NW2d 844 (1970),[6] is applicable to the facts of this case. The concerns about one's remuneration and failure to receive desired raises do not alone constitute good cause to refuse an offer of the same work so as to trigger benefits intended for "persons unemployed through no fault of their own". Although *Losada* should not be overruled, we do not reach the question of whether it would be subject to interpretation under more egregious circumstances.

Regardless of the standard ultimately adopted by the Court for determining good cause, there is

[6] In *Losada v Chrysler Corp,* 24 Mich App 656; 180 NW2d 844 (1970), the Court held that plaintiff's rejection of work which would take him out of "trim" and prevent his return to "trim", and at a slight reduction in pay, was a personal reason and did not comprise "good cause". It noted that the Employment Security Act provides for compensation "for the benefit of persons unemployed *through no fault of their own".* MCL 421.2; MSA 17.502.

no need to remand this case for findings either as to the suitability of the work or as to good cause for refusing it.

Having found that an offer of the same employment as that which plaintiff voluntarily quit can be an offer of suitable work, the record reveals no viable attack on its suitability. The record also reveals no sound basis for finding that plaintiff had good cause to refuse his previous employment —regardless of the fate of *Losada* or *Keith*.[7]

The findings of the referee and MESC are adequate on the record to support their conclusion.

This long legal journey should be concluded.

We would affirm.

FITZGERALD and RYAN, JJ., concurred with COLEMAN, C.J.

[7] Any person can voluntarily quit a job but fairness and economic reality require that not all persons who quit shall be remunerated when doing so. In this case, it would have been wise had plaintiff sought another placement prior to relinquishing the "bird in hand". If the pay was not commensurate with his perceived abilities, certainly going with no pay for some months (at least) while trying to obtain unemployment compensation did not serve the alleged purpose of wanting more money. Plaintiff's concern about not being placed in one of the new stores was one never communicated to the employer, who said he would have so placed him had he known of plaintiff's interest.

PEOPLE v McLEMORE

Docket Nos. 64801, 64802. Argued April 7, 1981 (Calendar No. 3).—Decided November 2, 1981.

Harold McLemore was charged, while he was serving a federal sentence for bank robbery, with murder, assault with intent to commit murder, and carrying a concealed weapon. The Wayne County Prosecutor obtained writs of habeas corpus *ad prosequendum* from the Recorder's Court of Detroit on several occasions to secure the temporary custody of the defendant from the Federal Correctional Institution in Milan, Michigan, for proceedings against him on the state charges. The Recorder's Court of Detroit, Samuel C. Gardner and George W. Crockett, III, JJ., granted motions by the defendant to dismiss the charges for failure to commence trial within 120 days of the arrival of the prisoner, as required under the Interstate Agreement on Detainers. The Court of Appeals, R. M. Maher, P.J., and Bronson and A. E. Moore, JJ., affirmed in a per curiam opinion, but remanded the case to the trial court to determine whether the murder and concealed-weapon charges had been brought within 120 days (Docket Nos. 77-4827, 78-41, 78-115). The parties appeal.

In a unanimous per curiam opinion, the Supreme Court *held:*

A writ of habeas corpus *ad prosequendum* is not a detainer within the meaning of the Interstate Agreement on Detainers. The decision of that question as a matter of federal law by the Supreme Court of the United States has been followed whether the writ emanated from federal or state court. The writ of habeas corpus *ad prosequendum* remains available as a means for a state to seek temporary custody of an accused incarcerated in another jurisdiction. The decision by federal authorities to honor a writ in the absence of a detainer as a matter of comity does not bring into operation the provisions of the Interstate Agreement on Detainers. Since the prosecution in this case obtained temporary custody of the defendant as a result of the writ and no detainer had been lodged against the defendant, the 120-day provision for commencement of trial is inapplicable.

The judgment of the Court of Appeals is reversed, and the

case is remanded to Recorder's Court of Detroit for further proceedings.

95 Mich App 536; 291 NW2d 109 (1980) reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Chari Grove* and *Rolf E. Berg)* and *Hoffa, Chodak & Robiner* for defendant.

PER CURIAM. The dispositive issue is whether a writ of habeas corpus *ad prosequendum*[1] constitutes a detainer[2] within the meaning of the Interstate Agreement on Detainers, MCL 780.601 *et seq.;* MSA 4.147(1) *et seq.*

I

The prosecution, by means of writs of habeas

[1] The common-law writ of habeas corpus *ad prosequendum* is an order by a court directing authorities to produce a prisoner to face criminal charges. See *State v Fender,* — W Va —, —; 268 SE2d 120, 123 (1980).

[2] A detainer is " 'a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction' ". *United States v Mauro,* 436 US 340, 359; 98 S Ct 1834; 56 L Ed 2d 329 (1978). In *United States v Dixon,* 592 F2d 329, 332, fn 3 (CA 6, 1979), the Court describes a detainer as

"simply a notice filed with the institution in which a prisoner is serving a sentence, advising that the prisoner is wanted to face pending criminal charges elsewhere, and requesting the custodian to notify the filing jurisdiction prior to releasing the prisoner. Filing a detainer is an informal process that generally can be done by any person who has authority to take a prisoner into custody. Furthermore, a detainer remains lodged against a prisoner without any action being taken on it. *Ridgeway v United States,* 558 F2d 357 (CA 6, 1977), *cert den* 436 US 946; 98 S Ct 2850; 56 L Ed 2d 788 (1978). See also *United States v Mauro,* 436 US 340; 98 S Ct 1834; 56 L Ed 2d 329 (1978)."

corpus *ad prosequendum* issued by the Recorder's Court for the City of Detroit, secured the temporary custody of defendant from authorities at the federal prison in Milan, Michigan, to proceed against him on charges of murder, assault with intent to murder, and carrying a concealed weapon. All charges were dismissed with prejudice at the trial court level based upon a perceived violation of Article IV(c) of the Interstate Agreement on Detainers:

> "In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

II

The prosecution appealed, claiming among other things that the Interstate Agreement on Detainers was inapplicable since a writ of habeas corpus *ad prosequendum* is not a detainer within the meaning of the Interstate Agreement on Detainers. Although the Court of Appeals rejected the prosecution's claim, the panel nonetheless remanded the case to the trial court for further proceedings because it was unable to determine from the record whether the murder charges and a carrying a concealed weapon charge had been brought within 120 days.[3]

III

The Interstate Agreement on Detainers is a

[3] 95 Mich App 536; 291 NW2d 109 (1980). The Court of Appeals reversed dismissal of another charge of carrying a concealed weapon after finding only 97 days of unexcused delay had lapsed at the time of dismissal.

congressionally sanctioned interstate compact, construction of which presents a federal question.[4] The United States Supreme Court has ruled that the provisions of the agreement apply if a participating jurisdiction which has untried charges against a prisoner lodges a detainer with the jurisdiction where the prisoner is incarcerated and that a writ of habeas corpus *ad prosequendum* is not a detainer within the meaning of the agreement. *United States v Mauro,* 436 US 340; 98 S Ct 1834; 56 L Ed 2d 329 (1978). The decision in *Mauro* has been followed regardless of whether the writ emanated from federal or state court.[5]

We conclude that the writ of habeas corpus *ad prosequendum* remains available as means for a state to seek temporary custody of an accused incarcerated in another jurisdiction. The decision by federal authorities to honor a writ in the absence of a detainer as a matter of comity does not trigger the provisions of the agreement. Since the prosecution in the instant case obtained temporary custody as a result of the writ and no detainer had been lodged against the defendant, the time provision for trial in Article IV(c) is inapplicable.

We reverse the judgments of the Court of Appeals and Recorder's Court for the City of Detroit, reinstate the charges against the defendant, and remand the case to the Recorder's Court for the City of Detroit for further proceedings consistent

[4] *Cuyler v Adams,* 449 US 433; 101 S Ct 703; 66 L Ed 2d 641 (1981).

[5] See *Foran v Metz,* 463 F Supp 1088 (SD NY, 1979); *United States ex rel Schlobohm v Medical Center for Federal Prisoners,* 453 F Supp 618, 620 (SD Ill, 1978); *Bean v United States,* 409 A2d 1064, 1066 (DC App, 1979); *People v Befeld,* 90 Ill App 3d 772; 413 NE2d 550 (1980); *State v Boone,* 40 Md App 41; 388 A2d 150 (1978); *Commonwealth v Florence,* — Mass App —, —; 387 NE2d 152, 153 (1979); *State v Kelsey,* 592 SW2d 509 (Mo App, 1979); *Commonwealth v Diggs,* 273 Pa Super 121; 416 A2d 1119 (1979); *Moore v Whyte,* — W Va —; 266 SE2d 137 (1980). See generally Anno: *Interstate Agreement on Detainers Act,* 98 ALR3d 160, 192-195, 245-247.

with this opinion. We do not address the issues raised on cross-appeal. Upon remand, the defendant may raise the issue involving his constitutional and statutory rights to a speedy trial as well as his claim that the murder charges should be dismissed because the prosecution breached an agreement to grant immunity. The people's motion to strike is denied as moot. We do not retain jurisdiction.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

SHOCK BROS, INC v MORBARK INDUSTRIES, INC

Docket No. 65583. Decided November 2, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, affirmed the judgment of the Court of Appeals.

Shock Bros., Inc., brought an action against Morbark Industries, Inc., for breach of an implied warranty of merchantability of a chip harvester machine which Shock purchased from Morbark. The Macomb Circuit Court, Frank E. Jeannette, J., denied the defendant's motion for change of venue, which argued that venue was improperly laid in Macomb County, on the ground that the defendant had business contacts in Macomb County when the cause of action accrued. The Court of Appeals, D. C. Riley, P.J., and R. B. Burns and N. J. Kaufman, JJ., affirmed in a per curiam opinion, holding that the trial court did not abuse its discretion (Docket No. 44223). The defendant applies for leave to appeal.

In a unanimous per curiam opinion, the Supreme Court *held:*

The courts below reached the correct result, but the Court of Appeals used the wrong standard for review. When venue is improperly laid, the circuit court has no discretion to refuse to transfer the case, and the Court of Appeals, in reviewing the decision, must determine whether the trial court clearly erred in its finding of proper or improper venue, not whether it abused its discretion. A review of the record in this case shows that the circuit court did not err in denying the motion.

The judgment of the Court of Appeals is affirmed.

97 Mich App 616; 296 NW2d 125 (1980) affirmed.

Joseph E. Mihelich for plaintiff.

Warner, Norcross & Judd (by *Joseph G. Scoville* and *Eugene E. Smary)* for defendant.

PER CURIAM. The defendant in this case filed a motion in Macomb Circuit Court in which a claim was made that venue in this action had been

improperly laid. The circuit court denied the motion and the Court of Appeals affirmed that determination.[1] Although we agree with the result reached by the circuit court and by the Court of Appeals, we issue this opinion to correct a misperception of the standard of review by the Court of Appeals.

I

The plaintiff purchased a chip harvester machine from the defendant in 1975. In 1977 the plaintiff filed a lawsuit in Macomb Circuit Court claiming, *inter alia,* that the machine had several defects which occasioned the payment of costs by the plaintiff and further deprived the plaintiff of business revenues.

The defendant answered the allegations in the plaintiff's complaint but also moved for a change of venue claiming that venue was improperly laid in Macomb County. GCR 1963, 404.

The circuit court, after examining the record which included affidavits, found that venue was properly laid in Macomb County.

II

The Court of Appeals, in affirming, originally referred to this motion as one brought under GCR 1963, 403.[2] In a subsequent order this error was

[1] 97 Mich App 616; 296 NW2d 125 (1980), and order of July 15, 1980, granting rehearing.

[2] GCR 1963, 403 provides:

"The venue of any civil action properly laid, or of an appeal from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules and regulations, may be changed to any other county by order of the court upon timely motion by one of the parties, for convenience of parties and witnesses, or, in the case of appellate review of the administrative proceedings aforementioned, for convenience of coun-

corrected. However, the Court of Appeals made the following statement in its opinion:

"We review a trial court's resolution of venue questions under an abuse of discretion standard. As stated in *Hunter v Doe,* 61 Mich App 465, 467; 233 NW2d 39 (1975):

" 'The grant or denial of a motion to change venue rests in the sound discretion of the trial court and will be reversed on appeal only in cases where there is a plain abuse of that discretion.'

"See also *Three Lakes Ass'n v Whiting,* 75 Mich App 564; 255 NW2d 686 (1977)."

The Court of Appeals then went on to find that the circuit court had not abused its discretion in denying the motion.

III

Hunter v Doe, 61 Mich App 465; 233 NW2d 39 (1975), and *Three Lakes Ass'n v Whiting,* 75 Mich App 564; 255 NW2d 686 (1977), are cases in which the question was whether venue should be changed though properly laid. The Court of Appeals decided that in such circumstances the standard of review is one of abuse of discretion. We need not decide the correctness of those decisions because that is not the situation here.

In the instant case, the claim was that venue was not properly laid. The circuit court, had it found that venue was improperly laid, would have had no discretion to refuse to transfer the case. Accordingly, the abuse of discretion standard is inapplicable. See *DesJardin v Lynn,* 6 Mich App 439, 443; 149 NW2d 228 (1967). The Court of

sel, or when an impartial trial cannot be had in the county wherein the action is pending."

Appeals, in cases such as the instant one, must review the lower court's decision in order to determine whether that court clearly erred in ruling that venue was properly or improperly laid, not whether it abused its discretion.

IV

We do not, however, remand this matter to the Court of Appeals. Our review of the record convinces us that the circuit court did not err in denying the motion. Accordingly, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we affirm the decisions of the Macomb Circuit Court and of the Court of Appeals.

Costs to plaintiff.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

PEOPLE v BARFIELD

Docket No. 66202. Decided November 2, 1981. On application by the defendant for leave to appeal the Supreme Court, in lieu of granting leave to appeal, vacated a revised sentence and reinstated the original sentence.

Woodrow Barfield was convicted on his plea of guilty in Recorder's Court of Detroit, John R. Murphy, J., of assault with intent to rob while armed, and was sentenced to three years of probation. On August 13, 1975, the Recorder's Court of Detroit, Dalton A. Roberson, J., found the defendant guilty of violating his probation and sentenced him to one year in the Detroit House of Correction without mention of further probation, but on October 27, 1975, the trial court entered an order continuing him on probation until March 1, 1977, and the defendant was released. On January 22, 1976, the defendant was convicted on his plea of nolo contendere in Recorder's Court of Detroit, Henry L. Heading, J., of first-degree criminal sexual conduct, and was sentenced to life in prison on that conviction. The trial court in the assault case found the defendant guilty of violating his probation as a result of his conviction of the sexual offense and sentenced him to 66 to 100 years in prison, to run consecutively with his sentence for the sexual offense, and denied his motion for resentencing. The Court of Appeals, Bashara, P.J., and N. J. Kaufman and R. M. Maher, JJ., denied the defendant's application for delayed appeal (Docket No. 51233). The defendant applies for leave to appeal.

In a unanimous per curiam opinion, the Supreme Court *held:*

The sentence of 66 to 100 years in the assault case must be vacated. Once the original and valid sentence of one year in the Detroit House of Correction with no further provision for probation was imposed the court did not have the power to release the defendant, nor could the court order that the defendant be continued on probation at a later date. The court had no power at that time to vacate the sentence because the authority over the prisoner had passed out of his hands by his own order. The trial court cannot set aside a valid sentence and impose a new and different one after the defendant has been remanded to jail to await the execution of the sentence. The

efforts to continue the defendant's probation and to resentence him were a nullity.

The defendant's sentence of one year is reimposed, to be concurrent with his sentence for first-degree criminal sexual conduct.

Woodrow Barfield, *in propria persona.*

PER CURIAM. The question to be decided in this case is whether a defendant who is first placed on probation and is subsequently sentenced to jail for a violation of the conditions of probation, with no record evidence of an intent to continue the probation at the time of the jail sentence, may thereafter be continued on probation and be given a second sentence of incarceration upon a finding of another probation violation. We answer the question in the negative.

I

On February 11, 1974 the defendant pled guilty to a charge of assault with intent to rob while armed contrary to MCL 750.89; MSA 28.284. On March 1, 1974 he was sentenced to three years of probation. In August 1975 defendant was found to have violated the conditions of his probation and he was sentenced to one year in the Detroit House of Correction. There is no evidence in this record that the one-year sentence was a condition of probation. On October 27, 1975 the trial court entered an order continuing the defendant on probation until March 1, 1977. On October 28, 1975 the court which had sentenced the defendant to one year in jail ordered his release.

On November 8, 1975 the defendant engaged in sexual intercourse with his 13-year-old daughter. He pled nolo contendere to a charge of first-degree criminal sexual conduct contrary to MCL 750.520b;

MSA 28.788(2) on January 22, 1976. He received a sentence of life imprisonment for this conviction on February 12, 1976.

On February 13, 1976 the court which had originally sentenced the defendant to three years of probation for the assault with intent to rob while armed conviction (and which had entered the other orders recounted *supra),* revoked defendant's probation on the basis of the criminal sexual conduct conviction and sentenced him to 66 to 100 years in prison "consecutively to whatever sentence you receive from Judge Heading". The Court of Appeals affirmed.

II

In April 1980 the defendant filed a motion for an evidentiary hearing and to vacate sentence or resentence with regard to the term of 66 to 100 years. The motion was denied by order dated April 18, 1980. The Court of Appeals denied the defendant's application for leave to appeal.

III

We conclude that the sentence of 66 to 100 years in prison must be vacated. Once the original and valid sentence of one year in the Detroit House of Correction was imposed the court did not have the power to release the defendant, nor could the court order that the defendant be continued on probation at a later date. In *People v Meservey,* 76 Mich 223; 42 NW 1133 (1889), the defendants had pled guilty to a charge of burglary and were sentenced to terms of five years in prison. On the following day they were brought back into court. The trial judge vacated the sentences and resentenced each of them to longer terms. In setting aside the longer terms we stated:

"We also think that the original sentences had gone into effect, and that one day of the imprisonment at Jackson, under the sentences, had passed at the time the order was made vacating them. The circuit judge had no power at that time to vacate the sentences, because the authority over the prisoners had passed out of his hands by his own order." 76 Mich 226.

In the case of *In re Richards,* 150 Mich 421; 114 NW 348 (1907), we also stated:

"We have held that a trial court cannot set aside a valid sentence and impose a new and different one, after the defendant has been remanded to jail to await the execution of the sentence." 150 Mich 426.

See also *People v Chivas,* 322 Mich 384; 34 NW2d 22 (1948).

The trial court's efforts to continue the defendant's probation and to resentence him were a nullity.

IV

Accordingly, pursuant to GCR 1963, 853.2(4) in lieu of granting leave to appeal, we vacate the defendant's sentence of 66 to 100 years and we reinstate the originally imposed sentence of 1 year. We note that the defendant has been incarcerated with relation to this offense for approximately two months in 1975 and since February 1976. The one-year term is to be concurrent with the defendant's life sentence for first-degree criminal sexual conduct.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

SCHAIBLE v MYERS

Docket No. 64809. Decided November 2, 1981. On application by the defendants for leave to appeal the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and reinstated the judgment of the trial court.

Dennis L. Schaible, the widower of Kathleen A. Schaible, who died in an automobile accident, brought an action under the wrongful death act against Kevin J. Myers and Carlton N. Myers. The defendants admitted liability and after trial on the issue of damages a jury in St. Clair Circuit Court, Ernest F. Oppliger, J., returned a verdict for the plaintiff of $30,000. The defendants were permitted by the trial court, over the plaintiff's objection, to cross-examine the plaintiff's expert witness on whether, in forming his opinion on damages, he had assumed that the plaintiff would not remarry. The Court of Appeals, Bashara, P.J., and R. M. Maher and Daner, JJ., in an unpublished per curiam opinion, reversed and remanded for a new trial on the ground that the question about the plaintiff's remarriage improperly suggested to the jury that the possibility of the plaintiff's remarriage should have been considered to mitigate damages (Docket No. 78-323). The defendants appeal.

In a per curiam opinion signed by Chief Justice Coleman and Justices Williams, Fitzgerald, and Ryan, the Supreme Court *held:*

The possibility of the remarriage of a surviving spouse is not admissible to prove that there has been no loss of consortium, but an exposition of the assumptions, including the possibility of remarriage, on which an expert witness relied in calculating the plaintiff's economic loss is necessary to an intelligent understanding and evaluation of the worth of the expert's opinion. The expert witness's assumption concerning remarriage was of interest solely because of its effect on the issue of economic values. It is proper to impeach an expert witness by reviewing the assumptions which underlie the expert's opinion and by arguing that the opinion is mere conjecture based on erroneous assumptions.

The judgment of the Court of Appeals is reversed, and the judgment of the trial court is reinstated.

Justice Moody, joined by Justices Levin and Kavanagh, dis-

> sented on the ground that, in effect, the defendants were permitted to bring an irrelevant and improper consideration, the possibility of the plaintiff's remarriage, to the attention of the jury. Evidence of the effects of a subsequent remarriage should have no bearing on the amount of recovery for a wrongful death. Compensation received by the plaintiff from another source should not affect the responsibility owed to the injured party by the tortfeasor. It makes no difference whether the jury is specifically told to take into account the possibility of remarriage in assessing damages or whether the possibility is used to evaluate testimony by an expert witness regarding damages. In either case, such evidence is irrelevant and should be excluded.

McIntosh, Mugan, Cummings & McColl (by *John B. McNamee)* for plaintiff.

Bush, Luce, Henderson & Bankson (by *Robert J. Henderson)* for defendants.

PER CURIAM. In *Wood v The Detroit Edison Co,* 409 Mich 279, 288; 294 NW2d 571 (1980), a majority of this Court agreed that evidence of a plaintiff surviving spouse's remarriage was not to be used to determine damages in a wrongful death action.[1] We now must consider whether error occurred in this case when an expert witness, who offered his opinion as to the amount of damages suffered by the surviving spouse, was asked whether he was assuming that the surviving spouse would not remarry.

I

Plaintiff's decedent died in an automobile accident. Liability was admitted; the parties tried the issue of damages. A jury returned a verdict for the plaintiff in the amount of $30,000. The Court of

[1] See also *Bunda v Hardwick,* 376 Mich 640; 138 NW2d 305 (1965).

Appeals reversed that judgment and remanded the case for a new trial.[2]

II

To establish the amount of his damages, the plaintiff called to the stand a witness who expressed the opinion that the plaintiff had been damaged by as much as $528,000. On cross-examination, the defendants undertook a detailed and comprehensive examination of the assumptions which underlay this opinion. A portion of this examination is recounted here:

"*Q.* One of your assumptions, I assume, is that Mrs. Schaible would continue to want to work during all of those years as opposed to being a housewife and mother?

"*A.* Yes, for the years after she would be age 42.

"*Q.* And, of course, if for one reason or another she decided she didn't want to work that would affect your calculations, would it not?

"*A.* That's correct.

"*Q.* One of your assumptions was that she would, if she continued working, that she would turn over all of her earnings, over and above the cost of her own maintenance, to her husband or at least he would receive the economic benefit of it?

"*A.* Based on the information I have this is what's been happening in the family.

"*Q.* That is one of your assumptions?

"*A.* That's correct.

"*Q.* It is one of your assumptions that would continue throughout her working life?

"*A.* Yes.

"*Q.* Even after they got in their forties and fifties, your assumption was that would still continue?

[2] *Schaible v Myers,* unpublished per curiam opinion of the Court of Appeals of January 10, 1980, Docket No. 78-323.

"*A.* That's correct.

"*Q.* She wouldn't keep any of her own earnings for herself or whatever purpose, they would all go other than the 30 percent that you subtracted for the cost of her maintenance, one of your assumptions was that all of it would go to Mr. Schaible or at least he would receive the economic benefit of that?

"*A.* I assumed beyond the 30 percent, right.

"*Q.* One of your assumptions, I assume, was that the marriage would continue during that period?

"*A.* Yes. All the indications I had it was a happy marriage.

"*Q.* But that was one of your assumptions?

"*A.* Based on the information I have.

"*Q. And one of your assumptions, I assume, also, was that Mr. Schaible would not remarry and everything would remain the same up to his own death?*

"*A.* Yes.

"*Q.* Another one of your assumptions was that Mrs. Schaible would continue in good health and be able to work?

"*A.* That's correct.

"*Q.* Will you agree, Mr. Tansky, there is really no way you can say for sure any of the assumptions you made and upon which your opinions were based are valid with reference to this particular individual other than your opinion?

"*A.* Could you restate that question?

"*Q.* Okay, I can try, anyway. Would you agree there's really no way you can say, talking about you, now, for sure, that any or all of the assumptions that you have made and upon which your opinions are based, are valid, or would turn out to be valid with reference to this particular individual?

"*A.* In my opinion?

"*Q.* No, I'm not asking for your opinion, I'm asking whether there's any way you can say they will be valid.

"*A.* No, things might have been better or worse economically.

"*Q.* So, what we are saying, again, you don't have a crystal ball, you don't know what is going to happen in

the future or what would happen with reference to any one specific individual?

"*A.* That's correct." (Emphasis supplied.)

The defendants had earlier received permission from the trial court to ask the emphasized question. That question and its answer were discussed by defendants during closing argument.

The Court of Appeals described the question and answer as an "erroneous suggestion that the possibility of remarriage could be considered to mitigate damages". The Court reversed, stating:

"Although the defendants' cross-examination and argument did not explicitly state that the possibility of remarriage should be considered to mitigate damages, the facts actually elicited serve no purpose other than to infer *[sic]* that the expert's estimate of economic loss was not accurate because it did not reflect a possibility that the plaintiff would remarry."

III

We conclude that the Court of Appeals erred. The jury was not told to take into account the possibility that the plaintiff might remarry. Rather it listened to an exposition of the many assumptions upon which the expert witness relied in making his calculations of the plaintiff's economic loss. Such an exposition is necessary to an intelligent understanding and evaluation of the worth of the expert's opinion.

Unlike the situation in *Wood,*[3] this expert's assumption concerning remarriage was of interest to

[3] In *Wood* the plaintiff had remarried prior to trial. The trial court permitted testimony concerning the remarriage on the ground that if loss of society and companionship were claimed as damages, all facts pertaining to such loss, including remarriage, should be considered. *Wood,* 409 Mich 284.

the defendants solely because of its effect on the expert's opinion as to the amount of economic damages. It was proper for defendant to examine fully the assumptions which underlay the expert's opinion. By calling into question the worth of an expert's many assumptions, defense counsel can seek to show that what appears to be the opinion of an expert is no more than conjecture which the jury can then be urged to ignore.

It remains improper to introduce evidence of the possibility of remarriage to prove that there has been no loss of consortium. It is proper, though, to impeach an expert witness by reviewing the assumptions which underlie the expert's opinion and by arguing that the expert's opinion is mere conjecture based upon erroneous assumptions.

In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court. GCR 1963, 853.2(4).

Costs to defendants.

COLEMAN, C.J., and WILLIAMS, FITZGERALD, and RYAN, JJ., concurred.

BLAIR MOODY, JR., J. *(dissenting).* Less than two years ago, in *Wood v The Detroit Edison Co,* 409 Mich 279, 286-287; 294 NW2d 571 (1980), a majority of this Court reaffirmed Michigan's rule that

" 'evidence of plaintiff's remarriage or the *probability* of her remarriage is irrelevant and, therefore, was properly excluded, in *determining the damages* she suffered upon the death of her spouse' ".[1]

[1] The *Wood* Court quoted *Bunda v Hardwick,* 376 Mich 640, 656; 138 NW2d 305 (1965). In *Bunda,* as in the instant case, the Court focused upon the issue of economic loss, as opposed to loss of consortium.

Describing the reasons for the rule, the Court noted:

"[E]vidence of the effects of a subsequent marriage should have no bearing on the amount due a plaintiff following a wrongful death. Compensation received from another source should not affect the responsibility owed to the injured party by the tortfeasor." *Wood,* 287.

Because the majority decision today not only undercuts the rule so recently restated in *Wood,* but also conflicts with its underlying rationale, we respectfully dissent.

As stated by the Court of Appeals in the instant case:

"The defendants argue that the possible remarriage of the plaintiff in this case was not argued as a possible mitigating factor but that it was only mentioned to inform the jury that the plaintiff's expert witness based his calculation of damages upon the assumption that the plaintiff would not remarry. The defendants contend that their right to cross-examine the plaintiff's expert witness to determine the assumptions which he made in calculating damages extends to asking whether or not the expert assumed that the plaintiff would not remarry. Although the defendants' cross-examination and argument did not explicitly state that the possibility of remarriage should be considered to mitigate damages, the facts actually elicited serve no purpose other than to infer *[sic]* that the expert's estimate of economic loss was not accurate because it did not reflect a possibility that the plaintiff would remarry. The assumption implicit within the expert's conclusion was, however, a proper application of the cases cited above *[Bunda v Hardwick,* 376 Mich 640; 138 NW2d 305 (1965); and *Bradfield v Estate of Burgess,* 62 Mich App 345; 233 NW2d 541 (1975), *lv den* 395 Mich 803 (1975)] to the estimate of damages in this case."

Thus, in effect, defendants were permitted to

bring an irrelevant and improper consideration, the possibility of plaintiff's remarriage, to the attention of the jury.[2] Under the rationale stated in *Wood,* it should make no difference whether the jury is specifically told to take account of the factor of remarriage in assessing damages, as occurred in *Wood,* or whether that factor is used to evaluate an expert's testimony regarding damages, as occurred in the instant case. In either case, such evidence is irrelevant and should be excluded.

Accordingly, we would affirm the decision of the Court of Appeals and remand the case for a new trial.

KAVANAGH and LEVIN, JJ., concurred with BLAIR MOODY, JR., J.

[2] In the instant case, not only did defendants' attorney raise the question of Mr. Schaible's remarriage during cross-examination of the expert witness, but he also discussed the question and its answer during his closing argument. Such repetition may have served to exaggerate the improper effect upon the jury.

FREDERICKS v GENERAL MOTORS CORPORATION

Docket No. 62960. Argued April 15, 1980 (Calendar No. 3).—Decided November 2, 1981.

Robert Fredericks brought an action against the General Motors Corporation for the loss of his hand suffered while he was operating a power press in the course of his employment at the Manistee Drop Forge Company to manufacture parts for the defendant. The die set being used at the time of the injury in the press at the Manistee Drop Forge Company had been built by the Lindell Drop Forge Company, and was owned by the defendant. The plaintiff alleged that the defendant negligently supplied the dies to his employer without a safety guard and should have known that the dies would be likely to be used in an unsafe manner. He also claimed that the absence of a guard on the dies subjected the defendant to strict liability for supplying an unreasonably dangerous product and offered proofs concerning the unsafe use of dies in the industry generally. The Manistee Circuit Court, Charles A. Wickens, J., upon remand by the Court of Appeals for trial (48 Mich App 580), decided that the plaintiff's evidence concerning unsafe use of the dies was inadmissible and granted a directed verdict for the defendant, after presentation of the plaintiff's other proofs, on the ground that there was no evidence that the defendant knew that the dies were likely to be used in a negligent manner by the Manistee Drop Forge Company. The Court of Appeals, T. M. Burns, P.J., and M. J. Kelly and D. F. Walsh, JJ., affirmed in a memorandum opinion (Docket No. 77-5220). Plaintiff appeals.

In an opinion by Justice Kavanagh, joined by Chief Justice Coleman and Justices Levin, Fitzgerald, and Ryan, the Supreme Court *held:*

1. To sustain a cause of action for negligent entrustment of a

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 8, 9] 8 Am Jur 2d, Bailments § 276.

[3] 8 Am Jur 2d, Bailments §§ 278, 279.

Products liability: Industrial presses. 8 ALR4th 70.

[4, 5] 63 Am Jur 2d, Products Liability §§ 174, 178.

[6, 7] 8 Am Jur 2d, Bailments § 317.

[10] 8 Am Jur 2d, Bailments §§ 276, 317.

manufactured product to another party a plaintiff must prove that the defendant knew or should have known of the propensities of the entrusted party for taking unreasonable risks. The plaintiff acknowledges that he could not prove that General Motors Corporation knew that the dies would be used in an unsafe manner, but he maintains that the defendant should have known as much. He complains about poor safety conditions throughout the industry and argues that the defendant is in a position, because of its "economic clout", to require the manufacturers of its parts (job shops) to provide safety guards on presses or dies.

2. What the defendant could accomplish has no bearing on a claim of negligent entrustment. The plaintiff did not prove that the defendant knew that all job shops were unsafe or that the defendant had special knowledge of particular conditions at the Manistee Drop Forge Company which would put the defendant on notice that use of the dies in an unsafe manner was likely there. Therefore, the plaintiff has not proven his claim of negligent entrustment.

3. The plaintiff also claims that the unguarded die set is unreasonably dangerous and therefore defective so that its supplier is liable for personal injuries sustained by its use on a theory of products liability. The plaintiff's injury may well have resulted from the absence of a guard on the dies; however, the accident also might have been prevented by guarding on the power press, or by other methods of guarding the point of operation. A product is defective if it is not reasonably safe for its foreseeable uses. An unguarded die may be used in a reasonably safe manner in a guarded press or in an unsafe manner in an unguarded press. At the time of the plaintiff's injury a statutory duty was imposed upon employers to establish and maintain conditions of work which are reasonably safe and healthful for employees. In the light of this duty, it cannot be held as a matter of law that it was foreseeable to the defendant that the product supplied for use by the plaintiff's employer would be used in an unsafe manner.

4. There was no error in the trial court's ruling that the other evidence offered by the plaintiff was inadmissible. The evidence concerning accidents involving other General Motors dies was not admissible to prove notice to the defendant because it concerned accidents which occurred after the accident in issue and which were irrelevant to this action. The proffered proof of writings and publications of the defendant criticizing the use of unguarded dies lacked sufficient foundation for its admission because the plaintiff was unable to show their rele-

vance to the occurrence in this case or to the testimony of the defendant's safety engineer.

Affirmed.

Justice Moody, joined by Justice Williams, dissented. He would hold that the relationship between the plaintiff and defendant in this case gives rise to a duty on the part of the defendant for the benefit of the plaintiff under the doctrine of negligent entrustment.

1. An entrustor may be subject to liability if he had reason to know that the entrustee is likely to use the entrusted chattel in a manner involving an unreasonable risk of physical harm. Whether the defendant had reason to know that the dies would be used in an unsafe manner should be a question for the jury. If the defendant had information from which a person of reasonable intelligence, or of the superior intelligence of the defendant, would infer that the risk in question exists, or such a person would govern his conduct upon the assumption that the risk exists, then the defendant had reason to know of the risk.

2. The plaintiff introduced evidence sufficient to withstand a motion for directed verdict. The safety director of the defendant's Saginaw Steering Gear Division testified that many job shops have power press operations which require their employees to reach into the "zone of danger" between the dies mounted on the power presses. The hand-loading process is a standard procedure at job shops, and the cost of providing guards for presses and dies may be prohibitive for job shops like Manistee Drop Forge Company. That testimony by an expert on safety was sufficient evidence to create a question for the jury whether General Motors had reason to know that Manistee Drop Forge Company would use the dies in a manner involving an unreasonable risk of harm to its employees. Therefore, it was error to grant the defendant's motion for a directed verdict.

OPINION OF THE COURT

1. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE.

To sustain a cause of action for negligent entrustment of a chattel to another party a plaintiff must prove that the defendant knew or should have known of the propensities of the party entrusted for taking unreasonable risks of injury.

2. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE — EVIDENCE — SUFFICIENCY.

Sufficient peculiarities of the party entrusted by a defendant with

a chattel to put the defendant on notice of the likelihood that the chattel would be used in an unsafe manner must be demonstrated by the plaintiff to prove a claim that the entrustment was negligent in the absence of proof that the defendant knew of the propensities of the party entrusted for taking unreasonable risks of injury.

3. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE — EVIDENCE — SUFFICIENCY.

A plaintiff failed to prove a claim that a defendant negligently entrusted a set of dies without a safety guard to the plaintiff's employer for use in a power press to make parts for the defendant where the plaintiff generally complained of poor safety conditions throughout the parts jobbing industry and argued that the defendant was in an economic position to require improvements in the conditions under which its parts were made but failed to prove that the defendant knew that all job shops were unsafe or that the defendant had special knowledge of the plaintiff's employer which would put the defendant on notice that the employer was likely to use the defendant's dies in an unsafe manner.

4. PRODUCTS LIABILITY — DEFECTIVE PRODUCT — UNREASONABLY DANGEROUS — WORDS AND PHRASES.

A product is unreasonably dangerous and therefore defective so that its supplier is liable for personal injuries sustained by its use if the product is not reasonably safe for its foreseeable uses.

5. PRODUCTS LIABILITY — DEFECTIVE PRODUCT — UNREASONABLY DANGEROUS — DIES — OCCUPATIONAL SAFETY ACT.

It cannot be held as a matter of law that it was foreseeable to a defendant that a set of dies without a safety guard which the defendant owned and supplied to the plaintiff's employer for use in a power press to make parts for the defendant would be used in an unsafe manner without guards where an unguarded die may be used in a reasonably safe manner by other methods of guarding the point of operation of a power press and at the time of the plaintiff's injury the occupational safety act required each employer to maintain conditions of work which are reasonably safe and healthful for employees (MCL 408.852; MSA 17.49[2]).

6. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE — EVIDENCE — ADMISSIBILITY — RELEVANCE.

Evidence of accidents involving other dies without safety guards belonging to a defendant manufacturer was irrelevant and

inadmissible to prove that the defendant should have known that the dies it supplied to the plaintiff's employer would be used in an unsafe manner where the evidence concerned accidents which occurred after the injury in issue.

7. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE — EVIDENCE — ADMISSIBILITY — RELEVANCE.

Writings and publications of a defendant manufacturer criticizing the use of dies without safety guards are inadmissible on the issue of whether the defendant should have known that such dies were likely to be used in an unsafe manner by the plaintiff's employer in a power press to make parts for the defendant where there was no showing of the relevance of the proffered evidence to the plaintiff's injury or to the testimony of the defendant's safety engineers.

DISSENTING OPINION BY BLAIR MOODY, JR., J.

See headnote 1.

8. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE.

A defendant may be liable for negligent entrustment of a chattel to another if the defendant had reason to know that the one entrusted is likely to use the chattel in a manner involving an unreasonable risk of physical harm.

9. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE.

A defendant had reason to know that the dies it supplied to the plaintiff's employer would be used in an unsafe manner where the defendant had information from which a person of reasonable intelligence, or the superior intelligence of the defendant, would infer that the risk in question exists, or such a person would govern his conduct upon the assumption that the risk exists.

10. NEGLIGENCE — NEGLIGENT ENTRUSTMENT — KNOWLEDGE — EVIDENCE — SUFFICIENCY.

Whether a defendant manufacturer had reason to know that a set of dies without a safety guard, entrusted to the plaintiff's employer for use in a power press to make parts for the defendant, would be used in an unsafe manner is for the jury where an expert on safety employed by the defendant testified that many job shops manufacturing parts require their employees to reach between dies mounted on power presses, the hand-loading process is a standard procedure at job shops, and the cost of providing guards for power presses and dies may be prohibitive for such job shops.

McCroskey, Libner, VanLeuven, Kortering, Cochrane & Brock for plaintiff.

Cholette, Perkins & Buchanan (by *Grant J. Gruel* and *Charles H. Worsfold); Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.* (by *James R. Kohl),* and *Otis Smith,* General Counsel *(Joseph M. Rozek,* of counsel), for defendant.

Amici Curiae:

Dickinson, Wright, McKean, Cudlip & Moon (by *John E. S. Scott* and *Richard A. Glaser)* for Michigan Defense Trial Counsel.

Kelman, Loria, Downing, Schneider & Simpson (by *Nicholas J. Rine)* and *Goodman, Eden, Millender & Bedrosian* (by *Joan Lovell)* for Michigan Trial Lawyers Association.

KAVANAGH, J. *(for affirmance).* The plaintiff was an employee of Manistee Drop Forge Company when he lost the major part of his left hand while operating an unguarded power press during the course of his employment. He sued to recover damages from the defendant who owned the die set being used in the press at the time of the accident.

The dies themselves were not manufactured by the defendant, but had been built by Lindell Drop Forge and were used by Lindell to manufacture parts for the defendant. When a labor dispute closed Lindell, defendant acquired possession of the dies and negotiated a contract with Manistee Drop Forge to have parts manufactured by Manistee with the dies. Under the arrangement Manistee was to make revisions in the dies as necessary

to adapt them to use on a press owned by Manistee.

The suit which plaintiff filed originally on December 29, 1970 sought recovery on the theory of negligence, implied warranty and strict liability. Following opening arguments the court granted defendant's motion for summary judgment.

On appeal the Court of Appeals reversed and remanded for a new trial, holding that the trial court erred in finding as a matter of law that defendant as owner of the dies had no duty to warn or duty to prescribe the method in which they were used. The Court held: "We find that an allegation that a defendant supplied a chattel to a party knowing the chattel would be used in a negligent manner states a cause of action, at least preliminarily, against the defendant for injuries to others resulting from the party's negligence." *Fredericks v General Motors Corp,* 48 Mich App 580, 583; 211 NW2d 44 (1973).

At the second trial at the close of plaintiff's proofs the trial court granted defendant's motion for a directed verdict, holding that there was no proof of any knowledge on the part of defendant that the dies were likely to be used in a negligent manner.

The Court of Appeals affirmed and we granted leave to appeal to consider (1) whether, prior to entrusting a die set to a manufacturer of automobile components, defendant had a duty to place guards on the die set or warn the component manufacturer of hazards attendant in its use, and (2) whether the trial court erred in excluding evidence and exhibits offered by the plaintiff in support of his negligent entrustment theory.

We answer both questions in the negative and affirm.

To sustain a cause of action for negligent entrustment a plaintiff must prove that defendant knew or should have known of the unreasonable risk propensities of the entrustee. *Moning v Alfono,* 400 Mich 425; 254 NW2d 759 (1977); 2 Restatement Torts, 2d, § 390, p 314. In this instance plaintiff needed to prove that General Motors knew or should have known that Manistee Drop Forge would use the dies in such a manner as to create the risk of amputation. Plaintiff's attorney acknowledged, both at trial and during oral argument before this Court, that he could not prove that General Motors in fact *knew* that Manistee Drop Forge would use its dies in an unsafe manner. Plaintiff maintained, however, that defendant *should have known* as much.

To prove an entrustor should have known an entrustee was likely to use the entrusted chattel in an unsafe manner, peculiarities of the entrustee sufficient to put the entrustor on notice of that likelihood must be demonstrated. Plaintiff introduced no evidence of peculiarities of Manistee Drop Forge, but rather complained of poor safety conditions industry-wide.

At oral argument plaintiff's attorney suggested: "The case today that we're dealing with, I think everybody recognizes, is not just Robert Fredericks * * *. What we're debating today is clearly power press safety." Plaintiff opined that poor working conditions at job shops are rampant. As a solution, plaintiff suggests that if defendant required all jobbers to provide guards on presses or dies the jobber would comply. General Motors could effectuate this result, suggests plaintiff, because of its "economic clout".

What the defendant could accomplish on account of its "economic clout" or otherwise has no bearing on negligent entrustment.

Plaintiff's assertion that bad safety conditions pertain at *all* job shops is subject to proof. If plaintiff had proved defendant knew that all job shops were unsafe he would have established that defendant knew Manistee Drop Forge was not to be entrusted with the dies. Plaintiff did not prove this nor that defendant had special knowledge of Manistee Drop Forge which would put defendant on notice.

Plaintiff did not prove negligent entrustment.

As an alternative to negligent entrustment plaintiff contends that an unguarded die is unreasonably dangerous and should, therefore, be considered "defective", giving rise to products liability on the part of the supplier for personal injuries sustained by its use. Plaintiff argues that his injury was a result of the absence of a guard on this particular die, that General Motors could have provided a guard, and that the failure to provide a guard should result in liability. Plaintiff's injury may well have resulted from the absence of guarding; however, this accident might have been prevented by guarding on the press instead of the die. There are numerous methods of guarding the point of operation on a power press. Die guards are merely one.

A product is defective if it is not reasonably safe for its foreseeable uses. An unguarded die may be used in a reasonably safe manner in a guarded press or in an unsafe manner in an unguarded press. At the time of plaintiff's injury 1967 PA 282 required that "[e]ach employer shall establish and maintain conditions of work which are reasonably safe and healthful for employees". In light of this statutory duty imposed on Manistee Drop Forge we cannot hold as a matter of law that it was foreseeable to defendant that the product it sup-

plied would be used in an unsafe manner rendering it defective.

As to the second issue, we find no error in the trial court's evidentiary rulings. The evidence offered by plaintiff to establish accidents involving other General Motors dies was not admissible to prove notice to defendant as they occurred after the accident in issue and were irrelevant to this action. The proffered proof of defendant's own writings and publications decrying the use of unguarded dies lacked sufficient foundation for admission as plaintiff's counsel was unable to relate them to the Fredericks occurrence or the testimony of defendant's safety engineer.

The Court of Appeals is affirmed.

COLEMAN, C.J., and LEVIN, FITZGERALD, and RYAN, JJ., concurred with KAVANAGH, J.

BLAIR MOODY, JR., J. *(for reversal).* Robert Fredericks was an employee of Manistee Drop Forge Company. Shortly after he began his employment with Manistee Drop Forge his left hand was severely injured while he was operating a power press. His hand was crushed in an unguarded die set owned by General Motors Corporation.

The die set had been manufactured by Lindell Drop Forge for General Motors. Lindell used the die set to manufacture parts for General Motors. A labor dispute closed Lindell Drop Forge. General Motors took possession of its dies and after contracting with Manistee to manufacture the parts, shipped the dies to Manistee Drop Forge.

Mr. Fredericks brought suit in 1970 to recover damages for the injury to his hand from the defendant, owner of the die set. Essentially, he claims that General Motors supplied a die set that presented a hazard to employees of Manistee Drop

Forge and that General Motors should have warned of or guarded against this danger. The trial court granted defendant's motion for summary judgment after the opening statements. The Court of Appeals, applying the doctrine of negligent entrustment, reversed and remanded for a new trial. *Fredericks v General Motors Corp,* 48 Mich App 580; 211 NW2d 44 (1973), *lv den* 390 Mich 805 (1973).

At the second trial the court granted defendant's motion for a directed verdict at the close of plaintiff's proofs. The trial court ruled that the plaintiff failed to produce any proof that General Motors had any knowledge that the dies would be used in a negligent manner. In addition, the court determined that General Motors had no knowledge as to the particular misuse of the dies at Manistee Drop Forge at the time of the injury to Mr. Fredericks.

The Court of Appeals affirmed in an unpublished memorandum opinion. We granted leave to appeal and directed the parties to include among the issues to be briefed "(1) whether, prior to entrusting a die set to a manufacturer of automobile components, defendant had or should have had a duty to place guards on the die set or warn the component manufacturer of hazards attendant in its use, and (2) whether the trial court erred in excluding evidence and exhibits offered by the plaintiff in support of his negligent entrustment theory". 407 Mich 896-897 (1979).

We would hold that the relationship between plaintiff and defendant gives rise to a duty: a legal obligation on the defendant's part for the benefit of the plaintiff. It is for a jury to decide whether the defendant should have warned the component manufacturer or the plaintiff; whether the defen-

dant should have placed guards on the die set; whether the defendant should have taken any other action to lessen the risk of injury; or whether the defendant acted in a reasonably prudent manner.

Since we would reverse on the issue of substantive law, we decline to address the question of whether the trial court erred in excluding certain evidence. Upon retrial, any proffered evidence would have to be evaluated in light of the law set forth in this opinion and the Michigan Rules of Evidence adopted after the second trial in this case.

In *Moning v Alfono,* 400 Mich 425, 443-444; 254 NW2d 759 (1977), this Court approved the doctrine of negligent entrustment set forth in 2 Restatement Torts, 2d, § 390, p 314:

> "One who supplies directly or through a third person a chattel for the use of another whom the supplier *knows or has reason to know* to be likely because of his youth, inexperience, *or otherwise,* to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." (Emphasis added.)

There is no question that the entrustor-supplier, General Motors, should have expected that Robert Fredericks, an employee of the component manufacturer, would share in the use of the chattel. As to the question of knowledge of the likelihood of unsafe use, plaintiff's attorney admitted that he could not prove that General Motors *actually knew* that Manistee Drop Forge would use General Motors' die set in a dangerous manner.

However, according to § 390 of the Restatement, the entrustor may also be subject to liability if he

had *reason to know* that the entrustee is likely to use the entrusted chattel in a manner involving an unreasonable risk of physical harm.

"The words 'reason to know' are used throughout the Restatement of [Torts] to denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor *would infer that the fact in question exists,* or that such person would govern his conduct upon the assumption that such fact exists." 1 Restatement Torts, 2d, § 12, p 19. (Emphasis added.)

Whether General Motors should have inferred that its die set would likely be used in a dangerous manner, *i.e.,* whether General Motors, in view of the evidence received by the court, had reason to know of the unsafe use of the die set at Manistee Drop Forge should be a question for the jury. The plaintiff introduced evidence sufficient to withstand a motion for directed verdict. The jury heard the testimony of Jack C. Gerwin, who at the time of the injury in this case was safety director of Saginaw Steering Gear Division of General Motors Corporation:

"*Q. [By Mr. Brock, Plaintiff's Attorney]:* And, a lot of job shops have operations set up that require their operators to reach into the die areas and the zone of danger?

"*A.* I have seen this.

"*Q.* Have you seen this often enough so that you are aware that this is more or less a standard way of proceedings *[sic]* in these small job shops?

"*A.* That's right. Let's face it; it costs money to guard presses.

"*Q.* And, most of the job shops do not have money to hire engineers and safety directors?

"*A.* That's right. Although, in most of the job shops,

they hire their own little boss that takes care of these little incidentals. The purchaser is buying a safety director and an engineer.

"*Q.* On this particular operation, did you gain the impression from Mr. Fredericks' deposition that the press was being activated with a single button?

"*A.* Yes, that is the impression that I got from the deposition.

"*Q.* It was being fed with his hands?

"*A.* It was being fed with a right hand, let's see, no, the left hand and being retracted from the die with the right hand, the cycle with the right hand. So, there was a great possibility of what happened to him because he could load with his left hand and cycle with his right hand.

* * *

"*Q. [By Mr. Brock, Plaintiff's Attorney]:* In looking at it as a safety engineer, it appears it would be a relatively simple method to design a revolving die or sliding or progressive die for this operation?

"*A.* Not for a small outfit like Manistee Drop Forge. It would costs *[sic]* maybe $40,000 to put that in.

"*Q.* Manistee Drop Forge would not have the economic capacity to design and manufacture such a die?

"*A.* Well, this is, in a way, it is the entire press, the whole sheet.

"*Q.* So, Manistee Drop Forge did not have the economic power to develop such a system of operation?

"*A.* I wouldn't think so, because they are basically a job shop, and they are doing this maybe three months and then they have got a press sitting there they can't use. And, they can't tie up their capital in this way. So, they are doing the job on presses they can do many other things."

This testimony would permit a jury to conclude that General Motors had reason to know that Manistee Drop Forge would use the dies in a manner involving an unreasonable risk of harm to its employees. There is no question that placing a hand between dies mounted on a power press

poses a substantial risk of serious injury. The testimony of Mr. Gerwin indicates that many job shops have power press operations which require their employees to reach into the "zone of danger". This hand-loading process is a standard procedure at job shops. The cost of guarding presses and dies may be prohibitive for jobbers like Manistee Drop Forge.

These facts, testified to by a safety expert, are sufficient evidence for consideration by a jury. It is the jury who should decide whether General Motors should have inferred or assumed that there was a likelihood of an unreasonable risk of physical harm to the employees of Manistee Drop Forge. Jurors should have been permitted to determine if it was likely, given the evidence of costs to and procedures at job shops, that General Motors' dies would be used in a dangerous manner.

On appeal of a directed verdict for defendant we view the evidence in the light most favorable to the plaintiff and draw the reasonable inferences from the testimony which are in his favor. *Dodd v Secretary of State,* 390 Mich 606, 612; 213 NW2d 109 (1973). We conclude that it was error to grant defendant's motion for directed verdict. Under § 390 of the Restatement of Torts the defendant owed plaintiff a duty. Whether the defendant should have placed guards on the die set or taken other action is a question to be answered on retrial.

Accordingly, we would reverse and remand for a new trial.

WILLIAMS, J., concurred with BLAIR MOODY, JR., J.

In re CERTIFIED QUESTION

(AIR PRODUCTS & CHEMICALS, INC v J F CAVANAUGH CO, INC)

Docket No. 66824. Decided November 2, 1981. On certification of a question by the United States District Court for the Eastern District of Michigan the Supreme Court answered the question in the negative.

Air Products and Chemicals, Inc., brought an action in the United States District Court for the Eastern District of Michigan against J. F. Cavanaugh Co., Inc., and its surety, Travelers Indemnity Company, for breach of a contract to pay the plaintiff for furnishing design and engineering services, and material and equipment, for an oxygen plant which defendant J. F. Cavanaugh Co. was constructing for the City of Detroit. The plaintiff alleged, among other things, that the defendant J. F. Cavanaugh Co. has received from the city approximately $805,000 which is owed to the plaintiff for the work performed and that the money constituted a trust fund by operation of the Michigan building contract fund act. The United States District Court, Philip Pratt, J., granted summary judgment for the plaintiff as to the claim of a statutory trust. Defendant J. F. Cavanaugh Co. moved for rehearing, claiming that the building contract fund act does not apply to public construction contracts. The United States District Court held the matter in abeyance and certified to the Supreme Court of Michigan the question whether the statute creates a trust fund for the benefit of suppliers of services and material for public construction projects.

In a unanimous per curiam opinion, the Supreme Court *held:*

The building contract fund act applies only to private construction contracts and not to public construction contracts. The purpose of the statute is to create a trust fund for the benefit of material suppliers and others under private construction contracts. It stands alone, without any reference to any other statute, and is in harmony with the provisions of the mechanics' lien law. The Court cannot presume, in the absence

of explicit language, that it was intended to apply to the erection of public buildings or to public works.

The reason for the difference in treatment of private and public construction contracts is found in the conditions of the time of its enactment, 1931. After the crash of 1929 and the consequent widespread insolvency of building contractors, subcontractors and materialmen on private projects were left only with mechanics' liens as remedies, and these were often ineffective. On the other hand, suppliers of labor and material on public projects were protected by statutorily required payment and performance bonds. Statutes like the building contract fund act were enacted to afford a supplement to the mechanics' lien law, providing a more effective remedy for private project suppliers against their principal contractors than they had previously.

The certified question is answered in the negative.

Dykema, Gossett, Spencer, Goodnow & Trigg (by *Richard J. McClear* and *Paul Owen Ashba)* for plaintiff.

Bujold & Bailey, P.C. (by *Frank J. Bujold, George B. Bailey, Jr.,* and *Douglas A. Tull),* for defendant J. F. Cavanaugh Co., Inc.

PER CURIAM. Pursuant to GCR 1963, 797 the United States District Court for the Eastern District of Michigan has certified the following question to us:

"Whether the building contract fund act, 1931 PA 259, as amended; MCL 570.151 *et seq.;* MSA 26.331 *et seq.,* applies to public construction projects."

We answer the question in the negative.

I

This case comes to us with the following statement of facts as certified by the United States District Court:

"On October 16, 1976, defendant J. F. Cavanaugh Co., Inc. ('Cavanaugh'), entered into a written contract with the City of Detroit, designated as contract PC-288A, for the construction of a 400 ton per day oxygen plant for a price of $10,448,000. Cavanaugh supplied a payment bond in that amount issued by the defendant The Travelers Indemnity Company ('Travelers'), as surety.

"On November 30, 1976, defendant Cavanaugh entered into a written contract with plaintiff Air Products and Chemicals, Inc. ('Air Products'), under the terms of which Air Products agreed to furnish to Cavanaugh certain design and engineering services, material, and equipment in the prosecution and performance of the work under the contract between Cavanaugh and the city. Cavanaugh was to pay Air Products $7,400,000 for such work subject to certain adjustments.

"Under the terms of the contract between Air Products and Cavanaugh, Air Products was required to submit to Cavanaugh on the 25th day of each calendar month invoices for items of work completed during that month. Cavanaugh was then obligated to add no more than 5% to the Air Products price and to promptly submit its invoices to the city for Air Products items of work. Upon receipt by Cavanaugh of payment from the city for work performed by Air Products, Cavanaugh was to pay Air Products within two working days, net of the city's retainage. Cavanaugh did not elect to add the 5% markup on invoices submitted to the city.

"Construction of the oxygen plant under contract PC-288A has been substantially completed. To date, Cavanaugh has been paid approximately $10,322,000 by the City of Detroit. Cavanaugh has paid Air Products approximately $6,500,000 upon their agreement. Cavanaugh has received but not paid to Air Products approximately $805,000 from the city for work performed by Air Products.

"Air Products filed its action on June 10, 1980 against Cavanaugh and its surety, Travelers, in this court alleging, among other matters, existence of a trust fund under the building contract fund act, 1931 PA 259, as amended; MCL 570.151 *et seq.;* MSA 26.331 *et seq.*

"Cavanaugh and Travelers as part of their answer to the complaint denied that the act applied to public projects. Cavanaugh filed a counterclaim alleging breach of the agreement, seeking damages from Air Products in excess of $900,000.

"In October, 1980 Air Products brought a motion for summary judgment upon count I (breach of contract) and count V (building contract fund act) of its complaint.

"On December 24, 1980, the court granted Air Products' motion for partial summary judgment on count V (building contract fund act) and held that Air Products was entitled to immediate possession of trust funds in the amount of $805,108.60. Cavanaugh was further ordered to disburse those funds and to account for any other funds received from the city in payment for work done by Air Products. A copy of the court's memorandum opinion and order, dated December 24, 1980, is attached hereto as exhibit 'A'.

"Following issuance of the court's memorandum opinion and order, Cavanaugh timely filed a motion for rehearing, citing the recent Michigan Court of Appeals decision in *Earl Dubey & Sons, Inc v Macomb Contracting Corp,* 97 Mich App 553; 296 NW2d 582 (1980), which held that the act *does not* apply to public contracts, citing with approval the dissenting opinion in *Parker v Klochko Equipment Rental Co, Inc,* 590 F2d 649 (CA 6, 1979).

"The issue appropriate for certification to the Michigan Supreme Court pursuant to the provisions of GCR 1963, 797.2 is whether the building contract fund act, MCL 570.151 *et seq.,* applies to public contracts. As indicated in its memorandum opinion and order, the court followed *Parker, supra,* which expressly held that the act *does* apply to public contracts. In its opinion, this court held that it was bound to follow and apply *Parker.* This court has held in abeyance enforcement of its memorandum opinion and order and a decision on Cavanaugh's motion for rehearing pending the outcome of this certification.

"This court finds that the following question is not now controlled by Michigan Supreme Court precedent.

Accordingly, it is appropriate that it be certified to the Michigan Supreme Court pursuant to the provisions of GCR 1963, 797.2 for resolution."

II

In *National Bank of Detroit v Eames & Brown, Inc,* 396 Mich 611; 242 NW2d 412 (1976), we considered the question of whether an unsecured creditor claiming under the building contract fund act, MCL 570.151 *et seq.;* MSA 26.331 *et seq.,* has priority over a previously perfected security interest in all present and after-acquired contract rights, accounts, general intangibles, and chattel paper. In deciding this question we stated:

"The purpose of the act is to create a trust fund for the benefit of materialmen and others under *private* construction contracts." (Emphasis supplied.) 396 Mich 622.

Additionally, in *Club Holding Co v Flint Citizens Loan & Investment Co,* 272 Mich 66; 261 NW 133 (1935), overruled on other grounds by *B F Farnell Co v Monahan,* 377 Mich 552; 141 NW2d 58 (1966), this Court had occasion to construe 1931 PA 259 and we stated:

"The act in question stands alone, without any reference to another; it is in harmony with the various provisions of the mechanics' lien law, and we cannot presume, in the absence of explicit language, that it was intended to apply to the erection of public buildings or to public works." 272 Mich 72.

Nevertheless, the United States Court of Appeals for the Sixth Circuit held in *Parker v Klochko Equipment Rental Co, Inc,* 590 F2d 649 (CA 6, 1979), that the act in question applies to

public construction contracts. The dissent in *Parker,* however, relied on our decision in *National Bank of Detroit v Eames & Brown, Inc.*

The Michigan Court of Appeals recently took note of this situation in *Earl Dubey & Sons, Inc v Macomb Contracting Corp,* 97 Mich App 553; 296 NW2d 582 (1980), *lv den* 410 Mich 897 (1981). The Court pointed to our decision in *National Bank of Detroit v Eames & Brown, Inc,* and to the dissent in *Parker,* and held that the building contract fund act does not apply to public construction contracts.

III

We reaffirm our rulings in *National Bank of Detroit v Eames & Brown, Inc,* and in *Club Holding Co v Flint Citizens Loan & Investment Co* that the act applies only to private construction contracts. It has no applicability to public construction contracts. Indeed we believe that the United States Court of Appeals for the Sixth Circuit in *General Ins Co of America v Lamar Corp,* 482 F2d 856 (CA 6, 1973), cited with approval in *National Bank of Detroit v Eames & Brown, Inc,* accurately analyzed the reason for the differentiation:

"The legislative history of the Michigan statute itself is obscure. The briefs of the parties do nothing to illuminate it, and our research has not disclosed the exact circumstances of the statute's enactment. Nevertheless, the date of its passage, 1931, identifies the act as one of a genre of Depression-era measures intended to afford relief to subcontractors and materialmen in the construction industry.

"During the boom period of the 1920's, speculative builders often undertook to construct projects too large for their available capital to finance, and they frequently paid suppliers and materialmen on older projects with funds received as payment on more current

operations. With the advent of the crash of 1929 and the consequent widespread insolvency of many building contractors, these pyramided empires also collapsed and many subcontractors and suppliers were never paid. Subcontractors and materialmen on private projects were left only with mechanics' liens as remedies, and these were often ineffective. See generally Grossman, *Trust and Penal Provisions of the New York State Mechanics' Lien Law,* 5 Brooklyn L Rev 14, 16-22 (1935).

"On the other hand, suppliers of labor and material on public projects were protected by statutorily required payment and performance bonds. These bonds required for public projects were intended 'to afford protection to the suppliers of labor or materials, similar to that afforded under the mechanics' lien laws in the case of private buildings or construction.' * * *

"When Depression-era experience demonstrated the inadequacy of mechanics' liens in many cases because the owner had a defense if he had paid the principal contractor, statutes like the Michigan Act of 1931 were enacted to afford a 'supplement to the Mechanics' Lien Law', providing a more effective remedy for private project suppliers against their principal contractors than they had previously."

The certified question is answered in the negative.

COLEMAN, C.J., and KAVANAGH, WILLIAMS, LEVIN, FITZGERALD, RYAN, and BLAIR MOODY, JR., JJ., concurred.

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

VOVAK v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE. (Docket No. 65391.) Leave to appeal denied April 1, 1981. *Joseph Crystal* for plaintiffs-appellees. *Dickinson, Pike, Mourad, Brandt & Hanlon* and *Gromek, Bendure & Thomas* for defendant-appellant. Reported below: 98 Mich App 81.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE v NEEQUAYE. (Docket No. 65179.) Leave to appeal denied April 1, 1981. *Dickinson, Pike, Mourad, Brandt & Hanlon* and *Gromek, Bendure & Thomas* for plaintiff-appellant. *Law Offices of A. Jerome Allen* for defendant-appellee. Case below, Court of Appeals No. 78-3959, per curiam opinion of April 25, 1980.

PEOPLE v DOSS. (Docket No. 65870.) Leave to appeal is considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the judgments of the Court of Appeals and Wayne Circuit Court and remand the case for retrial. Reversible error occurred when the trial court allowed the prosecution to present upon rebuttal testimony that properly belonged in its case in chief. *People v Bennett,* 393 Mich 445 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, and *Edward Reilly Wilson,* Principal Attorney, Appeals, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Reported below: 99 Mich App 824.

PEOPLE v TAYLOR. (Docket No. 64275.) Plaintiff-appellee's answer to this Court's order to show cause entered August 5, 1980 (409 Mich 879) considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), we remand the case to the Recorder's Court for the City of Detroit with the direction that the defendant be sentenced before the judge who presided at his trial, provided that that judge is reasonably available to sentence the defendant. If it should be determined that the judge presiding at defendant's trial is no longer reasonably available, defendant's sentence dated September 8, 1977 shall stand. In all other respects the request for review is denied. *Frank J. Kelley,* Attorney

General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Nels L. Olson,* Assistant Prosecuting Attorney, for the people. Tommie Taylor, *in propria persona,* appellant. Case below, Court of Appeals No. 77-4251, per curiam opinion of October 3, 1979.

PEOPLE v HEADSPETH. (Docket No. 63652.) Leave to appeal having been ordered held in abeyance pending decision in *People v Richardson,* and said decision having been issued, on June 24, 1980, 409 Mich 126, now, therefore, leave to appeal is considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and remand the case to the Court of Appeals for reconsideration in light of *People v Richardson.* We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon VanHoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-2491, per curiam opinion of August 2, 1979.

PEOPLE v BUTLER. (Docket No. 64758.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy C. Scallen,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant and Belton Butler, *in propria persona.* Case below, Court of Appeals No. 30462, order of May 17, 1978.

PEOPLE v BAXTER. (Docket No. 65127.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the decision of the Court of Appeals dated April 9, 1980 as well as the Court of Appeals order denying the defendant's motion to remand dated November 15, 1979. We remand the matter to the Court of Appeals with the direction to, while retaining jurisdiction, remand the matter to the Jackson Circuit Court for the holding of an evidentiary hearing as requested by the defendant. After the conclusion of the hearing, the trial judge shall forward his findings and conclusions to the Court of Appeals. Both the defendant and the prosecutor shall be given the right to oral argument before the Court of Appeals if requests are filed. The Court of Appeals shall reconsider the issues which relate to the evidentiary

hearing and shall issue a decision based thereon. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for plaintiff-appellee. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 43933, memorandum opinion of April 9, 1980, and order of November 15, 1979.

PEOPLE v RAYMOND WRIGHT. (Docket No. 65307.) Leave to appeal denied April 1, 1981. Raymond L. Wright, *in propria persona,* appellant. Reported below: 58 Mich App 735.

PEOPLE v BURCH. (Docket No. 65366.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *James D. Norlander,* Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46510, order of March 25, 1980.

PEOPLE v GRIMMETT. (Docket No. 65431.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Linda Berns Wright,* Appellate Prosecuting Attorney, for the people. *Michael C. Reinert* for defendant-appellant. Reported below: 97 Mich App 212.

PEOPLE v JANOWICZ. (Docket No. 65258.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. *Thomas A. Howard* for defendant-appellant. Case below, Court of Appeals No. 78-4272, per curiam opinion of January 24, 1980.

PEOPLE v HATHCOCK. (Docket No. 65349.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L. Milbourn,* Chief Appellate Lawyer, and *Robert John Berlin,* Assistant Prosecuting Attorney, for the people. *Max D. McCullough* for defendant-appellant. Case below, Court of Appeals No. 45029, order of December 14, 1979.

CRAWFORD v SALT RIVER LUMBER COMPANY, INC. (Docket No. 65359.) Leave to appeal denied April 1, 1981. *James J. Carras* for plaintiff-appellant. *Neal & Lengauer, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 48244, order of May 29, 1980.

UNITED COIN METER COMPANY v LASALA. (Docket No. 65433.) Leave to appeal and cross-appeal denied April 1, 1981. *Stephen M. Landau, P.C.,* for plaintiff-appellant. *Stewart, O'Reilly, Cornell, Lasco & Rancillio, P.C.,* for defendants-appellees-cross-appellants. Reported below: 98 Mich App 238.

IN THE MATTER OF BASS, BERRIEN COUNTY DEPARTMENT OF SOCIAL SERVICES v BASS. (Docket No. 65450.) Leave to appeal denied April 1, 1981. *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for plaintiff-appellee. Berrien County Legal Services Bureau, Inc., *Mary Ellen Drolet,* for defendant-appellant. Case below, Court of Appeals No. 50467, order of May 21, 1980.

Reconsideration denied July 14, 1981.

PEOPLE v GRAHAM. (Docket No. 65236.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John D. Foresman,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-5195, per curiam opinion of April 7, 1980.

PEOPLE v IDEIS. (Docket No. 66160.) Leave to appeal and cross-appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. *Richard R. Nelson* for defendant-appellee-cross-appellant. Reported below: 101 Mich App 179.

PEOPLE v ANGLIN. (Docket No. 66278.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people, appellant. State

Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 46414, per curiam opinion of October 2, 1980.

PEOPLE v LYLES. (Docket No. 64999.) Leave to appeal denied April 1, 1981. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 45810, per curiam opinion (on remand) of February 28, 1980.

PEOPLE v RALPH COBB. (Docket No. 61098.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we vacate the Court of Appeals judgment and remand the case to the Court of Appeals with the direction that it consider the issue of whether the trial judge's "law-presumes" instruction on intent was harmless error beyond a reasonable doubt. *People v Wright,* 408 Mich 1, 28-29 (1980). The parties shall be given an opportunity to brief the question. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry Roberts,* Assistant Prosecuting Attorney, for the people. *Sheldon M. Scharg* for defendant-appellant. Case below, Court of Appeals No. 28166, per curiam opinion of August 25, 1977.

PEOPLE v JAMES LEWIS. (Docket No. 65188.) Leave to appeal denied April 1, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, *Stephen M. Wheeler,* Principal Appellate Attorney, for the people. James William Lewis, Jr., *in propria persona,* appellant. Case below, Court of Appeals No. 78-1609, memorandum opinion of April 6, 1979.

PEOPLE v BILL. (Docket No. 65645.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Lawrence J. Bunting,* Assistant Prosecuting Attorney, for the people. *Kenneth M. Mogill* for

defendant-appellant. Case below, Court of Appeals No. 49949, per curiam opinion of July 31, 1980.

Reconsideration denied July 14, 1981.

PEOPLE v CORBETT. (Docket No. 65699.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Reported below: 97 Mich App 438.

WILCOX v WILCOX. (Docket Nos. 66039, 66042.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we vacate the Court of Appeals judgment and remand the case to the Court of Appeals for reconsideration in light of the new legislation concerning joint custody, 1980 PA 434. We retain no jurisdiction. *Dunnings & Canady, P.C.,* for plaintiff-appellant. Kent Wilcox, *in propria persona,* defendant-appellant. Reported below: 100 Mich App 75.

PEOPLE v POINDEXTER. (Docket No. 66227.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people, appellant. *Myron E. Sanderson* for defendant-appellee. Case below, Court of Appeals No. 47495, per curiam opinion of November 25, 1980.

PEOPLE v BOOKER. (Docket No. 65077.) Leave to appeal denied April 1, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Dianne M. Odrobina,* Assistant Prosecuting Attorney, for the people. Addison Seyburn Booker, *in propria persona,* appellant. Case below, Court of Appeals No. 77-1277, order of September 27, 1978.

WALKER v CAHALAN. (Docket No. 65245.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the judgments of the Court of Appeals and the trial court, and we remand the case to the Wayne Circuit Court for further proceedings. Defendant Cahalan's affidavit provided evidence only of his state of mind: that he bore plaintiff Walker no malice and that he believed his statements to be true. The probative value of a witness's testimony as to his own state of mind depends upon his credibility, and, when the credibility of a witness or deponent is crucial, summary judgment should not be granted. *Arber v Stahlin,* 382 Mich 300, 308-309 (1969). An averment of what the defendant believed or thought, as distinguished from an averment of the existence of objective facts, does not put a plaintiff to the burden of presenting evidentiary facts of actual malice to withstand a summary judgment action. *Peter R. Barbara & Associates, P.C.,* for plaintiff-appellant. *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for defendant-appellee. Reported below: 97 Mich App 346.

Reconsideration denied July 14, 1981.

Certiorari denied by the Supreme Court of the United States November 9, 1981.

DEMARS v ROADWAY EXPRESS, INC. (Docket No. 65857.) Leave to appeal denied April 1, 1981. *Goodman, Eden, Millender & Bedrosian* for plaintiff-appellee. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendant-appellant. Reported below: 99 Mich App 842.

BORDAS v DETROIT GENERAL HOSPITAL. (Docket No. 65931.) Leave to appeal denied April 1, 1981. *Lipton, Papista & Garfinkle, P.C.,* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Morrison Zack,* Assistant Attorney General, for defendant-appellant Second Injury Fund. Reported below: 100 Mich App 31.

PEOPLE v WASHBURN. (Docket No. 66058.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the Court of Appeals order of September 12, 1980 and remand the case to the St. Clair Circuit Court for an evidentiary hearing as requested by appellant. GCR 1963, 817.6. The motion to stay is granted; further proceedings in the Court of Appeals must await the completion of the evidentiary hearing. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter E. Deegan,* Prosecuting Attorney, and *Peter R. George,* Chief Appellate Attorney, for the people. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-

appellant. Case below, Court of Appeals No. 50443, order of September 16, 1980.

PENN v DEPARTMENT OF CORRECTIONS. (Docket No. 66298.) Leave to appeal denied April 1, 1981. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Thomas L. Casey,* Assistant Attorney General, for defendant-appellant. Reported below: 100 Mich App 532.

PEOPLE v GERMAIN. (Docket No. 63676.) Defendant's application for leave to appeal and plaintiff's application for leave to appeal as cross-appellant having been ordered held in abeyance pending decision in *People v Richardson,* and said decision having been issued on June 24, 1980, 409 Mich 126, now, therefore, the defendant's application is considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment because in the circumstances of this case the trial court's refusal to instruct the jury on manslaughter under MCL 750.329; MSA 28.561 was not harmless error. We remand the case to the Chippewa Circuit Court for entry of a judgment of conviction of the offense of manslaughter and for resentencing. If the prosecution is persuaded that the ends of justice would better be served by a retrial on the charge of second-degree murder, on notification to the trial court before resentencing, the trial court shall vacate the judgment and conviction and grant a new trial on the charge that the defendant committed the crime of second-degree murder. Plaintiff's application for leave to appeal as cross-appellant is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Farrell E. Elliott,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, cross-appellant. State Appellate Defender, *Ronald J. Bretz,* Assistant Defender, for defendant-appellant-cross-appellee. Reported below: 91 Mich App 154.

LAWAETZ v ST LUCIA INVESTMENT COMPANY. (Docket No. 65421.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals decision of March 24, 1980 and remand the case to the Court of Appeals for submission to the full panel originally assigned to decide the appeal, or to a panel including a substitute judge if one of the original panel is unavailable. GCR 1963, 800.1. We do not retain jurisdiction. *Dickinson, Wright, McKean, Cudlip & Moon* for plain-

tiffs-appellees. *Nederlander, Dodge & McCauley, P.C.,* and *Alexander B. Ritchie* for defendants-appellants. Case below, Court of Appeals No. 78-307, per curiam opinion of May 3, 1979.

IN THE MATTER OF VAN ZANT. (Docket No. 65888.) Leave to appeal considered April 1, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals for further consideration because the appeal is not moot. We do not retain jurisdiction. Legal Aid & Defender Association of Detroit, *Frederick L. Miller* for respondent-appellant. Case below, Court of Appeals No. 44259, per curiam opinion of July 28, 1980.

PEOPLE v MCQUEEN. (Docket No. 65891.) Leave to appeal considered April 1, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the Court of Appeals and Saginaw Circuit Court judgments and remand the case to the Saginaw Circuit Court for a new trial. We find that the prosecutor's introduction of irrelevant, prejudicial, and factually unsupported material in his questioning and argument was designed to and did deny the defendant a fair trial. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. *Demetriou, Shinners & St. Claire* for defendant-appellant. Case below, Court of Appeals No. 45180, per curiam opinion of September 8, 1980.

PEOPLE v MORENO. (Docket No. 65365.) Leave to appeal considered April 1, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the Court of Appeals judgment and remand the case to the Saginaw Circuit Court. On remand the defendant shall be given an opportunity to withdraw his guilty plea and shall be granted a new trial. *People v Bencheck,* 360 Mich 430, 433 (1960). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Linda Berns Wright,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45519, per curiam opinion of February 27, 1980.

COLEMAN, C.J., and BLAIR MOODY, JR., J., would deny leave to appeal.

PEOPLE v CLARK BROWN. (Docket No. 65078.) Leave to appeal considered April 1, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals for consideration as on leave granted. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Paul G. Bruno,* Assistant Prosecuting Attorney, for the people. Clark McKinley Brown, *in propria persona,* appellant. Case below, Court of Appeals No. 45777, order of January 18, 1980.

PEOPLE v VAN ALEXANDER. (Docket No. 65682.) Leave to appeal considered April 1, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate defendant's separate 7- to 20-year sentence as a third-felony offender and retain defendant's 7- to 20-year sentence for assault with intent to murder as enhanced under the habitual-offender statute since habitual-offender provisions were intended to allow enhancement of the sentence for the later felony and not to create a separate, substantive crime. In all other respects the application for leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people. *Leslie S. Chernikov* for defendant-appellant. Case below, Court of Appeals No. 49008, order of March 26, 1980.

PEOPLE v YALDOO. (Docket No. 66439.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case to the Recorder's Court for the City of Detroit for a new trial. In this criminal case it was improper for the trial judge to consider and adopt the findings of fact and conclusions of law prepared by the prosecuting attorney. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Farhat, Burns & Story, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 52526, per curiam opinion of December 22, 1980.

PEOPLE v BOWMAN. (Docket No. 65537.) Leave to appeal denied April 1, 1981. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-3444, order of June 6, 1980.

PEOPLE v JOSEPH MOORE. (Docket No. 66008.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse, in part, the judgments of the Court of Appeals and the Cass Circuit Court. We vacate defendant's conviction of carrying a concealed weapon. There was insufficient evidence on which a rational trier of fact could find present the element of concealment. See *People v Hampton,* 407 Mich 354 (1979), and *People v Kincade,* 61 Mich App 498, 503-505 (1975). As to defendant's felonious assault conviction, leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *William T. Grimmer,* Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45972, per curiam opinion of August 15, 1980.

PEOPLE v ROBERT H. LEWIS. (Docket No. 65265.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward T. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Janet Tooley,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 50765, per curiam opinion (on remand) of May 9, 1980.

PEOPLE v TERRELL. (Docket No. 64119.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. James Terrell, *in propria persona,* appellant. Case below, Court of Appeals No. 78-1491, per curiam opinion of November 8, 1979.

MYERS v REDFORD TOWNSHIP. (Docket No. 65255.) Leave to appeal denied April 1, 1981. *Owen J. Cummings* for defendants-appellants. Reported below: *(After Remand)* 96 Mich App 122.

DETROIT FIRE FIGHTERS ASSOCIATION, LOCAL 344, IAFF v CITY OF DETROIT. (Docket No. 65062.) Leave to appeal denied April 1, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare* for plaintiff-appellee. *George W. Crockett, Jr.,* Acting Corporation Counsel, and *William Dietrich, James C. Zeman,* and *Kenneth G. King,* Assistants Corpora-

tion Counsel, for defendant-appellant. Reported below: 96 Mich App 543.

BROOKS v REED. (Docket No. 64041.) Leave to appeal denied April 1, 1981. *Rader, Eisenberg & Feldman, P.C.,* for plaintiffs-appellants. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendants-appellees. Reported below: 93 Mich App 166.

PEOPLE v CHARLES CALDWELL. (Docket No. 66129.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Robert F. Davisson,* Assistant Prosecuting Attorney, for the people, appellant. *James H. Ebel* for defendant-appellee. Case below, Court of Appeals No. 49584, per curiam opinion of October 30, 1980.

PEOPLE v KELLY. (Docket No. 65749.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *David G. Edick,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 47719, per curiam opinion of August 29, 1980.

PEOPLE v CRAMER. (Docket No. 65120.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Jeffrey Jurmu,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Ronald J. Bretz,* Assistant Defender, for defendant-appellant. Reported below: 97 Mich App 148.

PEOPLE v IVERSON. (Docket No. 65131.) Leave to appeal considered April 1, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Jackson Circuit Court. On remand the prosecutor shall be given an opportunity to establish the missing element of breaking. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of breaking and entering an occupied dwelling with intent to commit larceny in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of breaking and entering an occupied dwelling with the

intent to commit larceny shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty pleas and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward T. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *John A. Lydick,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-4662, order of April 15, 1980.

Reconsideration granted *post,* 977.

PEOPLE v OLIVER. (Docket No. 65679.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. Gerald E. Oliver, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3725, memorandum opinion of March 11, 1980.

PEOPLE v SZYMANSKI. (Docket No. 66515.) Leave to appeal denied April 1, 1981. Leave to cross-appeal is also denied because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people, appellant. *Varnum, Riddering, Wierengo & Christenson* for defendant-appellee-cross-appellant. Reported below: 102 Mich App 745.

PEOPLE v RODGERS. (Docket No. 66210.) Leave to appeal considered April 1, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we direct the Court of Appeals to enter an order extending the time for filing the appellant's brief to February 20, 1981. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 47180, letter of November 18, 1980.

PEOPLE v VAN AUKER. (Docket No. 66211.) Leave to appeal considered April 1, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we direct the Court of Appeals to enter an order extending the time for filing the appellant's brief to October 29, 1980. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 44917, letter of November 17, 1980.

PEOPLE v LOSEY. (Docket No. 65733.) Leave to appeal considered April 1, 1981. In view of the inadequacy of the present submissions of the parties in address of an issue of probable significance, the prosecutor is ordered to show cause in writing, within 30 days of the date of this order, why defendant's conviction should not be reversed on the basis that the introduction of improper rebuttal testimony prejudiced defendant so as to deny him a fair trial. *People v Bennett,* 393 Mich 445 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Paul F. Berger,* Prosecuting Attorney, and *C. Sherman Mowbray,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Terence R. Flanagan,* Assistant Defender, for defendant-appellant. Reported below: 98 Mich App 189.

PEOPLE v ONIFER. (Docket No. 64080.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people. George F. Onifer, *in propria persona,* appellant. Case below, Court of Appeals No. 47113, order of February 22, 1980.

PEOPLE v VAN DIVER. (Docket No. 65785.) Leave to appeal denied April 1, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *David A. King,* Assistant Prosecuting Attorney, for the people. Jerry Van Diver, *in propria persona,* appellant. Reported below: 79 Mich App 539.

PEOPLE v PEREZ. (Docket No. 65406.) Leave to appeal considered April 1, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the trial court in order that defendant may be provided an opportunity to make a motion for new trial on the ground that the verdict was contrary to the great weight of the evidence. Barbara Ann Perez, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3383, per curiam opinion of June 5, 1980.

PEOPLE v MAURY. (Docket No. 65015.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50, decided March 30, 1981. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted his accomplices to obtain or retain possession of a firearm which the accomplices possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgments of conviction and felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Theodore B. Sallen* for defendant-appellant. Case below, Court of Appeals No. 78-5010, memorandum opinion of November 29, 1979.

PEOPLE v JORDAN. (Docket No. 63690.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *David G. Edick,* Assistant Prosecuting Attorney, for the people. Jessie Jordan, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3406, per curiam opinion of August 8, 1979.

RENNELL v CITY OF BIRMINGHAM. (Docket No. 64991.) Leave to appeal denied April 1, 1981. *Weiner, Hauser, Wartell & Roth* for plaintiffs-appellants. *Beier, Howlett, McConnell, Googasian & McCann* for defendant-appellee. Case below, Court of Appeals No. 45546, per curiam opinion of February 13, 1980.

PEOPLE v SAXTON. (Docket No. 65417.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Warner,* Prosecuting Attorney, and *Stephen C. Corwin,* Senior Assistant Prosecuting Attorney,

for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 48823, order of June 16, 1980.

PEOPLE v BRADLEY WARD. (Docket No. 65412.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Nels L. Olson,* Assistant Prosecuting Attorney, for the people. *Daniel R. Siefer* for defendant-appellant. Case below, Court of Appeals No. 78-3205, memorandum opinion of June 11, 1980.

PEOPLE v WAUGH. (Docket Nos. 65444, 65445.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand this matter to the Court of Appeals for consideration of the issues which defendant raises in his application to this Court, which issues have heretofore not been considered by the Court of Appeals. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people. *W. Otis Culpepper* for defendant-appellant. Case below, Court of Appeals Nos. 78-1305, 78-1306, memorandum opinions of October 22, 1979.

PEOPLE v ROBERT BARKER. (Docket No. 65676.) Leave to appeal considered April 1, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the Court of Appeals judgment and remand the matter to the Saginaw Circuit Court for new trial. The Court of Appeals determined that the trial court erred in its ruling of admissibility as to the prior convictions. Such error is not, however, rendered harmless either by the fact that the defendant ultimately testified or by the fact that defense counsel first raised the matter during direct examination of the defendant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Reported below: 97 Mich App 253.

COHEN v COHEN. (Docket No. 66096.) Leave to appeal denied April 1, 1981. *Sue Ann Canvasser* for plaintiff-appellee. *Leonard Lemberg, P.C.,* and *Gromek, Bendure & Thomas* for defendant-appellant. Case below, Court of Appeals No. 54287, order of November 7, 1980.

PEOPLE v CHATTERTON. (Docket No. 66320.) Leave to appeal considered April 1, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we affirm the judgment of the Court of Appeals for the reasons stated in its opinion and in the dissent of Judge CAVANAGH in *People v Marshall,* 74 Mich App 523, 528-531 (1977). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Robert F. Davisson,* Assistant Prosecuting Attorney, for the people, appellant. *Rabette & O'Dea, P.C.,* for defendant-appellee. Reported below: 102 Mich App 248.

PEOPLE v JIMMIE SPRINGER. (Docket No. 66372.) Leave to appeal and cross-appeal considered April 1, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals for resolution of the issues raised by the defendant but not addressed in its opinion. If the Court of Appeals determines that the defendant is not entitled to a new trial based on those issues, it shall modify its current judgment so as to remand to the judge who tried this case for reconsideration and reevaluation of the original trial record in light of the law of qualified self-defense outlined in its opinion of October 6, 1980, 100 Mich App 418. See, *e.g., People v Taskila,* 391 Mich 815 (1974). In all other respects, the applications are denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people, appellant-cross-appellee. *Burgess & Burgess, P.C.,* for defendant-appellee-cross-appellant. Reported below: 100 Mich App 418.

PEOPLE v MASSALSKY. (Docket No. 65438.) Leave to appeal considered April 1, 1981 and, it appearing to this Court that the case of *People v Briggs* (Docket No. 64571) is presently pending on appeal before this Court and that the decision in that case may be decisive of an issue raised in the present application for leave to appeal, it is ordered that the present application be held in abeyance pending decision in *People v Briggs. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, and *Ronald E. Steinberg,* Research Assistant, for defendant-appellant. Case below, Court of Appeals Nos. 78-1908, 78-1909, per curiam opinion of February 7, 1980.

PEOPLE v GILBERT. (Docket No. 64699.) Defendant's request for review of the record considered April 1, 1981. The decision of the Court of Appeals of October 19, 1979 is vacated and the case remanded to the Court of Appeals for submission pursuant to this Court's order of June 27, 1979, 406 Mich 980, to the full panel that originally decided the appeal, or to a panel including a substitute judge if one of the original panel is unavailable. Wayne Gilbert, *in propria persona,* appellant. Case below, Court of Appeals No. 45849, per curiam opinion (on remand) of October 19, 1979.

PEOPLE v BELANGER. (Docket No. 66618.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Philip A. Crowley,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 47734, per curiam opinion of February 9, 1981.

PEOPLE v KERLEY. (Docket No. 64872.) Leave to appeal denied April 3, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James Norlander,* Prosecuting Attorney, and *John H. MacFarlane* and *Samuel I. Durham, Jr.,* Assistants Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Reported below: 95 Mich App 74.

Reconsideration denied July 14, 1981.

LEVIN, J., would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, post,* 923.

PEOPLE v MORRIS. (Docket No. 64984.) Leave to appeal granted April 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Nels L. Olson,* Assistant Prosecuting Attorney, for the people. *John C. Mouradian* for defendant-appellant. Case below, Court of Appeals No. 78-2284, per curiam opinion of February 22, 1980.

W MASON, INC v JACKSON COUNTY PROSECUTOR. (Docket No. 64982.) Leave to appeal granted April 10, 1981. *Gibbons & Nye* for plaintiff-appellee. *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for defendants-appellants. Reported below: 95 Mich App 447.

This cause having been briefed and argued by appellants, the above order is vacated October 16, 1981, and leave to appeal is denied for the reason that the Court is no longer persuaded that the questions presented should be reviewed by this Court.

KESTENBAUM v MICHIGAN STATE UNIVERSITY. (Docket No. 65473.) Leave to appeal granted April 10, 1981. *Richard W. Kinkade* for plaintiff-appellant. *Byron H. Higgins* for defendants-appellees. Reported below: 97 Mich App 5.

PEOPLE v ELIZABETH FIELDS. (Docket No. 66361.) Leave to appeal granted April 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people, appellant. State Appellate Defender, *Susan J. Smith,* Assistant Defender, for defendant-appellee. Reported below: 101 Mich App 287.

MICHIGAN ASSOCIATION OF PSYCHOTHERAPY CLINICS v BLUE CROSS & BLUE SHIELD OF MICHIGAN and MIDWEST MENTAL HEALTH CLINIC, PC v BLUE CROSS & BLUE SHIELD OF MICHIGAN. (Docket Nos. 66644, 66645.) Leave to appeal considered April 10, 1981. As to the plaintiffs, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we set aside that portion of the Court of Appeals order of February 2, 1981, which granted the defendant's motion to vacate the permanent injunction in this case, and reinstate the permanent injunction. The Court of Appeals may nevertheless enter an order continuing, modifying or vacating the permanent injunction as the developing circumstances in the case may warrant. GCR 1963, 530.6. As to the defendant, leave to appeal is denied. *Goodenough, Smith & May* for plaintiffs-appellants-cross-appellees Michigan Association of Psychotherapy Clinics. *Bushnell, Gage, Reizen & Byington* for plaintiff-appellant Midwest Mental Health Clinic, P.C. *Michael T. Zajac* for defendant-appellee-cross-appellant. Reported below: 101 Mich App 559.

PEOPLE v MORRISON. (Docket No. 65565.) Leave to appeal considered April 13, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate defendant's convictions of assault with intent to rob being armed and felony-firearm and we remand the case to the Recorder's Court for the City of Detroit for further proceedings because, on the facts of this case, it was an abuse of discretion to deny the motion to withdraw the plea. Nathaniel Morrison, *in propria persona,* appellant. Case below, Court of Appeals No. 45125, order of March 6, 1980.

SIGNS v DETROIT EDISON COMPANY. (Docket No. 64558.) Leave to appeal and cross-appeal denied April 13, 1981. *Ripple, Chambers & Steiner, P.C.,* for plaintiff-appellee-cross-appellant. *Bushnell, Gage, Reizen & Byington* and *Jacob M. Abella* for defendant-appellee Detroit Edison Company. *W. E. Wisner* for defendant-appellant Consumers Power Company. Reported below: 93 Mich App 626.

COLEMAN, C.J., and RYAN, J., would grant leave to appeal and cross-appeal.

PEOPLE v ARTUSO. (Docket No. 66199.) Leave to appeal denied April 1, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. Reported below: 100 Mich App 396.

COLEMAN, C.J., and WILLIAMS and RYAN, JJ., would grant leave to appeal.

PEOPLE v HADDIX. (Docket No. 65902.) Leave to appeal denied April 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. *Arthur J. Tarnow* for defendant-appellant. Case below, Court of Appeals No. 49941, order of September 19, 1980.

PEOPLE v PATRICK MCDONALD. (Docket No. 65727.) Leave to appeal considered April 13, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4) and in recognition of the fact that the defendant has died, we vacate the judgments of the lower courts and remand the case to the Recorder's Court for the City of Detroit for dismissal of the charge. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Sheldon Halpern* and *Eileen R. Scheff* for defendant-appellant. Case below, Court of Appeals No. 44888, per curiam opinion of May 6, 1980.

PEOPLE v LARRY ALLEN. (Docket No. 66476.) Leave to appeal denied April 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,*

Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people, appellant. *Frank S. Spies* for defendant-appellee. Reported below: 102 Mich App 655.

AYOUB v FORD MOTOR COMPANY. (Docket No. 66131.) Leave to appeal denied April 13, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Carl G. Meyers* and *Hayim I. Gross* for defendant-appellee. Reported below: 101 Mich App 740.

In re HOWARD ESTATE, AMERICAN SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS v HOWARD. (Docket No. 66207.) Leave to appeal denied April 13, 1981. *Robert J. Dederichs* for appellant Traverse City State Bank. *Lawrence I. McKay, III,* for appellant Paul Oliver Memorial Hospital. Case below, Court of Appeals No. 48483, per curiam opinion of November 10, 1980.

PEOPLE v FARLEY. (Docket No. 65499.) Leave to appeal denied April 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Stephen M. Losh, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 48752, order of June 19, 1980.

PEOPLE v GARCIE MCCOY. (Docket No. 66549.) Leave to appeal denied April 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *Lynwood E. Noah,* Senior Assistant Prosecuting Attorney, for the people, appellant. *Toomey, Stewart & Bambery* for defendant-appellee. Case below, Court of Appeals No. 78-824, per curiam opinion of November 6, 1980.

COLEMAN, C.J., would grant leave to appeal.

RYAN, J., states:

I would reverse the Court of Appeals and reinstate the trial court judgment because on the facts of this case there was no duty to instruct on the lesser offense of attempted larceny in a building.

PEOPLE v RICHARD PHILLIPS. (Docket No. 65418.) Leave to appeal denied April 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 45077, order of June 16, 1980.

KAVANAGH and LEVIN, JJ., would remand to the Court of Appeals for consideration as on leave granted.

PEOPLE v CHARLES BAKER. (Docket No. 65890.) Leave to appeal considered April 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the judgment of the Court of Appeals, vacate defendant's habitual-offender sentence, and order that defendant's concurrent sentences of 2 to 4 years for felonious assault and 2 to 5 years for attempted kidnapping be reinstated. *People v Young,* 410 Mich 363 (1981); *People v Fountain,* 407 Mich 96 (1979). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. *Alvin C. Sallen* for defendant-appellant. Case below, Court of Appeals No. 47959, memorandum opinion of September 11, 1980.

PEOPLE v DOUGLAS. (Docket No. 65939.) Leave to appeal denied April 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Lawrence J. Bunting,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 47329, per curiam opinion of September 9, 1980.

PEOPLE v RODRIGUEZ. (Docket No. 66598.) Leave to appeal considered April 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the Court of Appeals judgment and reinstate the defendant's conviction and sentence for the reasons stated by Judge MICHAEL F. CAVANAGH in dissent. *People v Rodriguez,* 103 Mich App 163-164. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people, appellant. *Glenn Essebaggers* for defendant-appellee. Reported below: 103 Mich App 161.

PEOPLE v GOJCAJ and PEOPLE v SINISHTAJ. (Docket Nos. 65529, 66531.) Leave to appeal considered April 13, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse that portion of the Court of Appeals judgment which affirmed the defendants' convictions of burning insured property, MCL 750.75; MSA 28.270, and reverse the judgments of conviction, subject to the prosecutor's right to seek a hearing concerning the existence of prejudice from the failure to produce the res gestae witness Bill Edwards within 30 days after this order is issued. *People v Pearson,* 404 Mich 698, 725 (1979). The case is remanded to Oakland Circuit Court for further proceedings. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Richard H. Browne,* Assistant Prosecuting Attorney, for the people. *Martin S. Baum, P.C.,* for defendant-appellant Gojcaj. *F. Philip Colista* for defendant-appellant Sinishtaj. Case below, Court of Appeals No. 78-3676, per curiam opinion of May 21, 1980.

PEOPLE v MICHAEL BYRD. (Docket Nos. 65627-65629.) Leave to appeal denied April 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *David G. Edick,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lynn Chard,* Assistant Defender, and *Stuart B. Lev,* Research Attorney, for defendant-appellant. Case below, Court of Appeals Nos. 78-1547-78-1549, memorandum opinion of February 14, 1980.

SMITH v LUMBERMEN'S MUTUAL INSURANCE COMPANY. (Docket No. 66116.) Leave to appeal denied April 14, 1981. *Booth, Patterson, Lee, Karlstrom & Steckling* for plaintiff-appellee. *Davies, Rudzki & Bremer, P.C.,* for defendant-appellant Lumbermen's Mutual Insurance Company. *Steven K. Valentine, P.C.,* for defendants-appellees Alfred V. Lynas and Ronald Weichman. Reported below: 101 Mich App 78.

PEOPLE v HAGGITT. (Docket No. 64714.) Leave to appeal denied April 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. Bobby Joe

Haggitt, *in propria persona,* appellant. Case below, Court of Appeals No. 78-365, per curiam opinion of February 22, 1980.

BUNDO v LIQUOR CONTROL COMMISSION. (Docket No. 65089.) Leave to appeal denied April 15, 1981. *Rabette & O'Dea, P.C.,* for plaintiffs-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *A. C. Stoddard* and *Richard I. Rubin,* Assistants Attorney General, for defendant-appellee. Case below, Court of Appeals No. 44113, memorandum opinion of April 9, 1980.

EMPLOYMENT SECURITY COMMISSION v LANSING COMMUNITY COLLEGE. (Docket No. 65230.) Leave to appeal considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the Court of Appeals judgment and the judgment of the circuit court and reinstate the decision of the Employment Security Commission Appeal Board. The statutory language at issue is plain and unambiguous and administrative determination pursuant to statute is supported on the record. *MacLean, Seaman, Laing & Guilford* for defendant-appellee Lansing Community College. *Levin, Levin, Garvett & Dill* for defendant-appellant Sharon Rambo. Case below, Court of Appeals No. 45617, per curiam opinion of May 1, 1980.

FORD v MONROE STEEL CASTINGS COMPANY. (Docket No. 65317.) Leave to appeal denied April 15, 1981. *Robert L. O'Connell, P.C.,* for plaintiff-appellee. *Lacey & Jones* for defendant-appellant. Reported below: 97 Mich App 482.

COLE v MICHIGAN CONSOLIDATED GAS COMPANY. (Docket No. 66053.) Leave to appeal considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the August 20, 1980 order of the Wayne Circuit Court and remand the case to that court for reconsideration of the question of remand to the district court. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. Case below, Court of Appeals No. 53471, order of October 14, 1980.

BRAKE v BURKE. (Docket No. 65012.) Leave to appeal considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the April 2, 1980 order of the Court of Appeals dismissing plaintiffs' appeal. We direct the Court of Appeals to reinstate plaintiffs' appeal and to grant plaintiffs' motion with

respect to obtaining a transcript or settling the record. *Harry D. Hirsch, Jr.,* and *E. R. Whinham* for plaintiffs-appellants. *Bushnell, Gage, Doctoroff, Reizen & Byington* for defendant-appellee John McKivens. Case below, Court of Appeals No. 43133, order of April 2, 1980.

PEOPLE v CARGILL. (Docket No. 65274.) Leave to appeal considered April 15, 1981 and pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and remand the matter to the Court of Appeals for reconsideration in light of *People v Major,* 407 Mich 394 (1979). We do not retain jurisdiction. Marvin Cargill, *in propria persona,* appellant. Case below, Court of Appeals No. 78-1278, memorandum opinion of February 28, 1980.

PEOPLE v CRUM. (Docket No. 65347.) Leave to appeal denied April 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Lawrence J. Bunting,* Assistant Prosecuting Attorney, for the people. *Oehmke Legal Associates* for defendant-appellant. Case below, Court of Appeals No. 43723, per curiam opinion of May 22, 1980.

GREENE v UNION OPTICAL, INC. (Docket Nos. 65002, 65009.) Leave to appeal denied April 15, 1981. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendant-appellant Union Optical, Inc. *Keil, Henneke, Ruhala & McKone* for defendant-appellant NuVision Optical of Michigan, Inc. Case below, Court of Appeals No. 78-1364, per curiam opinion of January 23, 1980.

SWANSON v GENERAL MOTORS CORPORATION. (Docket No. 65092.) Leave to appeal denied April 15, 1981. This Court, like the Court of Appeals, commends to the appeal board's attention the interpretation of 1975 PA 34 which appears in *McAvoy v H B Sherman Co,* 401 Mich 419, 444, 445, fn 6 (1977). *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellee. *Anderson, Green & Vincent, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 48021, order of April 8, 1980.

PEOPLE v PILLETTE and PEOPLE v SCARLET SMITH. (Docket Nos. 64957, 65233.) Leave to appeal denied April 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William*

L. Cahalan, Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Gromek, Bendure & Thomas* for defendant-appellant Pillette. State Appellate Defender, *John A. Lydick,* Assistant Defender, for defendant-appellant Smith. Case below, Court of Appeals Nos. 77-2226, 77-2418, per curiam opinion of March 19, 1980.

VASQUEZ v UNIVERSAL OIL PRODUCTS COMPANY. (Docket No. 64989.) Leave to appeal is considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand this case to the Workers' Compensation Appeal Board with instructions that it amplify its reasons for ordering the payment of compensation from September 13, 1972, or correct the order to conform the date the award commences with the date it found plaintiff to have suffered a work-related disability. In all other respects the application for leave to appeal is denied. We retain no jurisdiction. *George E. Ganos* for defendants-appellants Universal Oil Products Company, Wolverine Tube Division, and Employers Mutual of Wausau. *Lacey & Jones* for defendants-appellees Pan Foods, Inc., and Home Indemnity Insurance Company. Case below, Court of Appeals No. 46655, order of January 24, 1980.

PEOPLE v SHELTON. (Docket No. 65232.) Leave to appeal denied April 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *F. Martin Tieber,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 44807, order of May 15, 1980.

PEOPLE v BLANTON. (Docket No. 65003.) Leave to appeal denied April 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Wayne C. Sheahan, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 77-1636, order of March 28, 1980.

PEOPLE v PEETE #1. (Docket No. 65079.) Leave to appeal considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we vacate the Court of Appeals order of September 25, 1979, granting a motion to affirm, and remand the case to the Court of

Appeals for plenary consideration. On remand, defendant shall be given the opportunity to raise and brief the issue concerning the validity of defendant's plea of guilty in light of the initiative law amending MCL 791.233; MSA 28.2303. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, and *Michael D. Lehto* and *Larry L. Roberts,* Assistants Prosecuting Attorney, for the people. Lad Peete, *in propria persona,* and *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 45049, order of September 25, 1979.

PEOPLE v BURL. (Docket No. 65461.) Leave to appeal considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we vacate the Court of Appeals order of March 31, 1980, granting a motion to affirm, and remand the case to the Court of Appeals for plenary consideration. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Sheila N. Robertson,* for defendant-appellant. Case below, Court of Appeals No. 77-4658, order of March 31, 1980.

FIGURES v RICKEN. (Docket No. 65464.) Leave to appeal considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and we remand the case to the Court of Appeals for further explication of the issues and reasons for decision. We retain no jurisdiction. *Hayim I. Gross, P.C.,* for plaintiff-appellant. Case below, Court of Appeals No. 78-4727, memorandum opinion of June 23, 1980.

PEOPLE v MCLENNAN. (Docket No. 65082.) Leave to appeal denied April 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael J. Hackett,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-4319, memorandum opinion of April 9, 1980.

LEVIN, J., would remand to the Court of Appeals for reconsideration in light of *People v Pearson,* 404 Mich 698 (1979).

GILMER v BENDIX UNITED GEOPHYSICAL. (Docket No. 65288.) Leave to appeal denied April 15, 1981. *Smith, Haughey, Rice & Roegge, P.C.,* for plaintiff-appellant. *Franklin, Petrulis, Lichty & Mellon, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 48201, order of May 12, 1980.

WISE v GENERAL MOTORS CORPORATION. (Docket No. 65167.) Leave to appeal denied April 15, 1981. *Bernard M. Freid & Associates, Inc.,* for plaintiff-appellant. *Braun, Kendrick, Finkbeiner, Schafer & Murphy* for defendant-appellee. Case below, Court of Appeals No. 48236, order of April 24, 1980.

REGENTS OF THE UNIVERSITY OF MICHIGAN v WASHTENAW COUNTY COALITION AGAINST APARTHEID. (Docket No. 65321.) Leave to appeal denied April 15, 1981. *Davis & Fajen* and *Roderick K. Daane,* General Counsel, University of Michigan, for plaintiff-appellee. *O'Brien, Moran & Dimond* for defendants-appellants. Reported below: 97 Mich App 532.

PEOPLE v CLARENCE ADKINS. (Docket No. 65001.) Leave to appeal denied April 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Gail Rodwan,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45157, order of September 24, 1979.

Defendant-appellant's motion for reconsideration granted September 2, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand this case to the Court of Appeals for plenary consideration. The Court of Appeals erred in *sua sponte* affirming defendant's conviction.

PEOPLE v MICHAEL JACKSON. (Docket No. 65117.) Leave to appeal is considered April 15, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand this case to the Lenawee Circuit Court to allow defendant an opportunity to file a motion for new trial. If defendant files such a motion, the trial court shall conduct an evidentiary hearing to determine the circumstances surrounding Officer Collins' questioning of defendant during a trial break. At the close of the hearing, the court, in deciding whether to grant defendant's motion for a new trial, shall make findings of fact and conclusions of law regarding defendant's claim that the questioning violated his right to counsel and to a fair trial. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Harvey A. Koselka,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys

Appellate Service), for the people. *Arthur J. Tarnow* for defendant-appellant. Case below, Court of Appeals No. 48026, order of April 14, 1980.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE v STRAW. (Docket No. 65134.) Leave to appeal considered April 15, 1981 and, it appearing to this Court that the cases of *Detroit Automobile Inter-Insurance Exchange v Gavin* (Docket No. 62043) and *Detroit Automobile Inter-Insurance Exchange v Standfest* (Docket No. 64862) are presently pending on appeal before this Court and that the decisions in those cases may be decisive of an issue raised in the present application for leave to appeal, it is ordered that the present application be held in abeyance pending decision in those cases. *Edward M. Miller* for defendant-appellant. Reported below: 96 Mich App 773.

PEOPLE v ROBERT GREEN. (Docket No. 65436.) Leave to appeal considered April 15, 1981 and, it appearing to this Court that the cases of *People v Briggs* (Docket No. 64397) and *People v Killebrew* (Docket No. 64398) are presently pending on appeal before this Court and that the decision in those cases may be decisive of an issue raised in the present application for leave to appeal, it is ordered that the present application be held in abeyance pending decision in those cases. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45431, memorandum opinion of March 11, 1980.

PEOPLE v WOODARD. (Docket No. 64513.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. Romelle Woodard, *in propria persona,* appellant. Case below, Court of Appeals No. 77-3227, per curiam opinion of December 7, 1979.

PEOPLE v HEILER. (Docket Nos. 65195, 65196.) Leave to appeal considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, the matter is remanded to the Saginaw Circuit Court for vacation of the habitual-offender conviction of defendant Theodore Heiler and resentencing. *People v Young,* 410 Mich 363

(1981). Defendants' application for leave to appeal is denied in all other respects. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Linda Berns Wright,* Assistant Prosecuting Attorney, for the people. *Irwin F. Hauffe, II,* for defendants-appellants William and Theodore Heiler. Case below, Court of Appeals Nos. 43039, 43040, per curiam opinion of April 29, 1980.

PEOPLE v COVINGTON. (Docket No. 65903.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Lostracco,* Prosecuting Attorney, and *Daniel Jon Loomis,* Chief Assistant Prosecuting Attorney, for the people. James Luther Covington, *in propria persona,* appellant. Case below, Court of Appeals No. 49179, order of August 15, 1980.

SAFRAN PRINTING COMPANY v CITY OF DETROIT. (Docket Nos. 63268-63270.) Leave to appeal denied April 20, 1981. *Honigman, Miller, Schwartz & Cohn* for plaintiff-appellee. *George G. Matish,* Acting Corporation Counsel, and *Kay D. Schloff* and *Carl Rashid, Jr.,* Assistants Corporation Counsel, for defendant-appellant. Reported below: 88 Mich App 376.

KIERNAN v SCOTT PAPER COMPANY. (Docket No. 65548.) Leave to appeal denied April 20, 1981. *George E. Ganos* for defendants-appellants. Case below, Court of Appeals No. 48906, order of July 9, 1980.

PEOPLE v STEIN. (Docket No. 65852.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellee. Reported below: 99 Mich App 781.

KIGGINS v BLOCKER. (Docket No. 66024.) Leave to appeal denied April 20, 1981. *William T. Grimmer,* Prosecuting Attorney, for plaintiff-appellee. Issac Blocker, *in propria persona,* defendant-appellant. Case below, Court of Appeals No. 48932, order of October 7, 1980.

PEOPLE v VIAENE. (Docket No. 66035.) Leave to appeal considered April 20, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals with directions to grant the defendant's motion to remand. GCR 1963, 817.6(1). We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *J. David Reck* for defendant-appellant. Case below, Court of Appeals No. 48860, order of September 9, 1980.

NATIONAL BORING CORPORATION v TUNA MACHINE TOOL, INC. (Docket No. 66018.) Leave to appeal denied April 20, 1981. *Karbel, Eiges, Rothstein & Karbel, P.C.,* for plaintiff-appellee. *Robert J. Kauflin* and *Bernard P. Penzien* for defendant-appellant. Case below, Court of Appeals No. 44063, per curiam opinion of July 28, 1980.

BULLARD v CITY OF KALAMAZOO. (Docket No. 65896.) Leave to appeal denied April 20, 1981. *Randolph McCarthy, Jr., P.C.,* for plaintiff-appellant. *Don A. Schmidt,* City Attorney, and *Robert H. Cinabro,* Deputy City Attorney, for defendants-appellees. Case below, Court of Appeals No. 45951, per curiam opinion of September 8, 1980.

PEOPLE v JERRILS. (Docket No. 64656.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people, appellant. *George S. Buth* for defendant-appellee. Case below, Court of Appeals No. 78-4816, per curiam opinion of February 8, 1980.

PEOPLE v STANDLEY. (Docket No. 65249.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people, appellant. *George S. Buth* for defendant-appellee. Case below, Court of Appeals No. 78-1679, per curiam opinion of May 7, 1980.

PEOPLE v GARRISON and PEOPLE v HAYES. (Docket No. 65894.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *David J. Buter,* Assistant Prosecuting Attorney, for

the people. *Varnum, Riddering, Wierengo & Christenson* for defendants-appellants. Case below, Court of Appeals Nos. 45409, 46574, memorandum opinion of September 10, 1980.

YOUNGBLOOD v FORD MOTOR COMPANY. (Docket No. 65983.) Leave to appeal denied April 20, 1981. *Levine & Benjamin, P.C.,* for plaintiff-appellant. *Carl G. Meyers,* Senior Attorney, and *Hayim I. Gross* for defendant-appellee. Case below, Court of Appeals No. 49852, order of September 23, 1980.

MICHIGAN MUTUAL INSURANCE COMPANY v SHARP. (Docket No. 66017.) Leave to appeal denied April 20, 1981. *Coticchio, Zotter & Sullivan, P.C.,* for plaintiff-appellant. *Tucker, Barbour & Mack, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 46624, per curiam opinion of August 18, 1980.

MAKRES v GROSSE POINTE CYCLE. (Docket No. 66051.) Leave to appeal denied April 20, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *LeVasseur, Egan, Leslie & Johnson, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 50057, order of October 10, 1980.

JORDAN v ROSEVILLE POLICE DEPARTMENT. (Docket No. 66079.) Leave to appeal denied April 20, 1981. Ronald L. Jordan, *in propria persona,* plaintiff-appellant. *LaBarge, Dinning & Lyon, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 47005, per curiam opinion of September 9, 1980.

PEOPLE v JOHNNIE SMITH. (Docket No. 64284.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *George A. Best, II,* Assistant Prosecuting Attorney, for the people, appellant. *Richard R. Nelson* for defendant-appellee. Case below, Court of Appeals No. 78-4451, per curiam opinion of November 27, 1979.

TOMICH v KROPP PAINTING. (Docket No. 65524.) Leave to appeal denied April 20, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *Davidson, Breen & Doud,* P.C., for defendants-appellants Kropp Painting and Western Casualty &

Surety Company. Case below, Court of Appeals No. 48854, order of July 3, 1980.

PEOPLE v WOODLEY. (Docket No. 65702.) Leave to appeal is considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the Court of Appeals judgment and remand the case for trial. The trial court improperly induced defendant's guilty pleas by informing him that it would recommend a sentence of life imprisonment if defendant exercised his right to trial. *People v Earegood,* 383 Mich 82, 84 (1970); *People v Guest,* 47 Mich App 500 (1973). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Nels L. Olson,* Assistant Prosecuting Attorney, for the people. *John C. Mouradian* for defendant-appellant. Case below, Court of Appeals No. 44109, memorandum opinion of February 28, 1980.

PEOPLE v PINCHEFF. (Docket No. 66080.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. Randy Pincheff, *in propria persona,* appellant. Case below, Court of Appeals No. 50078, order of September 26, 1980.

PEOPLE v GILLIS RICE. (Docket Nos. 66125, 66126.) Leave to appeal considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and vacate defendant's habitual-offender conviction and reinstate his conviction and sentence of six years and eight months to ten years for assault with intent to commit criminal sexual conduct involving penetration. See *People v Young,* 410 Mich 363 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Ronald C. Zellar,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *F. Martin Tieber,* Deputy Defender, for defendant-appellant. Reported below: 101 Mich App 1.

PEOPLE v ROBERT LEE HALL #1. (Docket No. 66478.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Harvey A. Koselka,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Robert Mann* for defendant-appel-

lant. Case below, Court of Appeals No. 46524, memorandum opinion of November 12, 1980.

PEOPLE v LAWRENCE JACKSON. (Docket No. 66077.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Robert F. Davisson,* Assistant Prosecuting Attorney, for the people. Lawrence E. Jackson, *in propria persona,* appellant. Case below, Court of Appeals No. 50889, order of October 22, 1980.

CLEVELAND v RIZZO. (Docket No. 66127.) Leave to appeal denied April 20, 1981. *Jasmer, Lobb & Weiss, P.C.,* for plaintiff-appellant. *Kerr, Russell & Weber* for defendant-appellee. Reported below: 99 Mich App 682.

UPTHEGROVE v MYERS. (Docket No. 65841.) Leave to appeal denied April 20, 1981. *Bebout, Potere, Cox & Hughes, P.C.,* for plaintiffs-appellants. *Seavitt, Westcott, Miller, Stowe & Magnuson* for defendant-appellee Troy Hilton Operating Company. Reported below: 99 Mich App 776.

PEOPLE v COLEMAN and PEOPLE v TRICE. (Docket Nos. 66044, 66045.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Annette M. Olejarz,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendants-appellants. Reported below: 100 Mich App 587.

CEAUSU v DOVER CORPORATION. (Docket No. 66057.) Leave to appeal denied April 20, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Lacey & Jones* for defendants-appellees. Case below, Court of Appeals No. 50820, order of October 17, 1980.

ENGLISH v VAN BUREN COUNTY ROAD COMMISSION. (Docket No. 65708.) Leave to appeal considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the Court of Appeals judgment and reinstate the decision of the Workers' Compensation Appeal Board dated April 19, 1979. The appeal board's finding

that plaintiff's unemployment subsequent to 1973 was based on his physical impairment is amply supported by the record which shows that because of his physical condition plaintiff was unable to compete in the common labor market. The fact that plaintiff was able to perform restricted work after his injury did not establish a wage-earning capacity and consequently plaintiff did not have the burden of showing a change in his wage-earning capacity after he left his employment. *Powell v Casco Nelmor Corp,* 406 Mich 332, 351 (1979). *Howard W. Green* for plaintiff-appellant. *Lilly, Piatt & Doyle* for defendants-appellees. Case below, Court of Appeals No. 45184, per curiam opinion of June 19, 1980.

SHOPPING CENTERS, INC v CITY OF EAST LANSING. (Docket No. 66027.) Leave to appeal denied April 20, 1981. *Willingham, Coté, Hanslovsky, Griffith & Foresman, P.C.,* for plaintiff-appellee. *McGinty, Halverson, Brown & Jakubiak, P.C.,* for defendants-appellees City of East Lansing, et al. *Miller, Canfield, Paddock & Stone* for intervening-defendant-appellant Citizens For a Livable Community. *Fraser, Trebilcock, Davis & Foster, P.C.,* for intervening-defendant-appellee Citizens For a Better East Lansing. Case below, Court of Appeals No. 47264, per curiam opinion of October 2, 1980.

PEOPLE v FISHER. (Docket No. 66112.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Richard H. Browne,* Assistant Prosecuting Attorney, for the people. William L. Fisher, *in propria persona,* appellant. Case below, Court of Appeals No. 50088, order of September 9, 1980.

PEOPLE v FELIDA SMITH. (Docket No. 66558.) Leave to appeal and cross-appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, *Janis L. Blough,* Chief Appellate Attorney, and *Barbara K. Hamm,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Karla Kendall,* Assistant Defender, for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 49293, memorandum opinion of January 16, 1981.

PEOPLE v TERRY MOORE. (Docket No. 66118.) Leave to appeal denied April 20, 1981. *People v Young,* 410 Mich 363 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D.*

Warner, Prosecuting Attorney, and *Judith K. Simonson,* Assistant Prosecuting Attorney, for the people. Terry Lee Moore, *in propria persona,* appellant. Case below, Court of Appeals No. 50612, order of October 23, 1980.

HIGHTOWER v GENERAL MOTORS CORPORATION. (Docket No. 66092.) Leave to appeal denied April 20, 1981. *Bernard M. Freid* for plaintiff-appellant. *Braun, Kendrick, Finkbeiner, Schafer & Murphy* for defendant-appellee. Case below, Court of Appeals No. 50252, order of October 21, 1980.

HAHN v SARAH COVENTRY, INC. (Docket No. 65547.) Leave to appeal denied April 20, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellee. *George E. Ganos* for defendants-appellants. Reported below: 97 Mich App 398.

PEOPLE v MAYS. (Docket No. 65411.) Leave to appeal considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we vacate the defendant's conviction of one count of first-degree criminal sexual conduct while "armed with a weapon, or an article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon" and remand the case to Recorder's Court for the City of Detroit for resentencing on the remaining count. Since there was a single penetration of the vagina, defendant could not be convicted of both counts of penetration of the vagina, and the defendant could not consent by plea of guilty to both convictions. *People v Johnson,* 406 Mich 320 (1979); *People v Humphrey,* 407 Mich 909 (1979). In all other respects leave to appeal is denied. Jack Mays, *in propria persona,* appellant. Case below, Court of Appeals No. 78-5173, memorandum opinion of November 16, 1979.

PEOPLE v OLLIE SMITH. (Docket No. 64659.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people, appellant. *George S. Buth* for defendant-appellee. Case below, Court of Appeals No. 78-3121, per curiam opinion of February 7, 1980.

PEOPLE v HENRY. (Docket No. 66228.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward*

Reilly Wilson, Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people, appellant. *Lewis, White, Clay & Graves, P.C.,* for defendant-appellee. Reported below: 101 Mich 585.

PRYBER v MARRIOTT CORPORATION. (Docket No. 65612.) Leave to appeal considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we affirm the Court of Appeals decision published at 98 Mich App 50; 296 NW2d 597 (1980). *Ray H. Boman* for plaintiffs-appellees. *Jack H. Erps* and *Ellen C. Nowicki* for defendant-appellant. Reported below: 98 Mich App 50.

BESCOE v LABORERS' UNION LOCAL NO 334. (Docket No. 65526.) Leave to appeal denied April 20, 1981. *James F. Finn* for plaintiffs-appellants. *Miller, Cohen, Martens & Sugerman, P.C.,* for defendant-appellee. Reported below: 98 Mich App 389.

PEOPLE v REESE. (Docket No. 65324.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Linda Berns Wright,* Appellate Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Ronald J. Bretz,* Assistant Defender, for defendant-appellee. Reported below: 97 Mich App 785.

PEOPLE v HAND. (Docket No. 65151.) Leave to appeal considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the St. Clair Circuit Court for an evidentiary hearing as to whether, despite the fact that an habitual-offender charge was not possible, the plea was nevertheless voluntary. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter E. Deegan,* Prosecuting Attorney, and *Peter R. George,* Chief Appellate Attorney, for the people. Roger David Hand, *in propria persona,* appellant. Case below, Court of Appeals No. 78-5127, per curiam opinion of February 11, 1980.

PEOPLE v SUMMERS. (Docket No. 64423.) Defendant's request for review, his delayed application for leave to appeal, and the prosecution's response to this Court's order to show cause (409 Mich 862) are considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we vacate the portion of the trial court's order of conviction and sentence which allowed the 7-1/2- to 15-year sentence

originally imposed to continue in effect; the habitual-offender sentence, however, remains in effect. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. Robert Summers, *in propria persona,* appellant. Case below, Court of Appeals No. 44068, order of November 3, 1979.

EVANS v CLARK EQUIPMENT COMPANY. (Docket No. 66074.) Leave to appeal denied April 20, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Ryan, Jamieson & Hubbell* for defendants-appellees. Case below, Court of Appeals No. 50788, order of October 23, 1980.

PEOPLE v DOZIER. (Docket No. 64697.) Leave to appeal considered April 20, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse in part the judgment of the Court of Appeals and remand the case to the Calhoun Circuit Court for resentencing. Defendant was denied his right of allocution. *People v Berry,* 409 Mich 774; 298 NW2d 434 (1980). Leave to appeal in all other respects is denied. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *Franklin K. Line, Jr.,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* for defendant-appellant. Case below, Court of Appeals No. 78-3147, per curiam opinion of February 8, 1980.

COLEMAN, C.J., not participating.

PEOPLE v HAMM. (Docket No. 66040.) Leave to appeal and cross-appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter E. Deegan,* Prosecuting Attorney, and *Peter R. George,* Chief Appellate Attorney, for the people, appellant-cross-appellee. *Bruce T. Leitman, P.C.,* for defendant-appellee-cross-appellant. Reported below: 100 Mich App 429.

PEOPLE v DUMMITT. (Docket No. 65618.) Leave to appeal denied April 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *Lynwood E. Noah,* Senior Assistant Prosecuting Attorney, for the people. *Nicholas Smith, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 78-3199, order of July 28, 1980.

PETRILLA v UNIROYAL, INC. (Docket No. 66081.) Leave to appeal denied April 20, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. *Lacey & Jones* for defendant-appellee. Case below, Court of Appeals No. 50687, order of October 23, 1980.

PEOPLE v COULTER. (Docket No. 66071.) Leave to appeal considered April 20, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Macomb Circuit Court to determine if the defendant was indigent in 1974 when he requested a transcript and, if so, to enter an appropriate order reimbursing the cost of preparing that portion of the transcript of his trial that had not at that point already been transcribed. *People v Cross,* 386 Mich 237 (1971). Leave to appeal is denied in all other respects. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L. Milbourn,* Chief Appellate Lawyer, and *Alice F. Sage,* Assistant Prosecuting Attorney, for the people. *Counard, Kevelighan & Van Houten, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 47644, order of October 15, 1980.

COMMERCIAL UNION INSURANCE COMPANY v SMITH. (Docket No. 65592.) Leave to appeal considered April 20, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals so that Court may decisionally address the second issue raised by the plaintiffs in their appeal and by the defendants in their application for rehearing. We do not retain jurisdiction. *Lilly & Domeny, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 43530, per curiam opinion of June 18, 1980.

IN THE MATTER OF ACQUISITION OF LAND FOR THE CENTRAL INDUSTRIAL PARK PROJECT. (Docket No. 66999.) Leave to appeal prior to decision by the Court of Appeals granted April 29, 1981. *Thomas Joseph Gagné* and *Schaden & Heldman* for appellant Richard Hodas. *Sylvester Delaney,* Acting Corporation Counsel, *Joseph N. Baltimore,* and *Honigman, Miller, Schwartz & Cohn,* Special Counsel to the City, for appellee City of Detroit. Case below, Court of Appeals No. 57188.

Remanded to the Wayne Circuit Court on May 7, 1981 for a hearing as to the necessity of the taking of parcel number 1130 and issuance of appropriate order. Appellant timely filed an adequate request for a hearing as to the necessity for the taking of the parcel in question. MCL 213.56; MSA 8.265(6). Jurisdiction not retained.

OAKLAND COUNTY PROSECUTOR v DEPARTMENT OF CORRECTIONS. (Docket No. 67134.) On the Court's own motion, leave to appeal the Court of Appeals order of April 30, 1981 in this case is granted April

30, 1981. This appeal is calendared for oral argument on May 6, 1981. It is further ordered that that portion of the Court of Appeals order which enjoins defendants from "taking any further acts to implement 1980 PA 519" remain in effect until further order of this Court. Case below, Court of Appeals No. 57297.

CONGER v FOREMOST-MCKESSON, INC. (Docket No. 63661.) Leave to appeal having been granted in this case, the briefs and oral arguments of the parties are considered, and it is determined that leave to appeal was improvidently granted. Accordingly, the order of this Court granting leave to appeal, dated December 21, 1979 (407 Mich 946), is vacated and leave to appeal is denied April 30, 1981. *Walter A. Lucken* for plaintiffs-appellants. *Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* and *Gromek, Bendure & Thomas* for defendants-appellees. Case below, Court of Appeals No. 78-1886, per curiam opinion of June 25, 1979.

PEOPLE v RICHMOND. (Docket No. 66481.) Leave to appeal denied May 5, 1981. *Gerald Hale Ladue* for defendant-appellant. Case below, Court of Appeals No. 49916, per curiam opinion of January 14, 1981.

PEOPLE v CAMERON. (Docket No. 66676.) Leave to appeal denied May 5, 1981. *Waterman, Hooe & Curry* for defendant-appellant. Case below, Court of Appeals No. 50672, per curiam opinion of January 14, 1981.

THOMPSON BEEF FARMS v OLD STATE BANK OF FREMONT. (Docket No. 64985.) Leave to appeal denied May 5, 1981. *Post, McMullen, Kramer & Wood* and *Michael J. Tummino, Jr.,* for plaintiff-appellant. *Baxter & Hammond* and *Murphy & Caris* for defendant-appellee. Case below, Court of Appeals No. 78-3536, per curiam opinion of February 8, 1980.

PEOPLE v JENNINGS. (Docket No. 65337.) Leave to appeal considered May 5, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the Court of Appeals for amplification of its opinion. The opinion as amplified should state the reasons resolving the defendant's issues. The amplified opinion is to be filed with the clerk of this Court within 60 days of the date of this order. We retain jurisdiction. Charles Jennings, *in propria persona,* appel-

lant. Case below, Court of Appeals No. 43799, memorandum opinion of May 27, 1980.

TORRES v ARMOND CASSIL COMPANY. (Docket No. 65980.) Leave to appeal considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Ripple, Chambers & Steiner, P.C.,* for plaintiff-appellant. *Sullivan, Ranger, Ward & Bone* for defendants-appellees. Case below, Court of Appeals No. 49460, order of August 20, 1980.

PEOPLE v MODOCK. (Docket No. 65428.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45105, per curiam opinion of April 30, 1980.

GANT v DETROIT BOARD OF EDUCATION. (Docket No. 65556.) Leave to appeal denied May 5, 1981. *Reosti & Papakhian* for plaintiff-appellee. *Grahame C. Capp* for defendant-appellant. Case below, Court of Appeals No. 49259, order of July 18, 1980.

CHENEY v VANDEVENTER. (Docket No. 64821.) Leave to appeal considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and of the Eaton Circuit Court and we remand the case to the Eaton Circuit Court for further proceedings. General principles of res judicata do not bar the plaintiffs' claims in this case. That doctrine requires identity of parties and claims. *E.g., Jordan v C A Roberts Co,* 379 Mich 235, 243; 150 NW2d 792 (1967). The individual defendant in the present case was not a party to the earlier action, and thus the plaintiffs' claims against him were not merged in the judgment against the corporation. Although the plaintiffs could have joined the individual defendant in the first action and asserted the claims they now raise, they were not required to do so. *Starr & Cornell* for plaintiffs-appellants. *Zimmer & Deitrick* for defendants-appellees. Case below, Court of Appeals No. 44954, per curiam opinion of February 27, 1980.

CLINK v LIVINGSTON COUNTY BOARD OF ROAD COMMISSIONERS. (Docket No. 65046.) Leave to appeal considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand the matter to the Court of Appeals for reconsideration in light of *Toussaint v Blue Cross & Blue Shield of Michigan* and *Ebling v Masco Corp,* 408 Mich 579 (1980), and to consider whether a county road superintendent appointed by a board of road commissioners under MCL 224.9; MSA 9.109 can acquire a right to employment for an indefinite term unless discharged for cause. We retain no jurisdiction. *John R. Brennan* for plaintiff-appellant. *Farhat, Burns & Story, P.C.,* for defendant-appellee. Reported below: 96 Mich App 524.

PEOPLE v DONNIE MARSHALL. (Docket No. 66082.) Leave to appeal considered May 5, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals for consideration as on leave granted. *People v McKinley,* 383 Mich 529 (1970). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. Donnie Ray Marshall, *in propria persona,* appellant. Case below, Court of Appeals No. 49028, order of October 22, 1980.

ETTINGER v HOOKER MOTOR FREIGHT. (Docket No. 65842.) Leave to appeal considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendants-appellees Hooker Motor Freight and Michigan Mutual Insurance Company. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard F. Zapala,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 50162, order of September 9, 1980.

PEOPLE v CONTE. (Docket No. 65650.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people. *Gerald Hale Ladue* for defendant-appellant. Case below, Court of Appeals No. 51294, per curiam opinion of July 31, 1980.

PEOPLE v MACKAY. (Docket No. 65323.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. *R. Darryl Mazur* for defendant-appellant. Case below, Court of Appeals No. 45283, per curiam opinion of May 22, 1980.

PEOPLE v WOGAMAN. (Docket No. 65693.) Leave to appeal considered May 5, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court. We find that the factual basis stated by the defendant was insufficient to establish the elements of the charged crime, breaking and entering a building with intent to commit larceny therein, MCL 750.110; MSA 28.305, or the attempted breaking and entering to which defendant pled guilty. MCL 750.92; MSA 28.287, GCR 1963, 785.7(3)(a). On remand the prosecutor shall be given an opportunity to establish the missing elements. If he is able to do so and there is no contrary evidence, the judgment of conviction shall be affirmed. If the prosecutor is unable to establish the missing elements, the judgment of conviction shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975). We do not retain jurisdiction. Richard A. Wogaman, *in propria persona,* appellant. Case below, Court of Appeals No. 47665, per curiam opinion of July 30, 1980.

SCHECTER v CITY OF SOUTHFIELD. (Docket No. 66621.) Leave to appeal denied May 1, 1981 because the Court is not persuaded that the question presented should now be reviewed by this Court. *S. Lawrence Stein, P.C.,* and *Katz, Victor & Yolles, P.C.,* for plaintiffs-appellees. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen; John P. Jacobs,* Taylor City Attorney; *Judith Cook,* Westland City Attorney; *Harry Tatigian,* Livonia City Attorney; *Sigmund A. Beras,* Southfield City Attorney; *Charles E. Lowe,* Plymouth City Attorney; and *Sylvester Delaney,* Detroit Deputy Corporation Counsel, and *Peter W. Macuga, II,* Assistant Corporation Counsel, for defendants-appellants. *Bauckham, Reed, Lang, Schaeffer & Travis, P.C.,* for Michigan Townships Association as amicus curiae. Case below, Court of Appeals No. 53311, order of January 28, 1981.

PEOPLE v MORRIS WILLIAMS. (Docket No. 65901.) Leave to appeal considered May 5, 1981 and, in lieu of leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the defendant's conviction and remand the case to the Oakland Circuit Court for new trial: The trial court erred reversibly in admitting evidence of other attempts to sell heroin. *People v Rustin,* 406 Mich 527 (1979); *People v Gee,* 406 Mich 279, 283 (1979). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Lawrence J. Bunting,* Assistant Prosecuting Attorney, for the people. *Talpos, Arnold & Rooyakker* for defendant-appellant. Case below, Court of Appeals No. 48526, memorandum opinion of September 11, 1980.

COLEMAN, C.J., and BLAIR MOODY, JR., J., dissent.

JONES v EAST LANSING-MERIDIAN WATER & SEWER AUTHORITY. (Docket No. 65397.) Leave to appeal denied May 5, 1981. *Starr & Cornell* for plaintiffs-appellees. *Foster, Swift, Collins & Coey, P.C.,* for defendants-appellants. Reported below: 98 Mich App 104.

PEOPLE v MCCARLEY. (Docket No. 65355.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Harvey A. Koselka,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. L. C. McCarley, *in propria persona,* appellant. Case below, Court of Appeals No. 44352, memorandum opinion of May 27, 1980.

PEOPLE v PAULI. (Docket No. 65651.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Paul G. Bruno,* Assistant Prosecuting Attorney, for the people. Frederick Pauli, *in propria persona,* appellant. Case below, Court of Appeals No. 78-1439, memorandum opinion of July 30, 1979.

PEOPLE v TALLMAN. (Docket No. 65822.) Leave to appeal is considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 47212, order of April 3, 1980.

FLOWER v GENSTERBLUM. (Docket No. 62371.) Intervening plaintiff's application for leave to appeal held in abeyance pending decision in *Great American Ins Co v Queen,* 410 Mich 73 (1980); leave to appeal denied May 5, 1981. *Smith & Maher* for plaintiff-appellee. *Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* for intervening plaintiff-appellant Michigan State Accident Fund. *Warner, Hart, Morgan, Fuzak & Williams,* for defendant-appellee The Brewery, Inc. Reported below: 86 Mich App 561.

BUSHNELL, GAGE & REIZEN v O'MEARA. (Docket No. 65226.) Leave to appeal considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand the case to Oakland Circuit Court for an evidentiary hearing to determine whether the consent judgment accurately reflected the agreement of the parties or whether there was in fact an agreement. After the hearing the circuit court shall make findings of fact and conclusions of law, and shall enter an appropriate order. We retain no jurisdiction. *Bushnell, Gage, Doctoroff, Reizen & Byington* for plaintiff-appellee. *Murray & Murray* for defendants-appellants. Case below, Court of Appeals No. 44985, per curiam opinion of April 30, 1980.

PEOPLE v HUNTER. (Docket No. 65371.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Martin M. Holmes,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. Mariano Hunter, *in propria persona,* and State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 77-5248, per curiam opinion of January 10, 1980.

PEOPLE v PAGE. (Docket No. 65467.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people. *Alvin C. Sallen* for defendant-appellant. Case below, Court of Appeals No. 78-3694, per curiam opinion of July 3, 1980.

VILLANEUVA v GENERAL MOTORS CORPORATION. (Docket No. 65542.) Leave to appeal considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals should consider, *inter alia, Martin v Ford Motor Co,* 401 Mich 607 (1977), and *Dechert v General Motors Corp,* 92 Mich App 124 (1979), and their possible application in this case. We retain no jurisdiction. *van Benschoten, Hurlburt & van Benschoten, P.C.,* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendant-appellee General Motors Corporation. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard F. Zapala,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 48523, order of July 8, 1980.

KYLE v MUTUAL OF OMAHA INSURANCE COMPANY, INC. (Docket No. 65736.) Leave to appeal denied May 5, 1981. *van Benschoten, Hurlburt & van Benschoten, P.C.,* for plaintiffs-appellees. *Arthur M. Hoffeins* for defendant-appellant. Case below, Court of Appeals No. 47067, per curiam opinion of August 18, 1980.

HICOK v DEVILBISS COMPANY. (Docket No. 65921.) Leave to appeal denied May 5, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *Sommers, Schwartz, Silver & Schwartz, P.C.,* for defendants-appellants DeVilbiss Company and Glen Falls Insurance Company. *Sullivan, Ranger, Ward & Bone* for defendants-appellees Marshall Blow Pipe Company and Atlantic Mutual Insurance Company. *Richard A. Jones* for defendants-appellees Mahon Technology Group, Inc., Gallagher-Kaiser Corporation, R. C. Mahon Corporation, and Aetna Casualty & Surety Company. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellees Myr Sheet Metal Industries, Inc., and Insurance Company of North America; Peerless Sheet Metal Company and Reliance Insurance Company; and Vanderbusch Sheet Metal and American Mutual Liability Insurance Company. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendants-appellees Frimberger Corporation and U.S. Fidelity & Guaranty. *Brakora & Pentis* for defendants-appellees Carden Metal Fabricators, Inc., Darin & Armstrong, Inc., C. A. Dauer Company, and Michigan Mutual Insurance Company. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendants-appellees Gancia Cote Company and The Hartford Insurance Company. Case below, Court of Appeals No. 51917, order of September 19, 1980.

IN THE MATTER OF JACKSON, DELTA COUNTY DEPARTMENT OF SOCIAL SERVICES v VOAKES. (Docket No. 66522.) Leave to appeal denied May 5, 1981. *Steven L. Pence,* Prosecuting Attorney, *John R. Filoramo,* Assistant Prosecuting Attorney, for plaintiff-appellee Department of Social Services. *Gary L. Olsen,* for defendant-appellant Marjorie Voakes. Case below, Court of Appeals No. 54530, order of December 30, 1980.

PEOPLE v GRIFFITH. (Docket No. 65739.) Leave to appeal denied May 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John M. Dennany,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *F. Martin Tieber,* Deputy Defender, for defendant-appellant. Case below, Court of Appeals No. 44307, per curiam opinion of August 14, 1980.

TULKKU v MACKWORTH REES DIVISION OF AVIS INDUSTRIES, INC (ON REMAND). (Docket No. 66276.) Leave to appeal denied May 5, 1981. *Goodman, Eden, Millender & Bedrosian* for plaintiff-appellee. *Dice, Sweeney, Sullivan & Feikens, P.C.,* for defendant-appellant Mackworth Rees. *Kitch, Suhrheinrich, Smith, Saubier & Drutchas, P.C.,* for defendant-appellant Illinois Tool Works, Inc. Reported below: *(On Remand)* 101 Mich App 709.

COLEMAN, C.J., and RYAN, J., would grant leave to appeal.

PEOPLE v RALPH WILLIAMS. (Docket No. 66403.) Leave to appeal denied May 5, 1981 because the delay exceeds six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people, appellant. *George Stone* for defendant-appellee. Reported below: 98 Mich App 510.

PEOPLE v TURNER. (Docket No. 65856.) Leave to appeal considered May 5, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Recorder's Court for a new trial. The trial judge failed to clearly explain to the jury the elements of the lesser included offenses it was to consider. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,*

Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. *Gromek, Bendure & Thomas* for defendant-appellant. Reported below: 99 Mich App 733.

PEOPLE v WARE. (Docket No. 64998.) Leave to appeal denied May 5, 1980. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *James D. Norlander,* Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove* and *Norris J. Thomas, Jr.,* Assistant Defenders, for defendant-appellant. Case below, Court of Appeals No. 77-2884, memorandum opinion of March 24, 1980.

COLEMAN, C.J., not participating.

ROHDE v EALY. (Docket No. 65398.) Leave to appeal denied May 5, 1981. *Patrick & Johnson, P.C.,* for plaintiffs-appellants. *Jeffery T. Lyon* for defendants-appellees. Case below, Court of Appeals No. 78-4821, per curiam opinion of April 28, 1980.

PEOPLE v HOWARD. (Docket No. 65997.) Leave to appeal considered May 5, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Recorder's Court for the City of Detroit to allow the judge who tried this case to explicate the path he followed in reaching the result that he did on the factual issues. *People v Jackson,* 390 Mich 621 (1973). The judge's new findings of fact are to be filed with the clerk of this Court within 60 days. We retain jurisdiction. In light of the additional findings of fact filed by the trial judge pursuant to our May 5, 1981 order, leave to appeal is denied on November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people. *Thomas A. Law* for defendant-appellant. Case below, Court of Appeals No. 43420, per curiam opinion of September 17, 1980.

PEOPLE v DOUGLAS TAYLOR. (Docket No. 65622.) Leave to appeal considered May 5, 1981 and, it appearing to this Court that the case of *People v Lytal* (Docket No. 64936) is presently pending on appeal before this Court and that the decision in that case may be decisive of an issue raised in the present application for leave to appeal, it is ordered that the present application be held in abeyance pending decision in that case. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice*

M. Joyce, Assistant Prosecuting Attorney, for the people. *Robert W. Hayden* for defendant-appellant. Reported below: 98 Mich App 685.

PEOPLE v WILLIAM HOLMES. (Docket No. 65908.) Defendant's request for review of the record and leave to appeal considered May 5, 1981 and, it appearing to this Court that the cases of *People v Gonzales* (Docket No. 64965) and *People v Howard* (Docket No. 65235) are presently pending on appeal before this Court and that the decision in those cases may be decisive of an issue raised in the present application for leave to appeal, it is ordered that the present request for review and application be held in abeyance pending decision in those cases. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Howard B. Gave,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Reported below: 98 Mich App 369.

PEOPLE v VILLARREAL and PEOPLE v MICHAEL FUSON. (Docket No. 66458.) Leave to appeal and cross-appeal denied May 6, 1981. Although we deny leave to appeal as to cross-appellant Alfredo Villarreal, we express our disagreement with that portion of the Court of Appeals opinion addressing his entrapment issue to the extent the opinion departs from the standards we adopted in *People v Turner,* 390 Mich 7 (1973), and *People v D'Angelo,* 401 Mich 167 (1977), and fails to recognize that the trial court applied incorrect standards and did not make the necessary findings of fact on the issue. *D'Angelo, supra,* 401 Mich 167, 183. Before Alfredo Villarreal may be retried, the trial court shall conduct a new entrapment hearing, employing the correct standards and making the required findings of fact. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people, appellant. *Ronald A. Molter* for defendants-appellees-cross-appellants Edward and Alfredo Villarreal. *Alvin C. Sallen* for defendant-appellee Michael Fuson. Reported below: 100 Mich App 379.

PEOPLE v ANNETTE ALEXANDER. (Docket No. 65263.) Leave to appeal granted May 8, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Kenneth*

M. Mogill for defendant-appellant. Case below, Court of Appeals No. 46446, per curiam opinion of May 9, 1980.

WOOD v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE. (Docket No. 65839.) Leave to appeal granted May 8, 1981. *Dickinson, Pike, Mourad, Brandt & Hanlon,* and *Gromek, Bendure & Thomas* for defendant-appellant. Reported below: 99 Mich App 701.

BEALS v WALKER. (Docket No. 65442.) Leave to appeal granted May 8, 1981. *Cincinelli, Mossner, Majoros & Alexander, P.C.,* for plaintiffs-appellants. *Isackson, Neering & Quinn, P.C.,* for defendant-appellee. Reported below: 98 Mich App 214.

FRESARD v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY. (Docket No. 65261.) Leave to appeal granted May 8, 1981. *Scholl, Theut, Robinson, Steig & Schellig* for plaintiffs-appellees. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendant-appellant. Reported below: 97 Mich App 584.

DAVEY v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE. (Docket No. 65227.) Leave to appeal granted May 8, 1981. *Stanton, Bullen, Nelson, Moilanen & Klaasen, P.C.,* for plaintiff-appellee. *Susskind, Hedstrom & Falahee, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 44477, per curiam opinion of April 30, 1980.

NEUMAYER v PONTIAC POLICE DEPARTMENT. (Docket No. 65256.) Leave to appeal denied May 8, 1981. *Faintuck, Shwedel, Wolfram, McDonald & Zipser* for plaintiff-appellant. *Peter A. Letzmann,* Deputy City Attorney/Police Legal Advisor, for defendants-appellees. Case below, Court of Appeals No. 49794, per curiam opinion (on remand) of May 9, 1980.

SMILEY v GRAND BLANC BOARD OF EDUCATION. (Docket No. 65326.) Leave to appeal granted May 8, 1981. *Kiefer, Allen & Cavanagh* for plaintiff-appellant. Case below, Court of Appeals No. 45764, order of January 3, 1980.

LENAWEE COUNTY BOARD OF HEALTH v MESSERLY. (Docket No. 65513.) Leave to appeal granted May 8, 1981. *Lawrence C. Force* for defendants-cross-plaintiffs-appellants William H. and Martha B. Mes-

serly. *Robertson, Bartlow & DesChenes, P.C.,* for third-party-defendants-appellees Charles B. and Nancy L. Pickles. Reported below: 98 Mich App 478.

PEOPLE v CAZAL. (Docket No. 66646.) Leave to appeal granted May 8, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Richard H. Browne,* Assistant Prosecuting Attorney, for the people, appellant. *Richard P. King* and *Donald W. Grant* for defendant-appellee. Case below, Court of Appeals No. 49683, per curiam opinion of January 28, 1981.

PEOPLE v WEBB. (Docket No. 65017.) Leave to appeal denied May 8, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. *Benjamin H. Logan, II,* for defendant-appellant. Reported below: 96 Mich App 493.

PEOPLE v RONALD WOODS. (Docket No. 65342.) Leave to appeal granted May 8, 1981. Ronald Woods, *in propria persona,* appellant. Case below, Court of Appeals No. 77-1290, per curiam opinion of March 7, 1979.

MCKEE v WOODHAVEN PUBLIC SCHOOLS. (Docket No. 65930.) Leave to appeal granted May 8, 1981. *Richard B. Bailey* for plaintiff-appellee. *Clark, Hardy, Lewis, Find & Pollard, P.C.,* for defendant-appellant. Reported below: 100 Mich App 195.

PEOPLE v TUCKER. (Docket No. 63099.) Leave to appeal granted May 8, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 31334, per curiam opinion of March 7, 1979.

COUSINEAU v OAKLAND COUNTY ROAD COMMISSION. (Docket No. 65441.) Leave to appeal denied May 11, 1981. *Turner & Turner, P.C.,* for plaintiffs-appellees. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendant-appellant. Case below, Court of Appeals No. 78-3069, per curiam opinion of May 7, 1980.

PEOPLE v MINIER. (Docket No. 65932.) Leave to appeal denied May 11, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael J. Hackett,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Lynn Chard,* Assistant Defender, and *Stuart B. Lev,* Research Attorney, for defendant-appellant. Reported below: 100 Mich App 114.

BORTELL v CITIZENS FOR BETTER CARE INSTITUTE, INC. (Docket No. 65783.) Leave to appeal denied May 11, 1981. *R. G. Corace, P.C.,* for plaintiffs-appellants. Legal Aid & Defender Association of Detroit, *Alan Kellman,* for defendant-appellant Citizens for Better Care Institute, Inc. *Honigman, Miller, Schwartz & Cohn* for defendant-appellee Citizens for Better Care in Nursing Homes, Homes for the Aged and Other After-Care Facilities, Inc. *Butzel, Long, Gust, Klein & Van Zile* for defendant-appellee The Evening News Association. *Kenneth Murray* and *Brownson Murray* for defendant-appellee WXYZ, Inc. Case below, Court of Appeals No. 78-1559, per curiam opinion of July 3, 1980.

BLAIR MOODY, JR., J., not participating.

PEOPLE v TIPSWORD and PEOPLE v DUDGEON. (Docket Nos. 65518, 65519.) Leave to appeal denied May 11, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Jeffrey Butler,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendants-appellants. Case below, Court of Appeals Nos. 78-5522-78-5525, per curiam opinion of July 7, 1980.

SZOPKO v KINSMAN MARINE TRANSIT COMPANY. (Docket No. 65879.) Leave to appeal denied May 11, 1981. *The Jacques Admiralty Law Offices, P.C.,* for plaintiff-appellee. *John Arthur Hamilton* and *Joseph V. McGovern* for defendant-appellant. Reported below: 96 Mich App 64.

PEOPLE v HUMBERT. (Docket No. 65675.) Leave to appeal denied May 11, 1981. This order is without prejudice to defendant seeking a delayed appeal of her larceny conviction in the Court of Appeals. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wilde-*

boer, Chief Appellate Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, and *Herb Jordan,* Research Assistant, for defendant-appellant. Case below, Court of Appeals No. 46124, order of March 3, 1980.

BAUER v UNDERWRITERS ADJUSTING COMPANY. (Docket No. 65914.) Leave to appeal denied May 11, 1981. *Robert F. Ponte* for plaintiffs-appellants. *Franklin, Petrulis, Lichty & Mellon, P.C.,* for defendants-appellees Underwriters Adjusting Company and Continental Insurance Company. Case below, Court of Appeals No. 46526, per curiam opinion of July 29, 1980.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION. (Docket No. 65427.) Leave to appeal considered May 11, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson, Roderick S. Coy,* and *Patrick J. Devlin,* Assistants Attorney General, for intervenor plaintiff-appellant Attorney General. *Alan J. Barak* for intervenor plaintiff-appellant Michigan Citizens Lobby. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Arthur E. D'Hondt, Wallace T. Hart,* and *Leo H. Friedman,* Assistants Attorney General, for defendant-appellee Public Service Commission. *Leon S. Cohan, Solomon Bienenfeld,* and *Raymond O. Sturdy, Jr.,* for defendant-appellee Detroit Edison Company. Case below, Court of Appeals No. 51429, order of June 11, 1980.

PEOPLE v ARTHUR PERRY. (Docket No. 65487.) Leave to appeal denied May 11, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-2445, per curiam opinion of June 5, 1980.

HOWARD v GLARUM. (Docket No. 65987.) Leave to appeal denied May 12, 1981. *Michael D. Lewis, P.C.,* for plaintiff-appellant. *John F. Huft* for defendants-appellees. Case below, Court of Appeals No. 48174, per curiam opinion of September 22, 1980.

DUNLAP v EMPLOYMENT SECURITY COMMISSION. (Docket No. 66107.) Leave to appeal denied May 12, 1981. *Miller, Cohen, Martens & Sugerman, P.C.,* and *Jordan Rossen,* Associate General Counsel, UAW, for plaintiff-appellee. *Best, Arnold, Gleeson & Best, P.C.,* for defendant-appellant Walker Manufacturing Company. Reported below: 99 Mich App 400.

PEOPLE v KENNETH MACKENZIE. (Docket No. 66601.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, and *Mary Kontolambros,* Assistant Prosecuting Attorney, for the people. *Stanley J. Szot* for defendant-appellant. Case below, Court of Appeals No. 54972, order of January 26, 1981.

PEOPLE v CONE. (Docket Nos. 62921, 62965.) Leave to appeal denied May 12, 1980 in Docket No. 62921, and in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate the defendant's habitual-offender conviction in Docket No. 62965. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Earl R. Spuhler* for defendant-appellant. Cases below, Court of Appeals No. 78-70, per curiam opinion of February 9, 1979, and No. 78-2709, order of January 2, 1979.

PEOPLE v GEORGE ADAMS. (Docket No. 66083.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. George C. Adams, *in propria persona,* appellant. Case below, Court of Appeals No. 50076, order of February 6, 1980.

PEOPLE v CURRELLEY. (Docket No. 66091.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Reported below: 99 Mich App 561.

HILGENDORF v SEARS, ROEBUCK & COMPANY. (Docket No. 66124.) Leave to appeal denied May 12, 1981. *Robert B. Tatham* and *Zemke & Hirschhorn, P.C.,* for plaintiff-appellant. *Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.,* and *Gromek, Bendure & Thomas* for defendant-appellee. Case below, Court of Appeals No. 78-5227, per curiam opinion of August 14, 1980.

PEOPLE v ALSTON. (Docket No. 66147.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. *Vincent D. Giovanni* for defendant-appellant. Case below, Court of Appeals No. 51610, order of October 31, 1980.

PEOPLE v BENSEK. (Docket No. 66689.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people. *Kiefer, Allen & Cavanagh* for defendant-appellant. Case below, Court of Appeals No. 55180, order of February 12, 1981.

PEOPLE v MARCIA WILSON. (Docket No. 65913.) Leave to appeal considered May 12, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the defendant's conviction as a habitual offender. *People v Young,* 410 Mich 363. We reinstate the defendant's conviction and sentence for possession of stolen property over $100. Marcia Jean Wilson, *in propria persona,* appellant. Reported below: 99 Mich App 348.

MCCALLISTER v SUN VALLEY POOLS, INC. (Docket No. 65929.) Leave to appeal denied May 12, 1981. *Law Offices of Joseph E. Mihelich* for plaintiff-appellant. *Hibbs & Lewis, P.C.,* for defendants-appellees Lorimer and Josee McCallister. Reported below: 100 Mich App 131.

PEOPLE v STITT. (Docket No. 66400.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baugh-*

man, Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 78-3874, per curiam opinion of November 24, 1980.

PEOPLE v PROPHET. (Docket No. 66637.)) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. *Thomas E. Binion* for defendant-appellee. Case below, Court of Appeals No. 53742, order of January 28, 1981.

PEOPLE v VENEGAS. (Docket No. 66457.) Leave to appeal considered May 12, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the portion of the trial judge's order of November 26, 1979 that denied the motion to suppress and remand the case to the trial court for further proceedings. If the defendant renews the motion, the trial court shall conduct an evidentiary hearing before ruling on it. *People v Talley,* 410 Mich 378 (1981). In all other respects leave to appeal is denied. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Ronald W. Emery,* Assistant Attorney General, for the people. *Joseph P. Zanglin* for defendant-appellant. Case below, Court of Appeals No. 49945, order of December 29, 1980.

HARRIS v HARLAN ELECTRICAL CONSTRUCTION COMPANY. (Docket No. 66132.) Leave to appeal denied May 12, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellee. *A. T. Iverson, Jr.,* for defendants-appellees. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Eileen D. Zielesch,* Assistant Attorney General, for defendant-appellant Second Injury Fund. Reported below: 101 Mich App 155.

PEOPLE v HESSON. (Docket No. 66034.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Nora J. Pasman,* for defendant-appellant. Case below, Court of Appeals No. 46585, memorandum opinion of October 3, 1980.

PEOPLE v COLLINS. (Docket No. 66105.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Bleau,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-1913, per curiam opinion of May 21, 1980.

PEOPLE v LEWIS GRIFFIN. (Docket No. 62793.) Leave to appeal and cross-appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert E. Edick,* Assistant Prosecuting Attorney, for the people, appellant-cross-appellee. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 77-891, per curiam opinion of January 18, 1979.

EMPLOYERS FIRE INSURANCE COMPANY v SMITH-SANTORO, INC. (Docket No. 66578.) Leave to appeal denied May 12, 1981. *MacArthur & Cheatham* and *Gromek, Bendure & Thomas* for plaintiff-appellee. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 51144, order of January 19, 1981.

PEOPLE v OMEYE. (Docket No. 66636.) Leave to appeal considered May 12, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals order certified January 29, 1981 which ordered a remand for resentencing. *People v Jankowski,* 408 Mich 79, 98 (1980). In all other respects leave to appeal is denied. Defendant's delayed application for leave to cross-appeal is denied. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert H. Cleland,* Prosecuting Attorney, and *Peter R. George,* Chief Appellate Attorney, for the people, appellant. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 44276, per curiam opinion of December 4, 1980 and order of January 29, 1981.

NATIONAL UNION OF POLICE OFFICERS, LOCAL 502, AFL-CIO v WAYNE COUNTY. (Docket Nos. 66863, 66885.) Leave to appeal denied May 12, 1981. *Jenkins, Nystrom & Sterlacci, P.C.,* for defendant-

appellant Wayne County Sheriff. *George H. Cross,* Corporation Counsel, for defendants-appellants Wayne County, et al. Case below, Court of Appeals No. 56720, order of March 24, 1981.

PEOPLE v ARTHUR HILL. (Docket No. 64299.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 78-3593, per curiam opinion of December 10, 1979.

ARSENAULT v CITY OF TAYLOR. (Docket No. 65617.) Leave to appeal denied May 1, 1981. *LaBarge & Dinning, P.C.,* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendants-appellees. Reported below: 98 Mich App 767.

PEOPLE v ROBINSON. (Docket No. 65899.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 46312, per curiam opinion of September 22, 1980.

OIKARINEN v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN. (Docket No. 66162.) Leave to appeal denied May 12, 1981. *Tercha & Daavettila* for plaintiff-appellant. *Priscilla S. Burnham* for defendant-appellee. Reported below: 101 Mich App 436.

BROWN v LTV AEROSPACE CORPORATION (AFTER REMAND). (Docket No. 55499.) The decision of the Employment Security Board of Review, after remand (394 Mich 702), and the formal communication from the parties are considered May 12, 1981. Because the claims of the individual plaintiff have been resolved, and because of the promulgation of 1979 AACS R 421.302, the appeal in this Court is moot and we dismiss the case, with prejudice and without costs. *Jordan Rossen,* Associate General Counsel, UAW, for plaintiffs-appellants. *Dickinson, Wright, McKean, Cudlip & Moon,* for defendant-appellee LTV Aerospace Corporation. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *George Blaty,* Assistant

Attorney General, for defendant-appellee Employment Security Commission. Reported below: 50 Mich App 237.

SCHWARK v LILLY. (Docket No. 63498.) Plaintiffs' application for leave to appeal held in abeyance pending decision in *Miller v State Farm Mutual Automobile Ins Co,* 410 Mich 538 (1981); pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand to the trial court for a determination of survivors' economic benefits under § 3108 (MCL 500.3108; MSA 24.13108) in light of this Court's decision in *Miller* May 12, 1981. *Sloan, Risdon, Benefiel & Farrer* for plaintiffs-appellants. Reported below: 91 Mich App 189.

PEOPLE v SENTER. (Docket Nos. 65568, 65569.) Leave to appeal, defendant's motions to dismiss and to add issues, and the supplemental record including the trial court's findings of fact are considered May 12, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and reinstate the plea-based convictions and sentences because we agree with the trial court's conclusions (on February 25, 1981) regarding the good-faith actions of the prosecution and the reasonableness of the delay of some 40 days. The motion to dismiss is denied. The motion to add issues is granted and we have reviewed those issues in deciding the case. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *Reck, Reck & Ashley, P.C.,* for defendant-appellee. Case below, Court of Appeals Nos. 44931, 44932, per curiam opinion of May 8, 1980.

ZENDT'S LANDSCAPING, INC v BURKE. (Docket No. 66134.) Leave to appeal denied May 12, 1981. *Gelman, Siman & Freedman, P.C.,* for plaintiff-appellant. *Michael Kranson* for defendants-appellees. Case below, Court of Appeals No. 48337, per curiam opinion of September 23, 1980.

STOKUS v WALLED LAKE BOARD OF EDUCATION. (Docket No. 66195.) Leave to appeal denied May 12, 1980. *Joseph A. Golden* for plaintiff-appellant. *Clark, Hardy, Lewis, Fine & Pollard, P.C.,* for defendant-appellee. Reported below: 101 Mich App 431.

WEST SIDE AUTO PARTS, INC v COPE. (Docket No. 66215.) Leave to appeal denied May 12, 1981. *Lawrence J. Stockler* for plaintiff-appellant. *Frank & Stefani* for defendants-appellees. Case below, Court of Appeals Nos. 50174, 50175, order of September 26, 1980.

JACQUES v BUNDY CORPORATION. (Docket No. 66222.) Leave to appeal denied May 12, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Charfoos & Reiter, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 51101, order of November 21, 1980.

PEOPLE v EICHELBERGER #1. (Docket No. 66511.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 78-3245, memorandum opinion of November 26, 1980.

PEOPLE v MARTIN. (Docket No. 63692.) Leave to appeal considered May 12, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate one of three convictions of criminal sexual conduct in the first degree because the defendant's trial counsel made a serious mistake in successfully requesting that the trial court permit amendment of the information to add a third charge of criminal sexual conduct against the defendant. In all other respects leave to appeal is denied. *People v Gardner,* 406 Mich 369 (1979), *People v Garcia,* 398 Mich 250, 266 (1976). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. *Ruth B. Acevedo* for defendant-appellant. Case below, Court of Appeals No. 78-1883, memorandum opinion of August 2, 1979.

PEOPLE v JOHN BROWN. (Docket No. 65686.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy C. Scallen,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 48291, per curiam opinion of August 19, 1980.

JEROME v MICHIGAN MUTUAL AUTO INSURANCE COMPANY. (Docket No. 66135.) Leave to appeal denied May 12, 1981. *Law Office of W. J. Drillock* for plaintiff-appellant. *David A. Wallace* for defendant-appellee. Case below, Court of Appeals No. 48833, per curiam opinion of October 8, 1980.

SEATON v STATE FARM LIFE INSURANCE COMPANY. (Docket No. 66154.) Leave to appeal denied May 12, 1981. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiff-appellant. *Fraser, Trebilcock, Davis & Foster, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 44849, order of November 4, 1980.

MACDONALD v COURT OF APPEALS. (Docket No. 66390.) Leave to appeal denied May 12, 1981. *William L. Fisher* for plaintiff-appellant. Case below, Court of Appeals No. 51102, order of November 7, 1980.

PEOPLE v MASK. (Docket No. 66751.) Leave to appeal denied May 12, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, *Janis L. Blough,* Chief Appellate Attorney, and *Barbara K. Hamm,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 48671, per curiam opinion of February 10, 1981.

PEOPLE v MCMILLAN. (Docket No. 66848.) Leave to appeal denied May 12, 1981. *Varnum, Riddering, Wierengo & Christenson* for defendant-appellant. Case below, Court of Appeals No. 56562, order of March 13, 1981.

PEOPLE v DEMPS and PEOPLE v MASSEY. (Docket Nos. 66013, 66016.) Leave to appeal considered May 12, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the cases to the trial court for further proceedings. *People v Johnson,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendants procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the guilty plea to felony-firearm in these cases shall stand.

If the prosecutor is unable to do so, the plea to felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96, 129 (1975). We do not retain jurisdiction. *Edwards & Edwards* for defendants-appellants. Case below, Court of Appeals Nos. 52886, 52865, orders of October 9, 1980.

PEOPLE v NEWTON. (Docket No. 65425.) Leave to appeal considered May 15, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we affirm the Court of Appeals grant of plaintiff's motion for peremptory reversal. We remand to the trial court for reinstatement of defendant's felony-firearm plea and conviction. The trial court shall treat defendant's service of his first two years of imprisonment, from September 8, 1977 to September 7, 1979, as satisfying the mandatory sentence for felony-firearm. Defendant's time in jail from September 8, 1979 through October 10, 1979, plus his restricted liberty on parole from October 10, 1979, to the present shall be credited toward his armed robbery sentence. We further direct that the trial court review defendant's armed robbery sentence to consider the appropriateness of recommending that the defendant be placed on special parole, in view of the unique circumstances of this case, including the time already served and his apparent readjustment to society. To aid the court in this determination, an updated presentence report shall be prepared. See *People v Triplett,* 407 Mich 510 (1980). The trial judge's recommendation in this regard shall be forwarded to the Department of Corrections. We retain no jurisdiction. Larry G. Newton, *in propria persona,* appellant. Case below, Court of Appeals No. 78-4492, order of May 27, 1980.

PEOPLE v MEDINA. (Docket No. 65824.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *John A. Lydick,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 43690, per curiam opinion of September 5, 1980.

ADKINS v AUTO OWNERS INSURANCE COMPANY. (Docket No. 65535.) Leave to appeal denied May 19, 1981. *McCroskey, Libner, VanLeuven, Feldman, Cochrane & Brock,* for plaintiff-appellant. *Linsey, Strain & Worsfold, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 48409, per curiam opinion of July 9, 1980.

PEOPLE v MCINTOSH. (Docket No. 64200.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for reconsideration in light of *People v Johnson, supra,* May 19, 1981. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. Joe Louis McIntosh, *in propria persona,* appellant. Case below, Court of Appeals No. 78-2234, per curiam opinion of November 9, 1979.

PEOPLE v GARZA. (Docket No. 64066.) Leave to appeal denied May 19, 1981. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 77-1268, per curiam opinion of May 2, 1979.

SLY v VALLEY CONSOLIDATED INDUSTRIES. (Docket No. 65721.) Leave to appeal denied May 19, 1981. *Hayim I. Gross* for defendant-appellant Valley Consolidated Industries and Employers Mutual Liability Company. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellees Furnco Construction Company and American Mutual Liability Company. Case below, Court of Appeals No. 47235, order of March 19, 1980.

KAVANAGH, J., not participating.

KLIMCZUK v GENERAL MOTORS CORPORATION. (Docket No. 66097.) Leave to appeal denied May 19, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Otis M. Smith,* General Counsel, *Willard W. Wallace,* and *E. R. Whinham* for defendant-appellee. Case below, Court of Appeals No. 50039, order of October 8, 1980.

KAVANAGH, J., not participating.

PEOPLE v POWERS. (Docket No. 64540.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender,

for defendant-appellant. Case below, Court of Appeals No. 78-5499, per curiam opinion of December 28, 1979.

PEOPLE v KERRY DAVIS. (Docket No. 64311.) Plaintiff's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that reversed defendant's conviction for possession of a firearm during the commission of a felony and remand the case to the Recorder's Court for the City of Detroit for further proceedings May 19, 1981. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. *Rosenberg, Hartsook & Spuhler* for defendant-appellee. Case below, Court of Appeals No. 78-1558, per curiam opinion of December 7, 1979.

KING v MCCULLOUGH. (Docket No. 65594.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court with directions to reinstate plaintiff's cause of action. Plaintiff's attorney did not receive the requisite notice that this case was on the no-progress docket. GCR 1963, 501.4 and Macomb Circuit Local Rule 7. *Stempien & Stempien, P.C.,* for plaintiffs-appellants. Case below, Court of Appeals No. 43841, order of July 18, 1980.

KAVANAGH, J., not participating.

PEOPLE v BUCKLES. (Docket No. 65587.) Plaintiff's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); pursuant to GCR

1963, 853.2(4), in lieu of leave to appeal, we modify that part of the judgment of the Court of Appeals that set aside defendant's conviction for possession of a firearm during the commission of a felony without remanding for a new trial May 19, 1981. We remand the case to the Recorder's Court for the City of Detroit for a new trial on the charge of felony-firearm. The trial court's instructions on this charge were erroneous. *People v Johnson* and *Tavolacci. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals Nos. 78-4694, 45360, per curiam opinion of July 3, 1980.

RIZA v NIAGARA MACHINE & TOOL WORKS, INC. (Docket No. 65892.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration of the plaintiff's delayed application for leave to appeal on its merits. The 18-month period provided by GCR 1963, 806.2 was tolled while an appeal was pending pursuant to a claim of appeal. *Kozlow, Woll, Crowley & Berman, P.C.,* for plaintiff-appellant. *Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.,* and *Gromek, Bendure & Thomas* for defendant-appellee. Case below, Court of Appeals No. 49782, order of September 10, 1980.

PEOPLE v BERRYMAN. (Docket No. 63647.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 77-1411, per curiam opinion of June 21, 1979.

LEVIN, J., would reverse and order a new trial because of the improper questioning of witness Van Meter regarding his plea of guilty.

PEOPLE v ROCHA. (Docket No. 65747.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Paul G. Bruno,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for

defendant-appellant. Reported below: *(After Remand)* 99 Mich App 654.

KAVANAGH, J., not participating.

PEOPLE v MIXON. (Docket Nos. 64615, 64616.) Leave to appeal and request for review of the record are considered May 19, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we set aside defendant's plea-based conviction of second-degree murder and remand the case for further proceedings to the Recorder's Court for the City of Detroit because the defendant was not advised that the maximum sentence for the offense was life imprisonment. *People v Jones* and *People v Grant*, 410 Mich 407 (1981). The case is also remanded to the Recorder's Court for the City of Detroit for resentencing of the defendant on his conviction on a second count of felony-firearm consistent with *People v Sawyer*, 410 Mich 531 (1981). In all other respects leave to appeal is denied. This Court does not retain jurisdiction. *Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, *William L. Cahalan*, Prosecuting Attorney, *Edward Reilly Wilson*, Principal Attorney, Appeals, and *Anne B. Wetherholt*, Assistant Prosecuting Attorney, for the people. Ronnie Mixon, *in propria persona*, appellant. Case below, Court of Appeals Nos. 78-4443, 78-4444, per curiam opinion of January 4, 1980.

CAPRARO v RITTER. (Docket No. 66200.) Leave to appeal denied May 19, 1981. *Jasmer, Lobb & Weiss, P.C.*, for plaintiffs-appellants. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.*, for defendant-appellee. Case below, Court of Appeals No. 43174, per curiam opinion of November 6, 1980.

KAVANAGH, J., not participating.

PEOPLE v CHANDLER. (Docket No. 65616.) Leave to appeal denied May 19, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). Fred Darnell Chandler, *in propria persona*, appellant. Case below, Court of Appeals Nos. 46752, 46753, order of January 30, 1980.

KAVANAGH, J., not participating.

PEOPLE v MONROE. (Docket No. 66099.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 77-3278, per curiam opinion of October 3, 1980.

KAVANAGH, J., not participating.

PEOPLE v CHAMBLIS. (Docket No. 64108.) Leave to appeal considered May 19, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's convictions because at the guilty plea proceedings the trial court failed to inform the defendant of the maximum sentence possible for armed robbery. *People v Jones,* 410 Mich 407 (1981). We remand the case to the Recorder's Court for the City of Detroit for further proceedings. Alonzo Chamblis, *in propria persona,* appellant. Case below, Court of Appeals No. 44955, memorandum opinion of October 24, 1979.

PEOPLE v ROOSEVELT HUDSON. (Docket No. 64152.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *Janis L. Blough,* Chief Appellate Attorney, for the people. State Appellate Defender, *Ronald J. Bretz,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-1805, memorandum opinion of November 1, 1979.

PEOPLE v JEFFREY WILSON. (Docket No. 65586.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 46313, per curiam opinion of July 29, 1980.

PEOPLE v GREGORY HOUSTON. (Docket No. 65383.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Carl*

Ziemba for defendant-appellant. Case below, Court of Appeals No. 77-1607, per curiam opinion of June 16, 1980.

LEVIN, J., would grant leave to appeal.

PEOPLE v KIRKPATRICK. (Docket No. 64732.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment. The habitual-offender conviction is vacated and the May 10, 1976 original sentence is reinstated. *People v Fountain,* 407 Mich 96 (1979), *People v Young,* 410 Mich 363 (1981). We retain no jurisdiction. Paul Kirkpatrick, *in propria persona,* appellant. Case below, Court of Appeals No. 78-1174, memorandum opinion of January 30, 1980.

GRAND RAPIDS GROWERS, INC v OLD KENT BANK & TRUST COMPANY. (Docket No. 65638.) Leave to appeal denied May 19, 1981. *Cicinelli, Mossner, Majoros & Alexander, P.C.,* and *Smith & Bovill, P.C.,* for plaintiffs-appellants. *Warner, Norcross & Judd* for defendant-appellee. Reported below: 99 Mich App 128.

KAVANAGH, J., not participating.

MCMILLAN v CITY OF ROYAL OAK. (Docket No. 66113.) Leave to appeal denied May 19, 1981. *William L. Fisher* for plaintiffs-appellants. Case below, Court of Appeals No. 48489, memorandum opinion of September 23, 1980.

KAVANAGH, J., not participating.

MCMILLAN v STATE HIGHWAY COMMISSION. (Docket No. 66114.) Leave to appeal denied May 19, 1981. *William L. Fisher* for plaintiffs-appellants. Case below, Court of Appeals No. 47293, per curiam opinion of September 22, 1980.

KAVANAGH, J., not participating.

PEOPLE v BYERS. (Docket No. 65855.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Michael D. Patterson*

for defendant-appellant. Case below, Court of Appeals No. 47161, order of August 13, 1980.

KAVANAGH, J., not participating.

STRINGER v KINROSS SPORTSMENS CLUB. (Docket No. 65469.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for amplification of its June 23, 1980 opinion. We retain no jurisdiction. *Perlman, Garber & Holtz, P.C.,* for plaintiffs-appellants. *Platt, Peacock & Lantzy, P.C.,* for defendants-appellees Edward and Adelaide Mundle, Doug Dosmas, and Michael DiPasquale. *Jack Carpenter* for defendant-appellee Ronald Roy Hayden. *Corcoran & Ingleson, P.C.,* for defendant-appellee Alice Miller. Case below, Court of Appeals No. 43935, memorandum opinion of June 23, 1980.

PEOPLE v RHILE. (Docket No. 62852.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *Charles M. Sibert,* Chief Appellate Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 77-5154, memorandum opinion of December 28, 1978.

PEOPLE v PROTHRO. (Docket No. 64153.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Oakland Circuit Court for further proceedings. *People v Johnson,* 411 Mich 50 (1981). On remand, the prosecutor shall have the opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96, 129 (1975). We retain no jurisdiction. Willie Prothro, *in propria persona,* appellant. Case below, Court of Appeals No. 78-2704, per curiam opinion of November 13, 1979.

PEOPLE v FLANNEL. (Docket No. 64278.) Plaintiff's application for leave to appeal held in abeyance pending decisions in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate that portion of the Court of Appeals judgment which set aside the defendant's felony-firearm conviction and remand the case to the Court of Appeals to consider in light of *Johnson* and *Tavolacci* May 19, 1981. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy C. Scallen,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 78-1998, per curiam opinion of November 26, 1979.

PEOPLE v OSTER. (Docket No. 65619.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, and *Robert C. Williams,* Chief Appellate Counsel, for the people. Ronald C. Oster, *in propria persona,* appellant. Reported below: *(On Resubmission)* 97 Mich App 122.

LEVIN, J., would grant leave to appeal.

KAVANAGH, J., not participating.

PEOPLE v ANAYA. (Docket No. 65956.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Dennis L. Keleher,* Prosecuting Attorney, for the people. *Bruce C. Gockerman* for defendant-appellant. Case below, Court of Appeals No. 47791, per curiam opinion of September 19, 1980.

KAVANAGH, J., not participating.

PEOPLE v SEAWRIGHT. (Docket No. 66787.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment which set aside the defendant's habitual-offender conviction and we reinstate that conviction and sentence. In reversing the Court of Appeals relied upon its decision in *People v Marshall,* 41 Mich App 66 (1972). *Marshall* requires a showing of substantial prejudice to the defendant because of a delay in filing a supplemental information. In

this case the defendant knew, prior to being tried on the underlying charge, of the prosecutor's intent to bring habitual-offender proceedings against him and the prosecutor did so nine days after his last conviction. We perceive no substantial prejudice to the defendant on this record. Furthermore, since the defendant's case was not pending on appeal on August 28, 1979, this Court's decision in *People v Fountain,* 407 Mich 96 (1979), does not apply. *People v Young,* 410 Mich 363 (1981). It is further ordered that defendant's sentence on the conviction of larceny in a building be vacated since the proper procedure in such circumstances is to vacate the conviction on the underlying charge and then to proceed to sentence on the habitual-offender conviction. MCL 769.13; MSA 28.1085. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people, appellant. *Shirley Saltzman* for defendant-appellee. Case below, Court of Appeals No. 47098, per curiam opinion of December 18, 1980.

PEOPLE v RUST. (Docket No. 66787.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we modify the Court of Appeals judgment in the following respect: we remand the case to the Oakland Circuit Court for entry of a judgment of conviction of manslaughter and for resentencing. If, however, the prosecuting attorney is persuaded that the ends of justice would be better served, upon notification to the trial court before resentencing, the trial court shall vacate the judgment of conviction and grant a new trial on the charge that the defendant committed the crime of first-degree murder. In all other respects leave to appeal and cross-appeal are denied. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Lawrence J. Bunting,* Assistant Prosecuting Attorney, for the people, appellant. Prison Legal Services of Michigan, Inc., *James S. Wilber,* Director, for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 48626, per curiam opinion of January 27, 1981.

PEOPLE v JOHNNY ANDREWS. (Docket No. 62764.) Plaintiff's application for leave to appeal held in abeyance pending decision in *People v Grayson, People v Wright,* and *People v Thompson,* and a decision in *Wright* and *Thompson* having been issued, 409 Mich 672, and *Grayson* having been dismissed, leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor

General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people, appellant. Reported below: 88 Mich App 115.

PEOPLE v MAHONE. (Docket No. 64964.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael Lehto,* Assistant Prosecuting Attorney, for the people. *Milton R. Henry* for defendant-appellant. Case below, Court of Appeals No. 78-2205, per curiam opinion of March 19, 1980.

MOULTRIE v MARTIN. (Docket No. 65315.) Leave to appeal considered May 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand the case to the Macomb Circuit Court for further consideration in light of *Krueger v Williams,* 410 Mich 144 (1981). *John J. Grech & Associates, P.C.,* for plaintiffs-appellants. *Nunneley, Hirt, Rinehart & Cermak, P.C.,* for defendant-appellee Detroit Automobile Inter-Insurance Exchange. Case below, Court of Appeals No. 44556, per curiam opinion of May 22, 1980.

KAVANAGH, J., not participating.

PEOPLE v RONALD WEAVER. (Docket No. 65656.) Leave to appeal denied May 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, and *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. Ronald Gene Weaver, *in propria persona,* appellant. Case below, Court of Appeals No. 51291, per curiam opinion (on remand) of June 10, 1980.

LEVIN, J., would grant leave to appeal.

KAVANAGH, J., not participating.

SIMOFF v CHRYSLER CORPORATION. (Docket No. 66138.) Leave to appeal denied May 19, 1981. *Donnelly & Associates, P.C.,* for plaintiff-appellant. *Dickinson, Wright, McKean, Cudlip & Moon,* for defendant-appellee. Case below, Court of Appeals No. 44587, per curiam opinion of October 27, 1980.

KAVANAGH, J., not participating.

PEOPLE v LONCHAR. (Docket No. 66009.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Stephen H. Naegele,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Lander C. McLoyd,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-5193, memorandum opinion of June 11, 1980.

KAVANAGH, J., not participating.

LEVIN, J., would grant leave to appeal and states:

Lonchar was convicted in a bench trial of first-degree murder committed in the perpetration or attempted perpetration of a larceny and was sentenced to life imprisonment without possibility of parole.

On the evening of September 11, 1977, Lonchar and two companions, Fred Tomkins and Gary McLellan, were drinking in a bar in Oscoda, Michigan. Daniel Christain, a stranger to the three men, was also in the bar. Testimony indicated that Christain was in possession of at least $40 in cash and a quantity of hashish.

Christain sat and talked with Lonchar and his companions at their table. At one point, Tomkins initiated a scuffle with Christain, a much larger man, and threatened to kill him. The fight subsided in a few minutes and the four men resumed drinking together. Tomkins went to the phone and returned to report that he had some girls for them. The four men left the bar together between 11 and 11:30 p.m.

Witnesses testified that later that night a car containing Lonchar, Tomkins and McLellan stopped on a nearby bridge over the Au Sable River. One of the occupants tried to throw a pistol out of the car, but retrieved it when it struck the handrail and landed on the sidewalk. Soon afterward the three men arrived at an Oscoda restaurant. When the group left the restaurant after eating, McLellan paid the check with two $20 bills he took from his shirt pocket.

At about 1:30 a.m. a fisherman pulled Christain's empty wallet from the Au Sable River. Christain's father reported his son's absence to the police the next day. Four days later, Christain's body was found in a secluded wooded area about two miles from the bridge where Lonchar and his companions had been observed on the night of September 11. He had been shot several times and had died from the wounds.

Lonchar stipulated that he and his companions had driven with Christain to the area where Christain was killed, that the vehicle contained the gun to kill Christain, and that he was in the general area where Christain was killed when the shots were fired.

Lonchar testified that when the four men left the bar he thought they were going to smoke Christain's hashish. They entered the car and smoked a marijuana cigarette provided by Lonchar as they drove. Suddenly Tomkins produced a gun and hit Christain in the head. Tomkins told McLellan, the driver, to turn onto a dirt road. Tomkins said, "I'm shooting this son of a bitch." Lonchar said he tried to calm him.

The car stopped and Tomkins ordered Christain out of the car. Lonchar said he continued to argue with Tomkins and to try to persuade him not to carry through his threat. Tomkins was waving the gun menacingly. Tomkins and Christain walked into the woods. Lonchar followed and continued to plead with Tomkins not to kill Christain. Tomkins appeared to calm down for a moment and Lonchar thought he had succeeded in dissuading him, but Tomkins suddenly turned and fired at least five shots into Christain in rapid succession. Both men returned to the car and left the scene.

After both sides submitted trial briefs, the judge entered a written statement of his findings and verdict. He found Lonchar "guilty of murder of the first degree, in that a murder was committed when the defendant was assisting another in the perpetration of the crime of larceny." The judge found that Christain's death was caused by an act of Tomkins which was consciously and knowingly performed, and not excused, justified or in any other way mitigated. Lonchar's culpability for Christain's death was apparently premised solely upon his participation in the larceny (see fn 7, *infra,* and accompanying text); the judge made no findings in respect to Lonchar's mental state at the time of the killing.

I

In *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), this Court decided that the felony-murder rule, a common-law doctrine which allowed "malice", the mental element of murder, to be supplied by the intent to commit the underlying felony whenever a death resulted from the perpetration or attempted perpetration of the felony, would no longer be the law of Michigan. After analyzing the questionable origin and sometimes harsh operation of the rule and declaring that "it violates the basic premise of individual moral culpability upon which our criminal law is based," the Court reversed the 1974 murder conviction of Stephen Aaron[1] and affirmed Court of Appeals reversals

[1] This Court initially vacated Aaron's first-degree murder conviction

of first-degree felony-murder convictions in two other cases.[2]

At the time *Aaron* was decided, this Court had held in abeyance approximately 30 other cases which also presented questions involving the continuing validity of the felony-murder doctrine. In a number of these cases, prosecutors appealed from decisions of the Court of Appeals reversing felony-murder convictions on the basis of *People v Fountain,* 71 Mich App 491; 248 NW2d 589 (1976), which reasoned that this Court had implicitly abandoned the felony-murder doctrine in prior decisions.

In *Aaron* the Court said: "This decision shall apply to all trials in progress and those occurring after the date of this opinion." *People v Aaron, supra,* p 734. That language does not, however, expressly reject application of the *Aaron* decision in cases where the trials had already been concluded. What was *not* said reflected a deliberate decision to avoid foreclosing some degree of retroactive application and to leave the resolution of that question for another day.

The Court today implements a policy of disposing of the cases held in abeyance pending the *Aaron* decision and of recently filed applications from pre-*Aaron* convictions by (1) denying applications for leave to appeal and letter requests for review[3] filed by defendants who assert that their first-degree murder convictions should be reversed because the jury was erroneously instructed, in accordance with the felony-murder rule rejected in *Aaron,* that the underlying felony supplied the element of malice or made it unnecessary to find malice,[4] and (2) peremptorily reversing—in some cases with citation to *Aaron* —Court of Appeals decisions which overturned first-degree murder convictions on the ground that the instructions erroneously embodied the felony-murder rule.

The Court, thus, now decides that the rule announced in *Aaron* should be confined to the causes explicitly addressed in the opinion's

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and remanded the case to the trial court for entry of a judgment of conviction of second-degree murder, on the basis of failure to instruct on lesser included offenses. 396 Mich 843 (1976). When Aaron sought reconsideration of that order nearly two years later on the ground that a first-degree murder conviction could not be reduced to second-degree murder where the jury was instructed only on felony murder and not required to find malice, the Court granted leave to appeal. 403 Mich 821 (1978).

[2] *People v Robert G Thompson,* 81 Mich App 348; 265 NW2d 632 (1978); *People v Wright,* 80 Mich App 172; 262 NW2d 917 (1977).

[3] See Administrative Order 1977-4, 400 Mich lxvii.

[4] Several cases, including the instant case, were bench trials. They present essentially the same question of whether the trier of fact found malice independent of the intent to commit the underlying felony.

penultimate paragraph—future trials and trials then in progress—and the three cases in which the opinion was rendered. I dissent from that decision because (1) the retroactivity of *Aaron* should not be decided without briefing, argument and a reasoned decision of this Court; (2) by granting Aaron a new trial and affirming Court of Appeals decisions to the same effect in two other cases, the Court recognized that some measure of retroactive application is appropriate, and retroactive application cannot justifiably be accorded to Aaron, Wright and Thompson but denied to others who were raising the same issue at virtually the same time—some of them successfully in the Court of Appeals; and (3) the nature of the rule altered in *Aaron* tends to favor retroactive application of that decision.

II

The opinion of the Court in *Aaron* acknowledged that the common-law felony-murder doctrine had remained the law of Michigan until it was there abrogated. This Court thus tacitly recognized that the first-degree murder convictions of Aaron, Wright and Thompson were obtained consistent with the law in effect at the time of their trials. Nevertheless, the Court remanded those cases for new trials, at which the defendants could not be convicted of murder in any degree unless the prosecution established that they had acted with malice, as that term is defined in the *Aaron* opinion.

It is not unprecedented for an appellate court announcing a change in the law to give its decision retroactive application to the case at hand in order to reward the party who successfully argued for the change, thereby encouraging others to advocate needed reforms. But where it is more a matter of happenstance than advocacy that a particular case or group of cases is chosen as the vehicle for announcing a new rule on a recurring issue, the retroactive effect of the new rule should not be limited to the case(s) so selected—particularly where retroactive application may make the difference between a mandatory, non-parolable life sentence for first-degree murder and, upon retrial, a verdict that the defendant is not guilty of any criminal homicide or, at most, guilty of manslaughter.

Limiting the retroactive effect of the *Aaron* decision to Aaron, Thompson and Wright produces *adventitious* results. For example, at the same conference at which leave to appeal was granted to Thompson and Wright, we considered letter requests for review under Administrative Order 1977-4 from two codefendants whose lawyer had unsuccessfully raised essentially the same issue in the Court of Appeals. The Court of Appeals opinion in their cases was filed before the Court of Appeals decided either *Thompson* or *Wright*. Our conference decision was to hold the requests for review in abeyance pending decision in *Thompson* and *Wright*. Several months thereafter, a

delayed application for leave to appeal was filed on behalf of those defendants. Had that application been filed earlier, or had the Court granted leave to appeal and appointed counsel on the basis of defendants' requests for review, their cases might have provided the occasion for abrogating the felony-murder rule.

Other applications raising essentially the same issue were filed before this Court heard argument in *Aaron, Thompson* and *Wright* in March, 1979. In at least two of those cases, the defendants had prevailed in the Court of Appeals.

The appellate process moved at different speeds in different cases, and any number of factors may have resulted in *Thompson* and *Wright* being presented for this Court's consideration before other cases which had been tried at the same time or even earlier, *e.g.,* that those decisions were adverse to prosecutors and an indigent defendant who suffers an adverse decision on his single appeal of right may not have immediate access to appellate counsel.

The Court ordered new trials for Aaron, Thompson and Wright because it regarded the felony-murder rule as violative of fundamental principles. Those principles were similarly violated in every case where the trier of fact found the defendant guilty of first-degree murder upon application of the felony-murder rule. To deny retroactive application of the change announced in the *Aaron* opinion to those whose cases were held in abeyance pending that decision or were moving through the appellate process is not to make a reasoned distinction but, rather, to invest the most trifling circumstances with the greatest significance in determining a defendant's treatment at the hands of the criminal justice system.

III

I would grant leave to appeal in a number of pending cases presenting different factual and procedural backgrounds with a view to deciding upon full consideration the retroactive application of the *Aaron* decision.

Const 1963, art 6, § 6, requires decisions of this Court to "contain a concise statement of the facts and reasons for each decision." We ignore the spirit and letter of this requirement if we adopt a policy regarding the retroactivity of *Aaron* without at least stating reasons for our choice. Nor is it consistent with sound appellate practice for the Court to decide that question without inviting argument directed to the issue. In view of the broad range of alternatives and the significance of the issue to the public and to the defendants involved, the Court's adoption of a policy on the retroactivity of *Aaron* should take place in a context which permits the greatest opportunity for informed consideration. As already noted, the conclusory statement in

the *Aaron* opinion reflects a decision to defer fuller consideration—consideration which the Court now gives without the benefit of adversarial argument and outside the context of any particular case, culminating in a decision without explanation or statement of the reasons for decision.

Among the alternative approaches to retroactivity that the Court might consider, if it were so moved, are: (1) full retroactive application to *all* defendants who, without an independent finding of malice by judge or jury, were heretofore convicted of felony murder, with provision made for defendants who have exhausted their direct appeals to move for new trials; (2) application of the *Aaron* decision to all pending appeals and requests for review in which the trial court's instructions or findings did not conform to the requirements of *Aaron,* with or without the requirement that the defendant have preserved the issue at trial or on appeal; (3) limited retroactive application in cases where the felony-murder rule may have resulted in injustice, *e.g.,* where the record leaves this Court, or the Court of Appeals, or the circuit, or Recorder's Court, in doubt whether the defendant, although a participant in the felony, participated in, aided or abetted the killing, or where the record shows the defendant could have raised a defense of accident but for the rule; and (4) reducing to second-degree murder every felony-murder conviction obtained without proper instructions or findings on malice,[5] with provision made for either resentencing of defendants in the trial court or blanket reduction of non-parolable life sentences to parolable life sentences (thereby allowing defendants to be selectively paroled in accordance with the procedures normally applied to those who receive life sentences for second-degree murder), and with the further provision that the prosecutor has the option to retry the defendant for first-degree murder if he believes the interests of justice require it.

The choice is not simple, and the issue is sufficiently complex to justify plenary consideration through grant of leave to appeal in a number of cases.

IV

This Court has said that "[t]hree factors must be balanced in order to limit the retroactive application of a judicial decision: (1) [t]he purpose of the new rule, (2) general reliance on the old rule and (3) the effect on the administration of justice." *People v Kamin,* 405 Mich

[5] I appreciate the conceptual difficulties implicit in this approach (see fn 1), but it might well represent a just, practical and better accommodation of the competing interests than either complete denial of retroactivity or the burden to the justice system which would result from adoption of another alternative.

482, 494; 275 NW2d 777 (1979).[6] See, also, *People v Hampton,* 384 Mich 669, 674; 187 NW2d 404 (1971). The United States Supreme Court, which devised this three-factor analysis, has said that the factors of the extent of reliance on the old rule and the effect on the administration of justice are determinative only when the purpose of the new rule does not clearly favor either retroactivity or prospectivity. *Desist v United States,* 394 US 244, 251; 89 S Ct 1030; 22 L Ed 2d 248 (1969); *Brown v Louisiana,* 447 US 323; 100 S Ct 2214; 65 L Ed 2d 159 (1980).

The purpose of the rule announced in *Aaron* is to realign criminal responsibility with moral culpability by restoring the "concept of determination of guilt on the basis of individual misconduct" where a killing in the course of a felony is charged as murder. The Court viewed abrogation of the felony-murder rule as necessary to the integrity of the criminal law; one would think such a principle deserving of the fullest implementation. The Court, having penetratingly criticized the rule's potential for injustice, should not flatly refuse to disturb every first-degree murder conviction and mandatory life sentence, save three, obtained through application of the rule.

In the instant case, for example, it is doubtful that there was sufficient evidence to find that Lonchar assisted Tomkins in perpetrating a larceny upon Christain,[7] and even more doubtful whether there is a basis for a reasonable inference that Lonchar participated with, or aided and abetted, Tomkins in causing Christain's death. There was evidence that Tomkins was bellicose, aggressive and "out of control" on the night of Christain's death, and that Tomkins was the only one who made threats against Christain. Lonchar testified that he attempted to intercede to prevent the killing but could not use force to prevent it because Tomkins threatened him with the gun. The judge would, of course, have been at liberty to disbelieve him, but

[6] Although this analysis, originating in *Linkletter v Walker,* 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965), is concerned with whether a newly announced constitutional rule should be retroactively applied, these criteria can be of assistance in evaluating the retroactivity of nonconstitutional doctrine, as *People v Kamin,* 405 Mich 482; 275 NW2d 777 (1979), illustrates. See also *People v Young,* 410 Mich 363; 301 NW2d 803 (1981).

[7] There was ample evidence of larceny, but doubtful evidence of concerted action to that end involving Lonchar. The judge said that he had not considered statements by Lonchar to police officers "as evidence of guilt". Two police officers testified that Lonchar had made a statement indicating that he and his companions intended to rip off Christain's "weed" after they left the bar. See *People v Bennie Thomas,* 406 Mich 971 (1979) (LEVIN, J., dissenting); *Jackson v Virginia,* 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979).

such a disbelief would not be affirmative evidence to the contrary[8]—and there was no contrary evidence. Because of the felony-murder rule, the judge made no finding on whether he believed Lonchar's factual recital regarding the killing.

If the trial judge were required on retrial to make a separate finding of fact on malice, he might find malice lacking even if he maintained that Lonchar had assisted in perpetrating a larceny, and thus conclude that Lonchar was not guilty of first-degree murder or, indeed, any criminal homicide. The felony-murder rule may well have worked an injustice in Lonchar's case.

V

Justice RYAN's analysis in *Aaron* also points toward according broad retroactivity to abrogation of the felony-murder rule. Justice RYAN declined to endorse the Court's statement that Michigan law previously recognized the felony-murder rule. If Michigan had no felony-murder rule, all defendants convicted of first-degree felony-murder without a finding of malice by the factfinder were convicted without a determination of an essential element of the crime and arguably are entitled to new trials. Separate and apart from whether Michigan had a felony-murder rule, Justice RYAN agrees that the rule "[failed] to correlate, to any degree, criminal liability with moral culpability * * * [an] incongruity [which] is simply more than we are willing to permit our criminal jurisprudence to bear." *People v Aaron, supra,* p 744 (RYAN, J., concurring). Such an incongruity supports retroactivity in at least some cases other than the three which happened to be selected out of many more for reconsideration of the felony-murder rule in light of the conflict in the Court of Appeals.

VI

I dissent from the disposition of the retroactivity question, and would set that question down for briefing and argument in cases which would provide the Court with a basis for an informed decision after thorough consideration.

PEOPLE v MADISON ANDREWS. (Docket No. 64103.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that reversed defendant's conviction

[8] See *People v Matthews,* 17 Mich App 48, 53, fn 5; 169 NW2d 138 (1969).

for possession of a firearm during the commission of a felony and remand the case to the Kent Circuit Court to give the prosecutor an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Assistant Prosecuting Attorney, for the people, appellant. *George S. Buth* for defendant-appellee. Case below, Court of Appeals No. 78-5154, memorandum opinion of October 24, 1979.

PEOPLE v MATTISON. (Docket No. 66895.) Leave to appeal denial of bail bond denied May 27, 1981. *Frank D. Eaman* for defendant-appellant. Case below, Court of Appeals No. 55972, order of February 20, 1981.

PEOPLE v HETRICK. (Docket No. 65952.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Michael H. Dzialowski,* Principal Appellate Attorney, for the people. *Bauckham, Reed, Lang, Schaefer & Travis, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 43907, per curiam opinion of September 17, 1980.

PEOPLE v KREGGER. (Docket No. 66110.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John Livesay,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. Daniel Joseph Kregger, *in propria persona,* appellant. Case below, Court of Appeals No. 50930, order of October 27, 1980.

PEOPLE v ZMIJEWSKI. (Docket No. 64304.) The people's application for leave to appeal having been held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to

appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that reversed defendant's conviction for possession of a firearm during the commission of a felony and remand the case to the trial court with instructions that the trial judge review the trial transcript and make additional and further findings of fact regarding whether the prosecutor established that defendant aided or abetted in the commission of this crime. The court is to apply the standard announced in this Court's decision in *People v Johnson* and *Tavolacci.* If it determines that the crime was established, defendant's conviction stands affirmed. If the crime was not established, the court shall enter an order setting aside the conviction because the prosecutor failed to establish a necessary element of the crime of felony-firearm. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. *Sidney Fershtman* for defendant-appellee. Case below, Court of Appeals No. 78-1723, per curiam opinion of December 7, 1979.

ARMSTRONG v ROSS TOWNSHIP. (Docket Nos. 65543, 65544.) Leave to appeal denied May 27, 1981. *Vandervoort, Cooke, McFee, Christ, Carpenter & Fisher* for appellees James and Kathleen Armstrong. *Early, Starbuck & Lennon; Bauckham, Reed, Lang, Schaefer & Travis, P.C.;* and *Ryan, Jamieson & Hubbell* for appellants Ross Township, et al. Case below, Court of Appeals Nos. 46385, 46386, per curiam opinion of July 9, 1980.

PEOPLE v GEORGE NELSON. (Docket Nos. 65992, 65993.) Leave to appeal considered May 27, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand this case to the Recorder's Court for the City of Detroit for the purpose of giving the prosecutor the opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of carrying or possessing a firearm during the commission of a felony shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide this matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975); *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). The court shall also

determine what effect, if any, *People v Jones,* 410 Mich 407 (1981), has on defendant's plea-based convictions for armed robbery. We retain no jurisdiction. George Nelson, *in propria persona,* appellant. Case below, Court of Appeals Nos. 49785, 49786, per curiam opinion of October 3, 1980.

WILLIAMS v WARDEN, STATE HOUSE OF CORRECTION & BRANCH PRISON. (Docket No. 66100.) Leave to appeal denied May 27, 1981. Louis E. Williams, *in propria persona,* petitioner-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stephen F. Schuesler,* Assistant Attorney General, for respondent-appellee. Case below, Court of Appeals No. 51384, order of October 23, 1980.

PEOPLE v GARSIDE. (Docket No. 64624.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that reversed defendant's conviction for possession of a firearm during the commission of a felony and remand the case to the Oakland Circuit Court to give the prosecutor an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, this matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people, appellant. *Neil A. Miller* for defendant-appellee. Case below, Court of Appeals No. 43850, per curiam opinion of January 29, 1980.

JACKSON v GENERAL ELECTRIC COMPANY. (Docket No. 66230.) Leave to appeal denied May 27, 1981. *Cholette, Perkins & Buchanan* for defendants-appellants. Case below, Court of Appeals No. 51864, order of November 24, 1980.

PEOPLE v NEAL. (Docket No. 66299.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the felony-firearm conviction shall be affirmed. If the prosecutor is unable to do so, the felony-firearm conviction shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975); *People v Johnson.* In all other respects the application for leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lander C. McLoyd,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46737, per curiam opinion of November 25, 1980.

PEOPLE v ADKINS. (Docket No. 65549.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), we reverse defendant's felony-firearm conviction and remand the case to the Wayne Circuit Court for a new trial as to this charge. *People v Johnson.* In all other respects leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Kenneth Lerner* and *Eaman & Ravitz, P.C.,* for defendant-appellant. Reported below: 97 Mich App 399.

PEOPLE v SPRAGNER. (Docket Nos. 66281, 66282.) Leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate defendant's five-year felony-firearm sentence in Recorder's Court No. 77-08430 and remand the case to the Recorder's Court for the City of Detroit for resentencing as

to that count. *People v Sawyer,* 410 Mich 531 (1981). In all other respects leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. *Robert T. Kinzer* for defendant-appellant. Case below, Court of Appeals Nos. 45512-45513, per curiam opinion of May 1, 1980.

PEOPLE v ROBERT J PALMER. (Docket No. 66149.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James D. Norlander,* Prosecuting Attorney, and *John H. MacFarlane,* Senior Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Terence R. Flanagan* and *Ronald J. Bretz,* Assistants Defender, for defendant-appellant. Case below, Court of Appeals No. 45956, per curiam opinion of September 8, 1980.

COLEMAN, C.J., not participating.

HOMENIK v ST JOSEPH HOSPITAL OF ANN ARBOR (APPEAL OF COHAN). (Docket No. 66325.) Leave to appeal denied May 27, 1981. *Baxter & Hammond* for appellant Bruce E. Cohan. *Kitch, Suhrheinrich, Smith, Saurbier & Drutchas, P.C.,* for defendant-appellee St. Joseph Hospital. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellee Dynatech Cryomedical Company. *Dice, Sweeney, Sullivan & Feikens, P.C.,* for defendant-appellee Alcon Laboratories. Case below, Court of Appeals No. 54456, order of November 21, 1980.

PEOPLE v JOHNNIE WILLIAMS. (Docket No. 58999.) Leave to appeal denied May 27, 1981. State Appellate Defender, *F. Martin Tieber,* Deputy Defender, for defendant-appellant. Case below, Court of Appeals No. 24621, memorandum opinion of September 9, 1976.

MARTIN v GENERAL MOTORS CORPORATION. (Docket No. 66235.) Leave to appeal denied May 27, 1981. Rosie L. Martin, *in propria persona,* plaintiff-appellant. *Cholette, Perkins & Buchanan* for defendant-appellee. Case below, Court of Appeals No. 51729, order of November 20, 1980.

PEOPLE v KEITH GREEN. (Docket No. 64747.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal

considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Recorder's Court for the City of Detroit. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the felony-firearm conviction shall be affirmed. If the prosecutor is unable to do so, the felony-firearm conviction shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975); *People v Johnson, supra. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Dianne M. Odrobina,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Stuart B. Lev,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45369, memorandum opinion of February 15, 1980.

PEOPLE v LARRY GRANT. (Docket No. 66214.) Leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Annette M. Olejarz,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45368, order of November 21, 1980.

PEOPLE v MONROE SMITH. (Docket No. 58146.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Warner,* Prosecuting Attorney, and *Judith K. Simonson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 23043, order of February 2, 1976.

PEOPLE v LUSTER. (Docket Nos. 64829, 64830.) Leave to appeal considered May 27, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for resentencing. *People v Sawyer,* 410 Mich 531 (1981). Will Henry

Luster, *in propria persona,* appellant. Reported below: 96 Mich App 89.

SALSINI v WHITE PINE COPPER COMPANY. (Docket No. 66206.) Leave to appeal denied May 27, 1981. *Weis & Cossi, P.C.,* for defendant-appellee White Pine Copper Company. *Vairo, Mechlin, Tomasi, Johnson & Manchester* for defendants-appellants Universal Oil Products, Inc., and Employers Insurance of Wausau. Case below, Court of Appeals No. 51030, order of November 13, 1980.

PEOPLE v WILLIS. (Docket Nos. 64890, 64891.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981, and in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), because the record does not show that the defendant assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the armed robbery and of the assault with intent to commit armed robbery, we remand this case to the Recorder's Court for the City of Detroit. *People v Johnson.* On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felonies. If the prosecutor is able to do so and there is no contrary evidence, the judgment of convictions of felony-firearm in this case shall be affirmed and defendant shall be resentenced in a manner consistent with *People v Sawyer,* 410 Mich 531 (1981). If the prosecutor is unable to do so, the judgment of convictions of felony-firearm shall be set aside. If contrary evidence is produced, this matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 495 Mich 96 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Dianne M. Odrobina* and *Don W. Atkins,* Assistants Prosecuting Attorney, for the people. *Kenneth Lerner* for defendant-appellant. Reported below: 95 Mich App 32.

PEOPLE v HAYNES. (Docket No. 64474.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Recorder's

Court for the City of Detroit to give the prosecutor an opportunity to establish that the defendant either personally possessed or procured, counseled, aided or abetted, and so assisted the accomplice to obtain or retain possession of the firearm which was possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael D. Lehto,* Assistant Prosecuting Attorney, for the people, appellant. *Gerald S. Surowiec* for defendant-appellee. Case below, Court of Appeals No. 78-4757, per curiam opinion of December 27, 1979.

WHITMORE v MERCY HOSPITAL OF BENTON HARBOR. (Docket No. 65756.) Leave to appeal denied May 27, 1981. *McCroskey, Libner, VanLeuven, Feldman, Cochran & Brock, P.C.,* for plaintiff-appellee. *Nelson, Payne & Peterson* for defendant-appellee Mercy Hospital. *Cholette, Perkins & Buchanan* for defendant-appellant Insurance Company of North America. Court of Appeals No. 49826, order of August 20, 1980.

PEOPLE v WARREN SMITH. (Docket No. 64273.) Leave to appeal considered May 27, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted an accomplice to obtain or retain possession of a firearm which an accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975). In other respects relief is denied. Warren Smith, *in propria persona,* appellant. Case below, Court of Appeals No. 78-2673, memorandum opinion of November 2, 1979.

PEOPLE v LANKFORD. (Docket No. 65269.) Leave to appeal considered May 27, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse defendant's felony-firearm conviction and remand the case to the Wayne Circuit Court for a new trial on the charge of felony-firearm. The trial court's instructions on this charge were erroneous. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). Arthur L. Lankford, Jr., *in propria persona,* appellant. Case below, Court of Appeals No. 78-2783, memorandum opinion of May 12, 1980.

PEOPLE v CARPENTER. (Docket No. 64213.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Genesee Circuit Court to give the prosecutor an opportunity to establish that the defendant procured, counseled, aided or abetted, and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John T. McGraw,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people, appellant. *Tedd E. Bean* for defendant-appellee. Case below, Court of Appeals No. 78-468, memorandum opinion of November 1, 1979.

KAYE v KATA. (Docket No. 65630.) Leave to appeal denied May 27, 1981. *Lawrence J. Stockler, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Michael A. Nickerson,* Assistant Attorney General, for defendant-appellee Department of Licensing & Regulation. Case below, Court of Appeals No. 48655, order of July 10, 1980.

PEOPLE v THOMAS KING. (Docket No. 64325.) The people's application for leave to appeal held in abeyance pending decision in *People v Aaron, People v Wright,* and *People v Thompson,* 409 Mich 672 (1980); leave

to appeal considered May 27, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Court of Appeals and reinstate defendant's conviction of first-degree felony-murder. *People v Aaron,* p 734. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Paul G. Bruno,* Assistant Prosecuting Attorney, for the people, appellant. *Bernstein & Rabinovitz, P.C.,* for defendant-appellee. Reported below: 94 Mich App 53.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

Reconsideration denied August 26, 1981.

PEOPLE v DUPUIE. (Docket No. 65920.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 50489, order of September 24, 1980.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

PEOPLE v BROOKS. (Docket No. 66152.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Reported below: 101 Mich App 416.

PEOPLE v WARZOCHA. (Docket Nos. 66219, 66220, 66221.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals Nos. 48914, 48915, 48916, per curiam opinion of October 30, 1980.

HIGHLAND PARK HOUSING COMMISSION v JOHNSON. (Docket No. 66288.) Leave to appeal denied May 27, 1981. *Robert E. Berg, Jr.,* and *Gregory L. Doctor* for plaintiff-appellee. Wayne County Neighborhood Legal Services, Inc., *Rodney Watts* and *Victoria Eva Abdella,* for defendant-appellant. Case below, Court of Appeals No. 48947, order of October 7, 1980.

PEOPLE v LEAVELL. (Docket No. 66556.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* for the people. *Jacob S. Ghannam* and *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 51460, per curiam opinion of January 29, 1981.

PEOPLE v GEORGE JACKSON. (Docket No. 66624.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. *Gary Granader* for defendant-appellant. Case below, Court of Appeals No. 51366, per curiam opinion of January 29, 1981.

PEOPLE v PITSAROFF. (Docket No. 66708.) Leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case to that Court. The Court of Appeals shall, while retaining jurisdiction, remand the case to Jackson Circuit Court for the making of a testimonial record to determine the reasons for the delay between the defendant's arraignment and trial. After the testimonial record is prepared, the Court of Appeals shall determine whether MCL 780.131; MSA 28.969(1) has been violated. *People v Schinzel,* 406 Mich 888 (1979). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people, appellant. State Appellate Defender, *Terence R. Flanagan,* Assistant Defender, for defendant-appellee. Reported below: 102 Mich App 116.

PEOPLE v VALDEZ. (Docket No. 66141.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Paul F. Berger,* Prosecuting Attorney, and *C. Sherman Mowbray,* Assistant Prosecuting Attorney, for the people. Felipe D. Valdez, *in propria persona,* appellant. Case below, Court of Appeals No. 46784, per curiam opinion of October 28, 1980.

FLYNN v LIBKIE. (Docket No. 66190.) Leave to appeal considered May 27, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the 72nd District Court for reconsideration and reevaluation by Judge Wilbur V. Hamm of the original trial record without reference to the adjudicative facts the Court of Appeals held to be judicially noticed in error. Upon reconsideration, Judge Hamm shall render an opinion, including new findings of fact and conclusions of law, and enter a final judgment in conformity with that opinion. In all other respects, leave to appeal is denied. Legal Assistance, Inc., of St. Clair County, *Frederick F. Swegles,* for plaintiff-appellant. Reported below: 101 Mich App 331.

PEOPLE v RONALD JONES. (Docket No. 66208.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. Ronald Jones, *in propria persona,* appellant. Case below, Court of Appeals No. 43354, per curiam opinion of September 4, 1980.

PEOPLE v SALISBURY. (Docket No. 65220.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Wayne Circuit Court to give the prosecutor an opportunity to establish that the defendant procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of a felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm should be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, it should be treated as a motion to withdraw the guilty plea and the court shall decide the case in the exercise of its discretion. *People v Johnson* and *Tavolacci. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly*

Wilson, Principal Attorney, Appeals, and *Dianne M. Odrobina,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Gail Rodwan,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45338, memorandum opinion of May 2, 1980.

PEOPLE v CRADER. (Docket No. 62789.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), we modify the judgment of the Court of Appeals so as to remand the count of possession of a firearm during the commission of a felony to Recorder's Court for a new trial. *People v Johnson* and *Tavolacci. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert Sheiko,* Assistant Prosecuting Attorney, for the people, appellant. *Robert E. Slameka* for defendant-appellee. Case below, Court of Appeals No. 77-5242, per curiam opinion of December 7, 1978.

PEOPLE v FRANKLIN. (Docket No. 65150.) Leave to appeal considered May 27, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reduce the defendant's sentence for his conviction of possession of a firearm in the commission of a felony, in Recorder's Court No. 77-09602, from five years to two years, to run concurrently with the two-year sentence imposed for the defendant's conviction of possession of a firearm in the commission of a felony in Recorder's Court No. 77-08981. *People v Sawyer,* 410 Mich 531 (1981). In all other respects leave to appeal is denied. Charles W. Franklin, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3441, per curiam opinion of April 4, 1980.

PEOPLE v RANES. (Docket No. 66223.) Leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse defendant's conviction of first-degree felony-murder and remand this case to the Kalamazoo Circuit Court for entry of a judgment of conviction of the lesser included offense of second-degree murder and for resentencing. If, however, the prosecuting attorney is persuaded that the ends of justice would be better served, upon notification of the trial court before resentencing, the trial court shall vacate the judgment of conviction and grant a new trial on the charge that the defendant committed the crime of first-degree felony-murder. The trial court erred in affirmatively excluding from the

jury's consideration of the felony-murder charge the lesser included offense of second-degree murder. *People v Ora Jones,* 395 Mich 379; 236 NW2d 461 (1975), *People v Carter,* 395 Mich 434; 236 NW2d 500 (1975), *People v Kamin,* 405 Mich 482; 275 NW2d 777 (1979). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Michael H. Dzialowski,* Principal Appellate Attorney, for the people. Danny Arthur Ranes, *in propria persona,* appellant. Case below, Court of Appeals No. 50023, order of November 17, 1980.

PEOPLE v MCENTYRE. (Docket No. 66136.) Leave to appeal denied May 27, 1981 because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people. Roy McEntyre, III, *in propria persona,* appellant. Case below, Court of Appeals No. 77-4980, memorandum opinion of October 11, 1979.

PEOPLE v CROSS. (Docket No. 66191.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Paul G. Bruno,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 46702, memorandum opinion of October 21, 1980.

SKUKALEK v FLINT OSTEOPATHIC HOSPITAL. (Docket No. 66233.) Leave to appeal denied May 27, 1981. *Bennett S. Engelman* for plaintiff-appellee. *Nelson, Payne & Peterson* for defendants-appellants Flint Osteopathic Hospital and Michigan Mutual Insurance Company. *Smith & Brooker, P.C.,* for defendants-appellees Flint Osteopathic Hospital and Travelers Insurance Company. Case below, Court of Appeals No. 51755, order of November 20, 1980.

AMICK v BALLER. (Docket No. 66266.) Leave to appeal denied May 27, 1981. *Simpter & Loznak* for plaintiff-appellant. *Williams, Coulter,*

Cunningham, Davison & Read for defendant-appellee. Reported below: 102 Mich App 339.

PEOPLE v RONALD WILLIAMS. (Docket No. 66420.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people, appellant. *Elizabeth L. Jacobs* for defendant-appellee. Case below, Court of Appeals No. 52282, order of December 12, 1980.

SWANSON v CITIZENS INSURANCE COMPANY. (Docket No. 65580.) Plaintiffs' application for leave to appeal held in abeyance pending decision in *Miller v State Farm Mutual Automobile Ins Co,* 410 Mich 538 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals reported at 99 Mich App 52 and remand to the trial court for a determination of survivors' economic benefits under MCL 500.3108; MSA 24.13108 in light of this Court's decision in *Miller v State Farm Mutual Automobile Ins Co. Sloan, Benefiel & Farrer* for plaintiffs-appellants. *Lilly & Domeny, P.C.,* for defendants-appellees. Reported below: 99 Mich App 52.

COLEMAN, C.J., not participating.

PEOPLE v CHATMAN. (Docket No. 65696.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn Schmidt,* Assistant Prosecuting Attorney Trainee, for the people. *Ronald Michael Solomon* for defendant-appellant. Case below, Court of Appeals No. 46832, per curiam opinion of July 30, 1980.

STERNICKI v CHURCH OF SCIENTOLOGY OF MICHIGAN. (Docket No. 65744.) Leave to appeal denied May 27, 1981. *Goodman, Eden, Millender & Bedrosian* for plaintiff-appellee. *Carson Fischer & Potts* for defendant-appellant. Case below, Court of Appeals No. 47046, per curiam opinion of August 18, 1980.

PEOPLE v GLOVER. (Docket No. 61495.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Aaron,*

409 Mich 672 (1980); leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Gerald D. Lostracco,* Prosecuting Attorney, for the people. *Reid, Reid, Mackay, Emery & Devine, P.C.,* for defendant-appellant. Reported below: 83 Mich App 247.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

Reconsideration denied 412 Mich 905.

PEOPLE v RICHIE HILL. (Docket No. 62502.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Thompson* and *People v Wright,* 409 Mich 672 (1980); leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Robert C. Mueckenheim* for defendant-appellant. Case below, Court of Appeals No. 77-593, per curiam opinion of July 7, 1978.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

Reconsideration denied 412 Mich 906.

PEOPLE v DONALD WOODS. (Docket No. 60379.) Reconsideration of the order of this Court of March 13, 1979 (406 Mich 887) is granted May 27, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals judgment and remand the case to the Court of Appeals for reconsideration in light of *People v Richardson,* 409 Mich 126 (1980). We do not retain jurisdiction. State Appellate Defender, *Lander C. McLoyd,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 30546, per curiam opinion of August 26, 1977.

PEOPLE v JULIAN. (Docket No. 60188.) Defendant's application for leave to appeal held in abeyance pending *People v Thompson* and *People v Wright,* 409 Mich 672 (1980); leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Maura D. Corrigan,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for

defendant-appellant. Case below, Court of Appeals No. 38520, per curiam opinion of August 11, 1977.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

STAFFNEY v FIREMAN'S FUND INSURANCE COMPANY and O'DELL v FIREMAN'S FUND INSURANCE COMPANY. (Docket Nos. 63697-63705, 63746-63763, and 63798, 63840, 63859.) The applications for leave to appeal were held in abeyance pending decision in *Smith v Allendale Mutual Ins Co* and *Sabraw v Michigan Millers Mutual Ins Co,* 410 Mich 685 (1981); the applications by the defendants for leave to appeal are considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the circuit court insofar as they apply to the plaintiffs' claim against the fire insurers and remand to the Saginaw Circuit Court for further proceedings consistent with *Smith v Allendale Mutual Ins Co* and *Sabraw v Michigan Millers Mutual Ins Co.* The plaintiffs' applications for leave to appeal as to the judgments in favor of the workers' compensation insurers are denied. *Cicinelli, Mossner, Majoros & Alexander, P.C.,* for plaintiffs William T. Staffney, et al. *van Benschoten, Hurlburt & van Benschoten, P.C.,* for plaintiffs Erma J. O'Dell, et al. *Joselyn, Rowe, Jamieson & Grinnan, P.C.,* for defendant Fireman's Fund Insurance Company. *Mainolfi, McGraw & Borchard, Otto & Otto* and *Purcell, Tunison & Cline* for defendant Michigan Millers Insurance Company. *Harvey, Kruse & Westen* for defendant Association of Mill and Elevator Mutual Insurance Companies. Reported below: 91 Mich App 745, and Court of Appeals Nos. 78-1526, 78-1527, 78-2760, memorandum opinion of September 13, 1979.

FISHER v NATIONAL BEN FRANKLIN LIFE INSURANCE CORPORATION. (Docket No. 66115.) Leave to appeal denied May 27, 1981. *William L. Fisher, in propria persona,* plaintiff-appellant. *Law Offices of Seth H. Barsky, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 53455, order of October 22, 1980.

PEOPLE v LADON JOHNSON. (Docket Nos. 64330, 64331.) Leave to appeal considered May 27, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the cases to the Detroit Recorder's Court for resentencing. The trial judge erred in failing to order the preparation

of an updated presentence report. *People v Triplett,* 407 Mich 510 (1980); *People v Brown,* 393 Mich 174 (1974). As to defendant's conviction under MCL 750.227b; MSA 28.424(2) in Recorder's Court case No. 77-5120, the defendant's statements at the guilty plea proceeding did not establish a factual basis for the offense. *People v Johnson,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the guilty plea to felony-firearm in this case shall stand. If the prosecutor is unable to do so, the plea to felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96, 126 (1975). In all other respects leave to appeal is denied. We do not retain jurisdiction. LaDon Johnson, *in propria persona,* appellant. Case below, Court of Appeals Nos. 77-4120, 78-1057, per curiam opinion of November 26, 1979.

PEOPLE v WILLIAMSON. (Docket No. 64021.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we modify that part of the judgment of the Court of Appeals that set aside defendant's conviction for possession of a firearm during the commission of a felony without remanding for a new trial. We remand the case to the Recorder's Court for the City of Detroit for a new trial on the charge of felony-firearm. The trial court's instructions on this charge were erroneous. *People v Johnson* and *Tavolacci. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 78-1903, per curiam opinion of October 17, 1979.

PEOPLE v EDDIE WILLIAMS. (Docket No. 62500.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Recorder's Court for the City of Detroit for reconsideration of the motion to quash the charge of felony-firearm in light of this Court's decision in

the aforementioned cases. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 78-2751, order of December 20, 1978.

PEOPLE v SHEPARD and PEOPLE v ULMER. (Docket Nos. 60776, 60777.) Defendants' application for leave to appeal held in abeyance pending decision in *People v Aaron, People v Thompson,* and *People v Wright,* 409 Mich 672 (1980); leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *Lynwood E. Noah,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Norris J. Thomas,* Assistant Defender, for defendants-appellants. Reported below: 78 Mich App 319.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

Reconsideration denied 412 Mich 908.

PEOPLE v MEIRTHEW and PEOPLE v ROBERT V LEWIS. (Docket No. 62449.) The people's application for leave to appeal held in abeyance pending decisions in *Wayne County Prosecutor v Recorder's Court Judge* and *People v Brintley,* 406 Mich 374 (1979); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reinstate defendant Robert Valentine Lewis's sentence on the felony-firearm count ordered vacated by the Court of Appeals. As to defendant Calvin Leslie Meirthew's plea of guilty to having in possession a firearm during the commission of a felony, we remand the case to Wayne Circuit Court. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm as to defendant Meirthew shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, this matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *People v Johnson,* 411 Mich 50 (1981); *Guilty Plea Cases,* 395 Mich 96, 130 (1975). We retain no jurisdiction. *Frank J. Kelley,* Attorney

General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Brian Marzek,* Assistant Prosecuting Attorney, for the people, appellant. *William J. DeBiasi, P.C.,* for defendants-appellees. Case below, Court of Appeals Nos. 78-1254, 78-5078, memorandum opinion of December 4, 1978.

PEOPLE v CURTIS HARRIS and PEOPLE v BUCHANAN. (Docket No. 63183.) Leave to appeal considered May 27, 1981, and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment which set aside the defendants' felony-firearm convictions and reinstate the convictions and sentences for possession of a firearm in the commission of a felony. *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374 (1979); *People v Johnson,* 411 Mich 50 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Maura D. Corrigan,* Assistant Prosecuting Attorney, for the people, appellant. Reported below: 88 Mich App 280.

PEOPLE v HARMON. (Docket No. 64267.) Leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to Livingston Circuit Court. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, this matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *People v Johnson,* 411 Mich 50 (1981); *Guilty Plea Cases,* 395 Mich 96, 130 (1975). Randall Harmon, *in propria persona,* appellant. Case below, Court of Appeals No. 78-4572, per curiam opinion of November 15, 1979.

PEOPLE v HUGHES. (Docket No. 64282.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to Recorder's Court

for the City of Detroit. On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, this matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Paul G. Bruno,* Assistant Prosecuting Attorney, for the people. *George Stone* for defendant-appellant. Case below, Court of Appeals No. 78-2370, per curiam opinion of December 10, 1979.

PEOPLE v LAVAIR ARMSTRONG, PEOPLE v ROBERT LEE HALL #2, and PEOPLE v GIVANS. (Docket Nos. 64715, 64962.) Leave to appeal denied May 27, 1981. *People v Johnson,* 411 Mich 50 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy C. Scallen,* Assistant Prosecuting Attorney, for the people, appellant. *Carl Ziemba* for defendants-appellants Armstrong and Hall. *Bernstein & Rabinovitz, P.C.,* for defendant-appellee Givans. Case below, Court of Appeals Nos. 77-4508, 77-4509, 77-4579, per curiam opinion of February 22, 1980.

RANKIN v GOURDIE, FRASER & ASSOCIATES, INC. (Docket No. 65895.) Leave to appeal denied May 27, 1981. *Earl E. Langlois* for plaintiffs-appellants. *Cholette, Perkins & Buchanan* and *Menmuir, Zimmerman, Rollert & Kuhn,* for defendant-appellee. Case below, Court of Appeals No. 43547, order of July 30, 1980.

GLOVER v CITY OF KALAMAZOO. (Docket No. 65935.) Leave to appeal denied May 27, 1981. *James F. Bauhof* for plaintiff-appellant. *Don M. Schmidt,* City Attorney, and *William S. Baird,* Assistant City Attorney, for defendant-appellee. Reported below: 98 Mich App 465.

PEOPLE v TOWNSEND. (Docket Nos. 66098, 66090.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A.*

Derengoski, Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. *Phillipson & Westrate* for defendant-appellant. Case below, Court of Appeals Nos. 78-1158, 78-5172, memorandum opinion of March 24, 1980.

PEOPLE v BENNETT. (Docket No. 66146.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. David LeRoy Bennett, *in propria persona,* appellant. Court of Appeals No. 50093, order of October 22, 1980.

PEOPLE v TYLER. (Docket No. 66151.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. Clarence Bernard Tyler, *in propria persona,* appellant. Reported below: 100 Mich App 782.

PEOPLE v GRAY. (Docket No. 66291.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. *George S. Buth* for defendant-appellant. Court of Appeals No. 51970, order of November 24, 1980.

GRAYSON v WHITE PINE COPPER COMPANY. (Docket No. 66292.) Leave to appeal denied May 27, 1981. *Wisti & Jaaskelainen* for plaintiff-appellee. *Vairo, Mechlin, Tomasi, Johnson & Manchester* for defendant-appellant. Case below, Court of Appeals No. 49833, order of November 25, 1980.

SNAVELY v CONSOLIDATED PACKAGING COMPANY. (Docket No. 66305.) Leave to appeal denied May 27, 1981. *Bockoff & Zamler, P.C.,* for plaintiff-appellee. *George E. Ganos* for defendants-appellants. Case below, Court of Appeals No. 51549, order of November 28, 1980.

PEOPLE v ASHLEY. (Docket Nos. 61385, 61576.) The people's application for leave to appeal held in abeyance pending decision in *People v Wright* and *People v Thompson,* 409 Mich 672 (1980); the application and defendant's request for review of the record are considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, in accordance with the application of the prosecution, we reverse the judgment of the Court of Appeals and reinstate defendant's conviction of first-degree felony murder. *People v Aaron. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, *Donald A. Kuebler,* Chief Appellate Division, and *Joel B. Saxe* and *Edwin R. Brown,* Assistants Prosecuting Attorney, for the people, appellant. *Geoffrey L. Neithercut* for defendant-appellee and Carl Lee Ashley, *in propria persona.* Case below, Court of Appeals No. 77-2710, per curiam opinion of April 24, 1978.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

Reconsideration denied 412 Mich 902.

PEOPLE v ROOSEVELT MOORE. (Docket No. 62986.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Wright* and *People v Thompson,* 409 Mich 672 (1980); leave to appeal denied May 27, 1981. *People v Aaron.* Roosevelt Moore, *in propria persona,* appellant. Case below, Court of Appeals No. 78-2092, order of November 9, 1978.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

PEOPLE v FRAZIER. (Docket No. 63277.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Leonara D. Frazier, *in propria persona,* appellant. Case below, Court of Appeals No. 77-2220, memorandum opinion of August 11, 1978.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

PEOPLE v WALTER TAYLOR. (Docket No. 63413.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Nels L. Olson,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 78-749, per curiam opinion of June 22, 1979.

PEOPLE v WOMACK. (Docket Nos. 64224, 64225.) Leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we modify the decision of the Court of Appeals and modify the defendant's sentence so that both sentences under MCL 750.227b; MSA 28.424(2) are two, rather than five, years. *People v Sawyer,* 410 Mich 531 (1981). Alfred Womack, *in propria persona,* appellant. Case below, Court of Appeals Nos. 78-4172, 78-4173, per curiam opinion of November 14, 1979.

CARLSON v MANISTIQUE PULP & PAPER COMPANY. (Docket No. 65625.) Leave to appeal denied May 27, 1981. *Green, Renner, Weisse, Rettig, Rademacher & Clark* for plaintiffs-appellants. *Hansley, Neiman, Peterson, Beauchamp, Stupak & Bergman, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 43497, per curiam opinion of July 25, 1980.

PEOPLE v RONALD WRIGHT. (Docket No. 65743.) Leave to appeal denied May 27, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James D. Norlander,* Prosecuting Attorney, and *Kenneth G. Walters,* Senior Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Ronald J. Bretz,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46195, per curiam opinion of August 15, 1980.

COLEMAN, C.J., not participating.

SPENCER v CITY OF WESTLAND. (Docket No. 65876.) Leave to appeal denied May 27, 1981. *Joseph A. Golden* for plaintiffs-appellants. *Bokos, Jones & Plakas, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 49478, order of August 22, 1980.

PHELPS v DEPARTMENT OF STATE HIGHWAYS. (Docket Nos. 66150, 66153.) Leave to appeal denied May 27, 1981. The application by third-party-plaintiffs-appellees for leave to appeal as cross-appellants is denied. *John T. Rogers, C. G. Carlson,* and *Barry P. Waldman* for plaintiff-appellant. *Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.,* and *Gromek, Bendure & Thomas* for intervening-plaintiffs-third-party-plaintiffs-appellees McCullagh Leasing, Madison Electric Company, and Dennis M. Durocher. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Carl K. Carlsen* and *Myron A. McMillan,* Assistants Attorney General, for defendant-third-party-defendant-appellant Department of State Highways. Case below, Court of Appeals Nos. 43992, 45412, per curiam opinion of September 19, 1980.

EASTERN MICHIGAN UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS v MORGAN. (Docket No. 66192.) Leave to appeal denied May 27, 1981. *Klein & Bloom, P.C.,* for plaintiff-appellee. *Morgan & Morgan* for defendant-appellant. Reported below: 100 Mich App 219.

DUHAME v KAISER ENGINEERS OF MICHIGAN, INC. (Docket Nos. 66236, 66279.) Leave to appeal denied May 27, 1981. *Clark, Klein & Beaumont* and *M. V. Kell* for defendant-third-party-plaintiff-appellant Kaiser Engineers of Michigan, Inc. *Hansley, Neiman, Peterson, Beauchamp, Stupak & Bergman, P.C.,* for defendant-third-party-plaintiff-appellant Whitehead & Kales Company. *Corcoran & Ingleson, P.C.,* for third-party-defendant-appellee W & K Erectors, Inc. Reported below: 102 Mich App 68.

AUSTIN v CITY OF ROMULUS. (Docket No. 66274.) Leave to appeal denied May 27, 1981. *Goodman, Eden, Millender & Bedrosian* for plaintiffs-appellants. *Bailey & Rossi* for defendant-appellee. Reported below: 101 Mich App 662.

UNION LAKE ASSOCIATES v IRISH ENTERPRISES. (Docket No. 66285.) Leave to appeal denied May 27, 1981. *Michael S. Surnow* for plaintiff-appellant. *Williams, Coulter, Cunningham, Davison & Read* for defendant-appellee. Case below, Court of Appeals No. 49382, order of November 24, 1980.

MABEL JONES v GENERAL MOTORS CORPORATION. (Docket No. 66289.) Leave to appeal denied May 27, 1981. *Carl R. Edwards* for plaintiff-appellee. *Munroe & Nobach, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 51897, order of November 24, 1980.

PEOPLE v EICHELBERGER #2. (Docket No. 64280.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered May 27, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that reversed defendant's conviction for possession of a firearm during the commission of a felony and remand the case to the Recorder's Court for the City of Detroit to give the prosecutor an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. *Cole & Tamsen* for defendant-appellee. Case below, Court of Appeals No. 78-4652, per curiam opinion of November 27, 1979.

VINE v DOLBY. (Docket No. 66133.) Leave to appeal and cross-appeal denied May 27, 1981. *Cicinelli, Mossner, Majoros & Alexander, P.C.,* for plaintiff-appellant-cross-appellee. *Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.,* and *Gromek, Bendure & Thomas* for defendants-appellees-cross-appellants. Case below, Court of Appeals No. 44945, per curiam opinion of October 27, 1980.

PEOPLE v SYKES. (Docket No. 64084.) Leave to appeal denied May 29, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Nels L. Olson,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-

appellant. Case below, Court of Appeals No. 78-753, per curiam opinion of November 8, 1979.

PEOPLE v KAPITZKE. (Docket No. 65066.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *David A. Hoort,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *John A. Lydick,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-1455, per curiam opinion of April 4, 1980.

LEVIN, J., would remand for an evidentiary hearing on whether the plea was an understanding plea as required by GCR 1963, 785 and on whether the defendant received effective assistance of counsel, and states:

Kapitzke was charged with first-degree murder, based both on a claim of premeditation and deliberation and on a theory of murder in the perpetration or attempted perpetration of a felony. Kapitzke pled guilty of first-degree murder.

Why would any defendant plead guilty of first-degree murder? After reviewing the transcripts of the plea and sentencing proceedings, I am concerned that Kapitzke may have been led astray by the well-intentioned but misleading statements of the judge with the result that his plea may not have been an understanding plea:

1. The judge apparently believed that he should proceed under MCL 750.318; MSA 28.550 to hold a hearing to determine the degree of the murder.[1] He stated several times, even after correction by the prosecutor, that he believed it was necessary to determine the degree although Kapitzke had pled guilty to the crime as charged, *i.e.,* murder in the first degree.

2. The judge addressed Kapitzke and explained the import of a first-degree murder charge but went on to speak to Kapitzke about second-degree murder and manslaughter before discussing first-degree felony murder. These comments might have suggested to Kapitzke that

[1] MCL 750.318; MSA 28.550 requires:

"The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk."

there was a possibility that the judge would find him guilty of some charge other than first-degree murder. Indeed, it is difficult to imagine what other meaning could be attached to the discussion.

3. At a later point, the judge told Kapitzke: "If instead of that [first-degree murder] the court determines that you're guilty of murder in the second degree, you're subject to being confined in a state prison for life." By this statement, the judge clearly indicated that Kapitzke might be found guilty of a lesser offense than the one to which he had pled, raising a substantial question whether Kapitzke understood that his plea could result *only* in a conviction for first-degree murder.

4. Although the judge subsequently asked Kapitzke if he understood what the penalty for first-degree murder was and whether his lawyer had told him anything different, the judge did not ask whether Kapitzke understood that he could be found guilty only of first-degree murder if his plea were accepted.

5. The judge said: "You understand that *if* you are convicted of first-degree murder, that the court has no discretion." (Emphasis supplied.)

6. Near the end of his preliminary questioning of Kapitzke and before taking the plea, the judge repeated his intention to hold a degree hearing. The prosecutor again responded that the judge could only find Kapitzke guilty of first-degree murder and had no power to find him guilty of a lesser degree of murder. Even had Kapitzke chosen to believe the prosecutor instead of the judge, the prosecutor's comments[2] were stated in terms Kapitzke may not have understood.

At this point in the proceeding, Kapitzke's main concern seemed to be whether a second count, assault with intent to commit murder of

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[2] The pertinent comments are as follows:

"The *Court:* * * * Pending the outcome of that hearing it would be my intent not to try your case, if the court accepts the plea to whatever degree. It's my understanding under those circumstances that the prosecutor is agreeing that he does not intend to proceed further on Count II.

"Do I have it right?

"*[Prosecutor]:* Nearly correct, your Honor. My understanding is that the defendant is to plead guilty to Count I.

"*The Court:* As charged.

"*[Prosecutor]:* Murder in the first degree, so if the court were not satisfied from the testimony provided by the defendant concerning his factual recollections of what happened and then determine that it could not accept a plea for that reason, or from its review of other testimony in the matter, I don't believe that the court could *sua sponte* decide to accept the second-degree plea. I think the defendant is offering a plea of guilty to Count I as charged, and as such a valid plea is offered to Count I as charged we will not proceed with Count II."

the decedent's child, would be dropped if he was convicted of the first count—an indication that Kapitzke did not completely comprehend that if he were convicted of first-degree murder on his plea of guilty he would necessarily be sentenced to life imprisonment without possibility of parole, making other charges or convictions superfluous.

7. After the plea was offered and Kapitzke's testimony establishing a factual basis for the plea was taken, the judge agains maintained that he would be determining the degree of the murder. If the judge himself continued to insist that a degree hearing was necessary, there is substantial reason to believe that Kapitzke was misled into thinking so too, and did not understand that acceptance of his plea could result *only* in a conviction for first-degree murder.

8. After a two-day adjournment, the judge announced his findings on the record, saying: "The court determined that the plea was properly offered and in the usual sense had the defendant sworn and took testimony in support of the plea pursuant to the *statute.* However, that required a hearing on determination of degree, whether or not the statute controls or is abrogated by the court rule. *We proceeded on the basis of that statute* and it was stipulated that the court would receive as evidence the testimony as given in the preliminary examination * * *." (Emphasis supplied.)

Thus, even at the conclusion of the proceedings, the judge maintained that he had determined degree under MCL 750.318.

The manner in which these proceedings were conducted may well have misled Kapitzke into believing that he might be convicted of a lesser offense than first-degree murder despite his plea of guilty.

I would remand for an evidentiary hearing on whether the plea was an understanding, voluntary plea and, because it is so extraordinary to plead guilty to first-degree murder, on whether Kapitzke received effective assistance of counsel.

VASSALLO v FOWLERVILLE COMMUNITY SCHOOLS. (Docket No. 66323.) Leave to appeal denied June 4, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 51521, order of November 28, 1980.

HURON METRO ASSOCIATES v HURON TOWNSHIP. (Docket No. 66340.) Leave to appeal denied June 4, 1981. *Bassey, Selesko, Couzens & Murphy, P.C.,* for plaintiff-appellant. *George H. Cross,* Corporation Counsel, and *Robert G. Schuch,* Assistant Corporation Counsel, for defendant-appellee Wayne County. Case below, Court of Appeals No. 51514, order of December 10, 1980.

PEOPLE v WHISNANT. (Docket No. 66800.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. *Parker, Adams & Mazur, P.C.,* for defendant-appellant. Reported below: 103 Mich App 772.

KALKA v KALKA. (Docket No. 65963.) Leave to appeal denied June 4, 1981. *Jack C. Chilingirian* for plaintiff-appellant. *Currie, Stieper, Haddrill & Seyferth, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 51756, order of August 6, 1980.

PEOPLE v BASSETT. (Docket Nos. 64641, 64642.) Leave to appeal considered June 4, 1981. In lieu of granting leave to appeal, we remand the case to the Recorder's Court for the City of Detroit for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, a judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the felony-firearm guilty plea and the court shall decide the matter in the exercise if its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). In other respects, leave to appeal is denied. Luchie Lee Bassett, *in propria persona,* appellant. Case below, Court of Appeals Nos. 43259, 43260, order of January 30, 1980.

PEOPLE v BLACHURA. (Docket No. 67086.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, and *Marvin S. Shwedel,* Special Prosecuting Attorney, for the people. *Bruce T. Leitman* for defendant-appellant. Case below, Court of Appeals No. 57106, order of April 15, 1981.

LINCOLN, DEVLIN & KALCHER, PC v THIEBAUT. (Docket No. 66120.) Leave to appeal denied June 4, 1981. *Donald G. Jennings, P.C.,* for

plaintiff-appellee. *Carr & Corwin, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 46933, per curiam opinion of September 9, 1980.

PEOPLE v BIBBS. (Docket No. 61778.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *Judd R. Spray,* Assistant Prosecuting Attorney, for the people. Charles Edward Bibbs, *in propria persona,* appellant. Case below, Court of Appeals No. 77-2448, per curiam opinion of June 9, 1978.

SILVOLA v DEPARTMENT OF STATE HIGHWAYS. (Docket No. 66087.) Leave to appeal denied June 4, 1981. *Wisti & Jaaskelainen* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Carl K. Carlsen* and *Myron A. McMillan,* Assistants Attorney General, for defendant-appellant. Case below, Court of Appeals No. 46117, per curiam opinion of August 15, 1980.

MOSES v YOUNG'S HOMES & APARTMENTS, INC. (Docket No. 66335.) Leave to appeal denied June 4, 1981. *Wisti & Jaaskelainen* for plaintiff-appellant. *Hansley, Neiman, Peterson, Beauchamp, Stupak & Bergman, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 51791, order of December 8, 1980.

VERHAGE v STEELCASE, INC. (Docket No. 66376.) Leave to appeal denied June 4, 1981. *William G. Reamon, P.C.,* for plaintiff-appellee. *Smith, Haughey, Rice & Roegge* for defendants-appellants. Case below, Court of Appeals No. 51730, order of December 10, 1980.

MICHIGAN MUTUAL INSURANCE COMPANY v INTERNATIONAL HARVESTER COMPANY. (Docket No. 66377.) Leave to appeal denied June 4, 1981. *Smith, Haughey, Rice & Roegge* for defendant-appellant. Case below, Court of Appeals No. 52180, order of December 5, 1980.

PEOPLE v GRATZER and PEOPLE v LARRY PERRY. (Docket Nos. 66881-66884.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Jon W. Newman,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people,

appellant. *Richard J. Amberg, Jr.,* for defendants-appellees. Reported below: 104 Mich App 705.

PEOPLE v JAMES FIELDS. (Docket No. 66917.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people, appellant. *Warren H. Siegel* for defendant-appellee. Case below, Court of Appeals No. 51471, per curiam opinion of March 12, 1981.

PEOPLE v SOLIS. (Docket No. 66286.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, *Charles M. Sibert,* Chief Appellate Attorney, and *Janis L. Blough,* Assistant Prosecuting Attorney, for the people. Benito Solis, *in propria persona,* appellant. Case below, Court of Appeals No. 50786, order of November 21, 1980.

COOPER v GARDEN CITY OSTEOPATHIC HOSPITAL. (Docket No. 65707.) Leave to appeal denied June 4, 1981. *Steven G. Silverman* for plaintiffs-appellees. *Dice, Sweeney, Sullivan & Feikens, P.C.,* for defendant-appellant. Reported below: 98 Mich App 362.

PEOPLE v PEETE #2. (Docket No. 66270.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Reported below: 102 Mich App 34.

MERIDIAN CHARTER TOWNSHIP v CITY OF EAST LANSING. (Docket No. 66284.) Leave to appeal denied June 4, 1981. *Foster, Swift, Collins & Coey, P.C.,* for plaintiffs-appellants. *McGinty, Halverson, Brown & Jakubiak, P.C.,* and *Thomas M. Hitch,* Assistant City Attorney, for defendant-appellee. Reported below: 101 Mich App 805.

PEOPLE v SPALLA. (Docket No. 67102.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert*

C. Williams, Chief Appellate Counsel, and *James L. McCarthy,* Assistant Prosecuting Attorney, for the people. *Kenneth M. Mogill* for defendant-appellant. Case below, Court of Appeals No. 56397, order of April 16, 1981.

PEOPLE v BILLY DAVIS. (Docket No. 62204.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered June 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals decision reversing, on double jeopardy grounds, defendant's felony-firearm conviction. *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374 (1979). Because, however, the record does not show that the defendant either personally possessed, or assisted the accomplice to obtain or retain possession of the firearm which was possessed during the commission of the armed robbery, we remand the case to the Recorder's Court for the City of Detroit to give the prosecutor an opportunity to establish that the defendant procured, counseled, aided or abetted, and so assisted the accomplice to obtain or retain possession of the firearm which was possessed during the commission of a felony. *People v Johnson* and *Tavolacci.* If the prosecutor is able to do so and there is no contrary evidence, the judgment of convictions of felony-firearm in this case shall be affirmed and defendant shall be resentenced in a manner consistent with *People v Sawyer,* 410 Mich 531 (1981). If the prosecutor is unable to do so, the judgment of convictions of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. *Alex J. Allen* for defendant-appellee. Case below, Court of Appeals No. 77-4783, per curiam opinion of October 6, 1978.

PEOPLE v DOWTIN. (Docket No. 62943.) Leave to appeal considered June 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals decision insofar as it set aside defendant's felony-firearm conviction, *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374 (1979), and we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted an accomplice to

obtain or retain possession of a firearm which an accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96 (1975). In other respects, the Court is not persuaded that relief should be granted and it is therefore denied. Reko Bernard Dowtin, *in propria persona,* appellant. Case below, Court of Appeals No. 77-5107, per curiam opinion of February 8, 1979.

PEOPLE v RONALD BROWN. (Docket No. 66852.) Leave to appeal denied June 4, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people, appellant. State Appellate Defender, *Ronald J. Bretz,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 48372, per curiam opinion of February 20, 1981.

PEOPLE v JAMES BAKER. (Docket No. 63171.) Leave to appeal considered June 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted an accomplice to obtain or retain possession of a firearm which an accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). In other respects, the Court is not persuaded that relief should be granted and it is therefore denied. James H. Baker, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3026, memorandum opinion of April 6, 1979.

PEOPLE v MILLS. (Docket No. 65998.) Leave to appeal considered June 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate defendant's sentences and remand the case

to the Recorder's Court for the City of Detroit for resentencing in conformity with *People v Berry,* 409 Mich 774, 781 (1980). We retain no jurisdiction. Andre Chavez Mills, *in propria persona,* appellant. Case below, Court of Appeals No. 51001, order of September 29, 1980.

PEOPLE v RICHARD GREEN. (Docket Nos. 63956, 65278.) Leave to appeal considered June 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand both cases to the Recorder's Court for the City of Detroit for further proceedings. With regard to Recorder's Court No. 78-00583, on remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted an accomplice to obtain or retain possession of a firearm which an accomplice possessed during the commission of the felony. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). With regard to Recorder's Court No. 78-00643, on remand the defendant shall be resentenced in a manner consistent with *People v Sawyer,* 410 Mich 531 (1981). In other respects, the Court is not persuaded that relief should be granted and it is therefore denied. Richard Green, *in propria persona,* appellant. Cases below, Court of Appeals No. 78-2206, order of September 10, 1979, and No. 78-2207, per curiam opinion of April 4, 1980.

NELMS v LEMPERT & BIEGEL COMPANY. (Docket Nos. 65962, 65969.) Leave to appeal denied June 4, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellee. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendants-appellants Lempert & Biegel Company and General Accident Assurance Group. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Morrison Zack,* Assistant Attorney General, for defendant-appellant Second Injury Fund. Case below, Court of Appeals Nos. 50128 and 50053, orders of September 19, 1980 and September 22, 1980.

PEOPLE v MICHAEL HILL. (Docket Nos. 63966, 63967.) Leave to appeal considered June 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411

Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted an accomplice to obtain or retain possession of a firearm which an accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). In other respects, the Court is not persuaded that relief should be granted and it is therefore denied. Michael Hill, *in propria persona,* appellant. Case below, Court of Appeals Nos. 43211, 43232, order of September 14, 1979.

PEOPLE v PAMELA PERRY. (Docket No. 64435.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered June 4, 1981, and in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate the Court of Appeals judgment and remand the case to the Court of Appeals for reconsideration in light of *People v Johnson* and *Tavolacci.* We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. *Daniel J. Blank* for defendant-appellant. Reported below: 92 Mich App 732.

PEOPLE v POWELL. (Docket No. 64146.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered June 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Genesee Circuit Court to give the prosecutor an opportunity to establish that the defendant procured, counseled, aided or abetted, and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion.

Guilty Plea Cases, 395 Mich 96; 235 NW2d 132 (1975). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people, appellant. *Jon T. Warren* for defendant-appellee. Reported below: 90 Mich App 273.

PEOPLE v BUSTION. (Docket No. 66358.) Leave to appeal denied June 4, 1981, because the Court is not persuaded that the question presented should be reviewed by this Court, because the issue raised appears to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. Jessie Bustion, *in propria persona,* appellant. Case below, Court of Appeals No. 78-2010, order of March 20, 1979.

PEOPLE v KAREN NELSON. (Docket Nos. 65482-65486.) Leave to appeal considered June 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted an accomplice to obtain or retain possession of a firearm which an accomplice possessed during the commission of the felonies. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgments of conviction of felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the guilty pleas and the court shall decide these matters in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). In other respects, the Court is not persuaded that relief should be granted and it is therefore denied. Karen Gail Nelson, *in propria persona,* appellant. Court of Appeals Nos. 78-5056-78-5060, per curiam opinion of January 26, 1981.

PEOPLE v JIMMIE BROWN. (Docket No. 64154.) Leave to appeal considered June 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for

further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, a judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the felony-firearm guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). In other respects leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Jimmie L. Brown, *in propria persona,* appellant. Case below, Court of Appeals No. 78-4322, per curiam opinion of November 15, 1979.

STOCKLER v ZEBARI. (Docket No. 65828.) Leave to appeal denied June 4, 1981. *Lawrence J. Stockler, P.C., in propria persona,* plaintiff-appellant. Case below, Court of Appeals No. 51115, order of August 28, 1980.

PEOPLE v POOLE. (Docket Nos. 64702, 64703.) Leave to appeal considered June 4, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand Recorder's Court No. 78-03350 to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, this matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). Whether or not the foregoing proceedings result in the reversal of a conviction and attendant resentencing, defendant's two present convictions of felony-firearm will not sustain sentence enhancement where the convictions are obtained at the

same time. *People v Sawyer,* 410 Mich 531 (1981). Accordingly, we remand for resentencing. In other respects, the Court is not persuaded that relief should be granted and it is therefore denied. Paul M. Poole, *in propria persona,* appellant. Case below, Court of Appeals Nos. 78-2907, 78-2908, per curiam opinion of January 11, 1980.

PEOPLE v ALEXANDER HUDSON. (Docket No. 65294.) Leave to appeal considered June 4, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate defendant's conviction and sentence for assault with intent to murder (MCL 750.83; MSA 28.278). The record of the plea proceedings indicates that defendant did not plead guilty to assault with intent to murder. Additionally we remand the case to the trial court for further proceedings. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). In other respects, leave to appeal is denied. Alexander Hudson, *in propria persona,* appellant. Case below, Court of Appeals No. 48435, order of March 20, 1980.

PEOPLE v BRIDGES. (Docket No. 65533.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981); leave to appeal considered June 4, 1981, and pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals insofar as it reversed the defendant's conviction of felony-firearm and remand the case to the trial court for further proceedings. *People v Johnson* and *Tavolacci.* On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted, and so assisted the accomplices to obtain or retain possession of the firearm which the accomplices possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a

motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; 235 NW2d 132 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people, appellant. Reported below: 98 Mich App 436.

PEOPLE v VINCENT PHILLIPS. (Docket No. 67285.) Leave to appeal granted June 5, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *James A. Christopherson,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 57694, order of May 18, 1981.

PEOPLE v JESSE JONES. (Docket No. 66011.) Leave to appeal granted June 8, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. Jesse James Jones, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3255, per curiam opinion of April 25, 1980.

DETROIT BOARD OF EDUCATION v PARKS, ABOOD v DETROIT BOARD OF EDUCATION, WARCZAK v DETROIT BOARD OF EDUCATION, and KYES v DETROIT BOARD OF EDUCATION. (Docket Nos. 65818-65821.) Leave to appeal granted June 8, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for appellees Detroit Board of Education and Detroit Federation of Teachers. *Keller, Thoma, Schwarze & Schwarze, P.C.,* and National Right to Work Legal Defense Foundation, Inc., *Raymond J. LaJeunesse, Jr.,* for appellants Anne B. Parks, D. Louis Abood, Christine Warczak, and Alberta M. Kyes. Reported below: 98 Mich App 22.

CITIZENS INSURANCE COMPANY v LEMASTER. (Docket No. 65981.) Leave to appeal denied June 8, 1981. *Scott D. Moore* for third-party-plaintiff-appellee Robert Lee Lemaster. *Barbier, Goulet & Petersmarck, P.C.,* for third-party-defendant-appellant Old Reliable Fire Insurance Company. Reported below: 99 Mich App 325.

FITZGERALD and RYAN, JJ., would grant leave to appeal.

FLETCHER v HARAFAJEE. (Docket No. 66047.) Leave to appeal denied June 8, 1981. *Wilson, Portnoy, Basso & Leader, P.C.,* for defendants-appellants K. Johannsson and P. Zyber. Reported below: 100 Mich App 440.

LEWIS v STADLER. (Docket No. 63551.) Leave to appeal considered June 8, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we affirm the Court of Appeals judgment in part and reverse in part. We agree with the Court of Appeals that plaintiff's latest effort to serve defendant was untimely under MCL 600.5856; MSA 27A.5856, and MCL 600.5805(7); MSA 27A.5805(7). However, we remand the case for an evidentiary hearing at which the trial court shall consider whether plaintiff's earlier efforts to serve defendant successfully performed as an "other manner of service of process" within the meaning of GCR 1963, 105.8. *Cf. Krueger v Williams* and *Rodgers v Davis,* 410 Mich 144 (1981). In making this determination the court shall consider: (1) whether at the time plaintiff could reasonably have made service of process in the manner provided under other rules; and (2) whether the "other manner of service of process" was reasonably calculated to give defendant actual notice of the proceedings and an opportunity to be heard. If such service meets these rule criteria, the motion for accelerated judgment shall be denied, if not, it shall be granted. We do not retain jurisdiction. *Carney & Shureb* for plaintiff-appellant. *Dickinson, Pike, Mourad, Brandt & Hanlon* for defendant-appellee. Case below, Court of Appeals No. 78-2478, per curiam opinion of July 16, 1979.

LEDESMA v DETROIT RENDERING COMPANY. (Docket No. 65844.) Leave to appeal denied June 8, 1981. *Clifford R. Williams* for plaintiff-appellant. *Ulanoff, Ross, Summer, LaKritz, Wesley & Bloom, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 50084, order of September 5, 1980.

PEOPLE v SHELDON WASHINGTON. (Docket No. 65113.) Leave to appeal considered June 8, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we modify the Court of Appeals judgment in the following respect: we reverse the defendant's conviction and remand the case to the Recorder's Court for the City of Detroit for a new trial. *People v Oliver,* 407 Mich 857 (1979). Sheldon Washington, *in propria persona,* appellant. Case below, Court of Appeals No. 78-4271, per curiam opinion of November 15, 1979.

SILVA v ADA TOWNSHIP. (Docket No. 65815.) Leave to appeal and leave to file brief amicus curiae granted June 8, 1981. *Dilley & Dilley* for plaintiffs-appellants. *Varnum, Riddering, Wierengo & Christenson* for defendant-appellee Ada Township. *Freihofer, Oosterhouse, DeBoer & Barnhart* for intervening defendants-appellees Carl and Cornelia Huisman, Albert Dykstra, Timothy and Karen Holt, Larry and Debbie Osterink, and James and Beverly Vogt. *Dykema, Gossett, Spencer, Goodnow & Trigg* for Lyon Development Company as amicus curiae. Reported below: 99 Mich App 601.

GLOWCZYNSKI v DANLY MACHINE CORPORATION. (Docket No. 65871.) Leave to appeal denied June 8, 1981. *Goldsmith, Yaker & Goldsmith* for plaintiff-appellant. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendant-appellee Park Metal Products Company. Case below, Court of Appeals No. 47401, memorandum opinion of September 11, 1980.

BROWDER v INTERNATIONAL FIDELITY INSURANCE COMPANY. (Docket No. 65520.) Leave to appeal granted June 8, 1981. *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* for plaintiff-appellant. *Zemke, Hirschhorn & Tukel, P.C.,* for defendant-appellee. Reported below: 98 Mich App 358.

PEOPLE v MAURICE HURD. (Docket No. 66721.) Leave to appeal denied June 8, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellee. Reported below: 102 Mich App 424.

COLEMAN, C.J., and BLAIR MOODY, JR., and RYAN, JJ., would grant leave to appeal.

BRAY v DEPARTMENT OF STATE. (Docket No. 65164.) Leave to appeal and cross-appeal granted June 8, 1981. *Harry S. Ellman* and *Barris, Sott, Denn & Driker* for plaintiffs-appellees-cross-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Joseph B. Bilitzke* and *Warren R. Snyder,* Assistants Attorney General, for defendants-appellants-cross-appellees. Reported below: 97 Mich App 33.

PEOPLE v HOLLOWAY. Leave to appeal granted June 8, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James D. Norlander,* Prosecuting Attorney, and *John H. MacFarlane,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Karla Kendall,* Assistant Defender, for defendant-appellant. Reported below: 99 Mich App 174.

VESELENAK v SMITH. (Docket No. 65534.) Leave to appeal granted June 8, 1981. The parties are directed to include among the issues to be briefed whether exemplary damages should be recoverable in a malpractice or negligence action. The Michigan Trial Lawyers Association and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. *Conlin, Conlin & McKenney* for plaintiffs-appellees. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellant. Case below, Court of Appeals No. 44941, per curiam opinion of July 8, 1980.

EMMONS v ROCKWELL INTERNATIONAL, AUTOMOTIVE PRODUCTS DIVISION. (Docket No. 65878.) Leave to appeal denied June 8, 1981. *Wickett, Erickson, Bartl & Haslett, P.C.,* for plaintiff-appellee. *Jerome H. Solomon* for defendant-appellant. Case below, Court of Appeals No. 50061, order of September 5, 1980.

LANGLEY v HARRIS CORPORATION. (Docket No. 65966.) Leave to appeal granted June 8, 1981. *Butzel, Long, Gust, Klein & Van Zile* for third-party-plaintiff-appellant Harris Corporation. *Martin, Bacon & Martin, P.C.,* for third-party-defendant-appellee King-Seeley Thermos Company. Case below, Court of Appeals No. 45977, per curiam opinion of September 19, 1980.

LEWIS v FARMER JACK'S, INC. (Docket No. 65976.) Leave to appeal granted June 8, 1981. *Milia & Curran* and *Faintuck, Shwedel, Wolfram, McDonald & Zipser* for plaintiff-appellant. *Gromek, Bendure & Thomas* for defendants-appellees. Case below, Court of Appeals No. 45248, per curiam opinion of October 1, 1980.

PECORARO v DEPARTMENT OF CORRECTIONS. (Docket No. 66093.) Leave to appeal denied June 8, 1981. *Peter H. Shumar* for plaintiffs-appellants. Reported below: 100 Mich App 802.

KAVANAGH, J., would grant leave to appeal.

OTTAWA SILICA COMPANY v BROWNSTOWN TOWNSHIP. (Docket No. 66201.) Leave to appeal granted June 8, 1981. *D'Avanzo, Danko & Aycock* for plaintiff-appellant. *William J. DeBiasi, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 45906, per curiam opinion of September 18, 1980.

BERGY BROTHERS, INC v ZEELAND FEEDER PIG, INC. (Docket No. 65345.) Leave to appeal granted June 8, 1981. *Landman, Luyendyk, Latimer, Clink & Robb* for plaintiff-appellee. *Randolph McCarthy, Jr.,* for defendants-appellants. Reported below: 96 Mich App 111.

PEOPLE v STEPHENS. (Docket No. 65691.) Leave to appeal granted June 8, 1981. The parties are directed to include among the issues to be briefed: whether this Court should abrogate the policy rule of *People v Chamblis,* 395 Mich 408 (1975), which precludes instruction on lesser included offenses for which the maximum allowable incarceration is one year or less when the charged offense is punishable by imprisonment for more than two years. Robert Lee Stephens, *in propria persona.* Case below, Court of Appeals No. 44743, per curiam opinion of July 7, 1980.

ROFE v ROBINSON. (Docket No. 65728.) Leave to appeal granted June 8, 1981. *Eggenberger, Eggenberger, McKinney & Weber, P.C.,* for plaintiffs-appellants. *Dykema, Gossett, Spencer, Goodnow & Trigg* for defendants-appellees. Case below, Court of Appeals No. 51131, per curiam opinion (on remand) of August 12, 1980.

SHEFFIELD DEVELOPMENT COMPANY v CITY OF TROY. (Docket No. 65817.) Leave to appeal denied June 8, 1981. *Schlussel, Lifton, Simon, Rands, Kaufman, Lesinski & Jackier* for plaintiff-appellant. *William S. Wolanin,* City Attorney, for defendant-appellee. Reported below: 99 Mich App 527.

PEOPLE v HUFF. (Docket No. 66155.) Leave to appeal considered June 9, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand the case to the Bay Circuit Court for a new trial. *People v Van Dorsten,* 409 Mich 942 (1980). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Neil P. Wackerly,*

Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Reported below: 101 Mich App 232.

PEOPLE v KALY. (Docket No. 67180.) Leave to appeal denied June 9, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 57396, order of May 4, 1981.

PEOPLE v WILLIE WARD. (Docket No. 66238.) Leave to appeal denied June 9, 1981 because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. Willie James Ward, *in propria persona,* appellant. Case below, Court of Appeals No. 44893, per curiam opinion of January 29, 1980.

PEOPLE v FRECK. (Docket Nos. 66344-66346.) Leave to appeal denied June 9, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L. Milbourn,* Chief Appellate Lawyer, and *Joseph G. Wetzel,* Assistant Prosecuting Attorney, for the people. *David W. Wright* for defendant-appellant. Case below, Court of Appeals Nos. 49078-49080, memorandum opinion of December 5, 1980.

BURTON v PONTIAC GENERAL HOSPITAL. (Docket No. 66349.) Leave to appeal denied June 9, 1981. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiff-appellant. *Dice, Sweeney, Sullivan & Feikens* for defendants-appellees. Case below, Court of Appeals No. 52288, order of December 11, 1980.

MUNDAY v MERCURY PLASTICS COMPANY. (Docket No. 66389.) Leave to appeal denied June 9, 1981. *Kelman, Loria, Downing, Schneider &*

Simpson for plaintiff-appellant. *Franklin, Petrulis, Lichty & Mellon* for defendants-appellees. Case below, Court of Appeals No. 52248, order of December 12, 1980.

ISELER v TINSEY. (Docket No. 66899.) Leave to appeal denied June 9, 1981. *Michael D. Dennis* for plaintiffs-appellees. Warren Tinsey and Lucille Billings, *in propriis personis,* defendants-appellants. Case below, Court of Appeals No. 54000, order of March 12, 1981.

SPARTAN PLASTICS, INC v ADVANCE WATCH COMPANY, LTD and MCLEAN SCREEN PRINT, INC v ADVANCE WATCH COMPANY, LTD. (Docket No. 66324.) Leave to appeal denied June 9, 1981. *Kahn & Kahn* for plaintiffs-appellees. *Schlussel, Lifton, Simon, Rands, Kaufman, Lesinski & Jackier* for defendant-appellant. Case below, Court of Appeals No. 51852, order of November 28, 1980.

TIRPAK v SEARS, ROEBUCK & COMPANY. (Docket No. 66364.) Leave to appeal denied June 9, 1981. *Glotta, Adelman, Dinges, Davis & Riley, P.C.,* for plaintiff-appellee. *Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 51732, order of December 4, 1980.

KARKLIS v APPLIED ARTS, DIVISION OF AGM INDUSTRIES, INC. (Docket No. 66380.) Leave to appeal denied June 9, 1981. *Meana & Spruit, P.C.,* for plaintiff-appellee. *Smith, Haughey, Rice & Roegge* for defendants-appellants. Case below, Court of Appeals No. 50979, order of December 10, 1980.

PEOPLE v MAJORS. (Docket No. 66980.) Leave to appeal considered June 9, 1981, and in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand to the Court of Appeals for reconsideration in light of *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people, appellant. Reported below: 104 Mich App 684.

PEOPLE v DAVID HAMILTON. (Docket No. 66387.) Leave to appeal denied June 9, 1981 because the Court is not persuaded that the question

presented should be reviewed by this Court, because the issue raised appears to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *David W. King,* Assistant Prosecuting Attorney, for the people. David Lewis Hamilton, *in propria persona,* appellant. Case below, Court of Appeals No. 77-311, order of May 31, 1978.

ULTIMATE PRECISION, INC v SMITH. (Docket No. 66373.) Leave to appeal denied June 9, 1981. *Stern, Milmet, Vecchio, Goll & Carnago, P.C.,* for plaintiff-appellee. *William G. Boyer* for intervening plaintiff-appellee A. F. Shaw & Associates, Inc. *John W. Hoffman* for defendants-appellants. Case below, Court of Appeals No. 48820, per curiam opinion of December 5, 1980.

PEOPLE v IVERSON. (Docket No. 65131.) Reconsideration of the Court's order of April 1, 1981 (*ante,* 862) granted June 9, 1981. On reconsideration, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Court of Appeals and remand the case to the Jackson Circuit Court for further proceedings based on the circuit judge's order of August 6, 1979 vacating the defendant's conviction. On June 29, 1979, the Court of Appeals remanded this case to the Jackson Circuit Court to provide the prosecutor an opportunity to establish the element of breaking, pursuant to *Guilty Plea Cases,* 395 Mich 96, 129 (1975), where we said: "On remand the prosecutor shall be given an opportunity to establish the missing element. If he is able to do so and there is no contrary evidence, the judgment of conviction shall be affirmed. If the prosecutor is unable to establish the missing element, the judgment of conviction shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion." The circuit judge exercised his discretion by setting aside the guilty plea. The subsequent review by the Court of Appeals was limited to the question of whether the trial judge abused his discretion. As we have defined that term (see, *e.g., People v Talley,* 410 Mich 378, 387 [1981]), we find no abuse of discretion. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Rolf E. Berg,* Assistant

Defender, for defendant-appellant. Case below, Court of Appeals No. 78-4662, orders of January 16, 1980 and April 15, 1980.

PEOPLE v WAYNE MARSHALL. (Docket No. 65103.) Leave to appeal considered June 9, 1981. In lieu of granting leave to appeal, the Court, pursuant to GCR 1963, 853.2(4), reverses the defendant's convictions for the reason that the trial court failed to inform the defendant of the maximum sentence possible for the crimes to which the defendant pled guilty. *People v Jones,* 410 Mich 407 (1981). Wayne B. Marshall, *in propria persona,* appellant. Case below, Court of Appeals No. 78-5428, per curiam opinion of November 27, 1979.

PEOPLE v NEWHOUSE. (Docket No. 67001.) Leave to appeal denied June 9, 1981. *Kooistra, Doornbox & Hoogeboom* for defendant-appellant. Reported below: 104 Mich App 380.

PEOPLE v LEAPHART. (Docket No. 64269.) Leave to appeal considered June 9, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand this case to the Detroit Recorder's Court. On remand, the prosecutor shall be given an opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of felony-firearm in this case shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, this matter shall be treated as a motion to withdraw the guilty plea and the court shall decide this matter in the exercise of its discretion. *People v Johnson,* 411 Mich 50 (1981). Leave to appeal is in all other respects denied. Kirk Leaphart, *in propria persona,* appellant. Case below, Court of Appeals No. 78-249, per curiam opinion of November 26, 1979.

PEOPLE v LOUIS FREEMAN. (Docket No. 67057.) Leave to appeal denied June 9, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Margaret G. Horenstein,* Assistant Prosecuting Attorney, for the people. *Wallace & Mannino* for defendant-appellant. Case below, Court of Appeals No. 56369, order of March 27, 1981.

SOUTHEASTERN MICHIGAN TRANSPORTATION AUTHORITY v SECRETARY OF STATE. (Docket No. 66049.) Leave to appeal denied June 9, 1981. *Downs, Zagaroli & Downs, P.C.,* for plaintiff-appellee. *Bodman, Longley & Dahling* for intervening defendants-appellees Wayne County Board of Road Commissioners, Oakland County Board of Road Commissioners, and The County Road Association. *Katz, Victor & Yoll* for proposed intervening defendants-appellants Automotive Replacement Parts Co., Phillips Shoes, Inc., Marcus Plitkin, Jack M. Schultz, and Richard A. Polk. Case below, Court of Appeals No. 52719, order of October 7, 1981.

PEOPLE v KESSLER. (Docket No. 66297.) Leave to appeal denied June 9, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 52802, order of December 3, 1980.

PEOPLE v CARTER. (Docket No. 66393.) Leave to appeal denied June 9, 1981. Robert Carter, *in propria persona,* appellant. Case below, Court of Appeals No. 52954, order of December 9, 1980.

JOHNNY JONES v GENERAL MOTORS CORPORATION. (Docket No. 66396.) Leave to appeal denied June 9, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *Munroe & Nobach, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 52344, order of December 12, 1980.

PEOPLE v STANKIEWICZ. (Docket No. 66259.) Leave to appeal considered June 9, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse defendant's habitual-offender conviction and sentence. *People v Fountain,* 407 Mich 96 (1979); *People v Young,* 410 Mich 363 (1981). We remand the case to the Kent Circuit Court for sentencing on defendant's conviction of burning real property. Victor Bernard Stankiewicz, *in propria persona,* appellant. Reported below: 101 Mich App 476.

KOZIARSKI v DEPARTMENT OF SOCIAL SERVICES. (Docket No. 62367.) Leave to appeal having been granted (406 Mich 960) and this cause having been briefed, argued and submitted, and it appearing that effective January 1980 the regulation in question has been amended to extend benefits in the future to those in plaintiffs' position, this appeal is dismissed June 18, 1981, for the reason that the Court is no longer persuaded that the questions presented should be reviewed by this Court. Wayne County Neighborhood Legal Services, Inc., *Gregory L. Carr,* for plaintiffs-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Janis Meija* and *Robert N. Rosenberg,* Assistants Attorney General, for defendant-appellee. Legal Services of Eastern Michigan, *Ronald B. Eskin,* and Michigan Legal Services, *Edward J. Hoort,* as amici curiae. Reported below: 86 Mich App 15.

PEOPLE v WELLS. (Docket No. 66758.) Leave to appeal and cross-appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Rasdale,* Assistant Prosecuting Attorney, for the people, appellant-cross-appellee. *Brady & Allen, P.C.,* for defendant-appellee-cross-appellant. Reported below: 102 Mich App 122.

In re BRINKMAN ESTATE, REICHENBACH v BRINKMAN. (Docket No. 65703.) Leave to appeal denied June 19, 1981. *Freeman, McKenzie, Matthews, Scherer & Stepek, P.C.,* for plaintiff-appellee. *Leonard J. Simasko* for defendant-appellant. Case below, Court of Appeals No. 43019, per curiam opinion of July 25, 1980.

PEOPLE v FOSTER. (Docket No. 66803.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people, appellant. Reported below: 103 Mich App 311.

DECHERT v GENERAL MOTORS CORPORATION. (Docket No. 66231.) Leave to appeal considered June 19, 1981 and, pursuant to GCR 1963,

853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order of November 19, 1980 and remand the case to the Court of Appeals for submission to the full panel originally assigned to decide the appeal, or to a panel including a substitute judge if one of the original panel is unavailable. GCR 1963, 800.1. We do not retain jurisdiction. *Dietrich & Cassavaugh, P.C.,* for plaintiff-appellant. *William Nole Evans* and *Willard W. Wallace* for defendant-appellee General Motors Corporation. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Joseph M. Binno,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 53684, order of November 19, 1980.

PEOPLE v FINKLEA. (Docket No. 66226.) Leave to appeal considered June 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals decision of November 26, 1980 and remand the case to the Court of Appeals for submission to the full panel originally assigned to decide the appeal, or to a panel including a substitute judge if one of the original panel is unavailable. GCR 1963, 800.1. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *David A. King,* Assistant Prosecuting Attorney, for the people. *Norman Fell* for defendant-appellant. Case below, Court of Appeals No. 78-715, memorandum opinion of November 26, 1980.

PEOPLE v MCNAMEE. (Docket No. 63651.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *James D. Norlander,* Prosecuting Attorney, and *Kenneth G. Walters,* Assistant Prosecuting Attorney, for the people. Patrick McNamee, *in propria persona,* appellant. Case below, Court of Appeals No. 78-2902, order of September 18, 1980.

COLEMAN, C.J., not participating.

LEVIN, J., would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

PEOPLE v CASPER. (Docket No. 65777.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L.*

Milbourn, Chief Appellate Lawyer, and *Alice F. Sage,* Assistant Prosecuting Attorney, for the people. *Bennett & Rosenthal, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 49624, order of August 21, 1980.

PEOPLE v SCHINZEL. (Docket No. 65805.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people. *Gerald M. Lorence* for defendant-appellant. Reported below: *(On Remand)* 97 Mich App 508.

SCROGGINS v DEPARTMENT OF SOCIAL SERVICES. (Docket No. 66218.) Leave to appeal considered June 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgments of the Court of Appeals and Ingham Circuit Court and reinstate the judgment of the Civil Service Commission because the Commission's decision is supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28; *Viculin v Dep't of Civil Service,* 386 Mich 375, 392 (1971); *Parnis v Civil Service Comm,* 79 Mich App 625, 629-630 (1977). *Darryl P. Mitchell* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Janis Meija* and *Ronald W. Carlson,* Assistants Attorney General, for defendant-appellee. Case below, Court of Appeals No. 46593, order of November 14, 1980.

PEOPLE v TILL. (Docket No. 63311.) The people's application for leave to appeal and defendant-appellee's application for leave to appeal as cross-appellant held in abeyance pending decision in *People v Aaron, People v Wright,* and *People v Thompson,* 409 Mich 672 (1980); the people's application for leave to appeal is considered June 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment, in part, and reinstate defendant's conviction of first-degree murder. On this record it is unclear that defendant objected to a lack of lesser included offense instruction. The trial court was not under obligation to give, *sua sponte,* lesser included offense instructions. *People v Jenkins,* 395 Mich 440, 443 (1975). Leave to appeal as cross-appellant is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate De-

fender, *Rolf E. Berg,* Assistant Defender, for defendant-appellee-cross-appellant. Reported below: 80 Mich App 16.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

Reconsideration denied 412 Mich 907.

PEOPLE v WARREN MOORE. (Docket No. 64221.) Leave to appeal considered June 19, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's felony-firearm conviction and remand the case to Recorder's Court for the City of Detroit for a new trial on the charge of felony-firearm. The trial court's instructions on this charge were erroneous. *People v Johnson,* 411 Mich 50 (1981). In all other respects the Court is not persuaded that relief should be granted and it is therefore denied. Warren J. Moore, *in propria persona,* appellant. Case below, Court of Appeals No. 78-1387, per curiam opinion of November 8, 1979.

PEOPLE v SINCLAIR. (Docket No. 64465.) Leave to appeal considered June 19, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for further proceedings. *People v Johnson,* 411 Mich 50 (1981). On remand the prosecutor shall be given an opportunity to establish that the defendant procured, counselled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the guilty plea to felony-firearm in this case shall stand. If the prosecutor is unable to do so, the plea to felony-firearm shall be set aside. If contrary evidence is produced, these matters shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96, 129 (1975). We do not retain jurisdiction. Paul Sinclair, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3558, memorandum opinion of November 2, 1979.

PEOPLE v WEST. (Docket No. 64450.) Defendant-appellant's application for leave to appeal held in abeyance pending decision in *People v Aaron, People v Thompson,* and *People v Wright,* 409 Mich 672 (1980); leave to appeal considered June 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for reconsideration in light of *People v Pearson,* 404 Mich 698 (1979). We do not retain jurisdiction. *Frank J.*

Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael Lehto,* Assistant Prosecuting Attorney, for the people. Stanley West, *in propria persona,* appellant. Case below, Court of Appeals No. 27144, per curiam opinion of July 24, 1979.

WILKERSON v CARLO. (Docket No. 66275.) Leave to appeal denied June 19, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Draugelis, Ashton & Scully* for defendant-appellant. Reported below: 101 Mich App 629.

PEOPLE v RONE. (Docket No. 64570.) Leave to appeal, together with the November 21, 1980 opinion of the Court of Appeals as amplified pursuant to this Court's order of remand of September 4, 1980, is considered June 19, 1981. We vacate the Court of Appeals decision of November 21, 1980 and remand the case to the Court of Appeals for submission pursuant to this Court's order of September 4, 1980 to the full panel that originally decided the appeal, or to a panel including a substitute judge if one of the original panel is unavailable. GCR 1963, 800.1. We retain no jurisdiction. *Strefling & Brode, P.C.,* for defendant-appellant. Reported below: *(On Remand)* 101 Mich App 811.

PEOPLE v GREGORY TAYLOR. (Docket No. 64393.) The people's application for leave to appeal held in abeyance pending decision in *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1980); leave to appeal considered June 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we modify that part of the judgment of the Court of Appeals that set aside defendant's conviction for possession of a firearm during the commission of a felony without remanding for a new trial. We remand the case to the Genesee Circuit Court for a new trial on the charge of felony-firearm. The trial court's instructions on this charge were erroneous. *People v Johnson* and *Tavolacci. Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people, appellant. Case below, Court of Appeals No. 78-3751, per curiam opinion of December 10, 1979.

PEOPLE v LOUIS MACKENZIE. (Docket No. 64503.) Leave to appeal considered June 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse defendant's felony-firearm

conviction and remand the case to the Jackson Circuit Court for a new trial on the charge of felony-firearm. The trial court's instructions on this charge were erroneous. *People v Johnson* and *People v Tavolacci,* 411 Mich 50 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-1472, per curiam opinion of November 26, 1979.

PEOPLE v RUSH. (Docket No. 66981.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, *Janis L. Blough,* Chief Appellate Attorney, and *Muriel Winter,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellee. Reported below: 104 Mich App 668.

PEOPLE v CHARLES HOLMES. (Docket No. 63995.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. *Raymond L. Miller* for defendant-appellant. Case below, Court of Appeals No. 77-3572, memorandum opinion dated October 11, 1979.

PEOPLE v ARNOLD WRIGHT. (Docket No. 63805.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people, appellant. *Daniel J. Blank* for defendant-appellee. Reported below: 89 Mich App 244.

PEOPLE v JAMES JONES. (Docket No. 65576.) Leave to appeal denied June 19, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellant. Reported below: 95 Mich App 390.

PEOPLE v COOK. (Docket No. 65959.) Leave to appeal considered June 19, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the trial court for resentencing. The record indicates that defendant was denied his right of allocution. *People v Berry,* 409 Mich 774 (1980). In all other respects, leave to appeal is denied. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Theodore O. Johnson,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45795, memorandum opinion of August 29, 1980.

PEOPLE v MARVIN. (Docket No. 66209.) Leave to appeal considered June 23, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the defendant's habitual-offender conviction, affirm the defendant's manslaughter conviction, and remand the case to the Jackson Circuit Court for resentencing. *People v Young,* 410 Mich 363 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Janet Tooley,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46065, per curiam opinion of November 7, 1980.

PEOPLE v CEBERT FUSON. (Docket No. 66300.) Leave to appeal considered June 23, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals and direct the defendant's discharge from custody. The Court of Appeals erred in finding that the defendant had been convicted of assault (MCL 750.81; MSA 28.276) and being a disorderly person (MCL 750.167; MSA 28.364) at his bench trial. The record, as evidenced by the judgment entered by the circuit judge, demonstrates that he was convicted only of being a disorderly person. Since the Court of Appeals concluded there was insufficient evidence to find the defendant guilty of being a disorderly person, it should have directed the defendant's discharge from custody. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people. *Thomas J. Quarles* for defendant-appellant. Case below, Court of Appeals No. 49052, per curiam opinion of November 26, 1980.

PEOPLE v TRAMELL. (Docket No. 63634.) Leave to appeal denied June 23, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. *Raymond L. Miller* for defendant-appellant. Case below, Court of Appeals No. 78-768, order of March 27, 1979.

PEOPLE v EALEY. (Docket No. 66271.) Leave to appeal considered June 23, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals and remand this matter to the Wayne Circuit Court for a new probation violation hearing. This record fails to show that the defendant was notified of his right to a contested hearing. See Judge BRONSON's dissents in *People v Darrell,* 72 Mich App 710; 250 NW2d 751 (1976), and *People v Hooks,* 89 Mich App 124; 279 NW2d 598 (1979). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lynn Chard,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45931, memorandum opinion of November 12, 1980.

PEOPLE v KOWTUN. (Docket No. 66995.) Leave to appeal denied June 23, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. *Posner, Posner & Posner* for defendant-appellee. Case below, Court of Appeals No. 46516, per curiam opinion of March 19, 1981.

PEOPLE v MCRAFT. (Docket No. 66321.) Leave to appeal denied June 23, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Gail Rodwan,* Assistant Defender, for defendant-appellant. Reported below: 102 Mich App 204.

BLACK v RASILE. (Docket No. 66354.) Leave to appeal denied June 23, 1981. *Jason, Jason & Finkbeiner, P.C.,* for defendant-appellant.

Case below, Court of Appeals No. 46621, per curiam opinion of December 4, 1980.

ELLISON v WAYNE COUNTY GENERAL HOSPITAL. (Docket No. 66117.) Leave to appeal considered June 23, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse in part the Court of Appeals judgment and remand the matter to the Wayne Circuit Court for a trial on plaintiff's claims against defendant hospital. *Parker v Highland Park,* 404 Mich 183; 273 NW2d 413 (1978). The instructions given at the first trial permitted the jury, in considering whether the defendant physicians were negligent, to take into account their training and experience. The jury's finding that the physicians were not negligent does not therefore bar plaintiff's claim that the hospital erred in committing her to the care of these physicians. Leave to appeal is otherwise denied. We retain no jurisdiction. *The Jacques Admiralty Law Offices, P.C.,* for plaintiff-appellant. *Kitch, Suhrheinrich, Smith, Saurbier & Drutchas, P.C.,* for defendants-appellees. Reported below: 100 Mich App 739.

PEOPLE v MCMASTER. (Docket No. 67121.) Leave to appeal denied June 23, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people, appellant. *Lawrence R. Greene* for defendant-appellee. Reported below: 105 Mich App 162.

VERMIGLIO v CONDOR MANUFACTURING, INC. (Docket No. 63440.) The application for leave to appeal and the Workers' Compensation Appeal Board's opinion after remand are considered June 26, 1981 and we deny leave to appeal. *Ripple, Chambers & Steiner, P.C.,* for plaintiff-appellant. *Sommers, Schwartz, Silver & Schwartz, P.C.,* for defendants-appellees. Reported below: 91 Mich App 8.

PEOPLE v DAVID CLARK. (Docket No. 66426.) Leave to appeal denied June 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gary C. Hoffman,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. David Earl Clark, *in propria persona,* appellant. Case below, Court of Appeals No. 52531, order of November 28, 1980.

LYBERG v MONTGOMERY WARD & COMPANY, INC. (Docket No. 66447.) Leave to appeal denied June 26, 1981. *Levine & Benjamin, P.C.,* for plaintiff-appellant. *Crippen, Urquhart & Cmejrek* for defendant-appellee. Case below, Court of Appeals No. 52371, order of December 26, 1980.

PEOPLE v TATE. (Docket No. 66985.) Leave to appeal denied June 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 78-2127, per curiam opinion of March 18, 1981.

OBAD v AMERICAN STEAMSHIP COMPANY. (Docket No. 67233.) Leave to appeal denied June 26, 1981. *Leonard C. Jaques, P.C.,* for plaintiff-appellee. *Harrison & Gruber* and *Foster, Meadows & Ballard* for defendant-appellant. Case below, Court of Appeals No. 56303, order of May 1, 1981.

PEOPLE v MCGHAR. (Docket No. 66412.) Leave to appeal denied June 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *Lynwood E. Noah,* Senior Assistant Prosecuting Attorney, for the people. Johnnie Lee McGhar, *in propria persona,* appellant. Case below, Court of Appeals No. 50851, order of October 22, 1980.

WAYNE COUNTY SHERIFF v WAYNE COUNTY BOARD OF COMMISSIONERS. (Docket No. 67316.) Leave to appeal denied June 26, 1981. *Jenkins, Nystrom & Sterlacci, P.C.,* for plaintiff-appellant. *Bodman, Longley & Dahling* and *George C. Cross,* Corporation Counsel, for defendants-appellees. Case below, Court of Appeals No. 57870, order of May 26, 1981.

PEOPLE v DUGAN. (Docket No. 66890.) Leave to appeal denied June 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,*

Assistant Prosecuting Attorney, for the people, appellant. *George C. Dovas* for defendant-appellee. Reported below: 102 Mich App 497.

IN THE MATTER OF THE APPLICATION OF CONSUMERS POWER COMPANY FOR AUTHORITY TO ISSUE SECURITIES, ATTORNEY GENERAL v MICHIGAN PUBLIC SERVICE COMMISSION. (Docket No. 66887.) Leave to appeal denied June 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson, Roderick S. Coy,* and *Patrick J. Devlin,* Assistants Attorney General, for appellant Attorney General. *Alan J. Barak* for appellant Michigan Citizens Lobby. *Arthur E. D'Hondt, Leo H. Friedman,* and *Wallace T. Hart,* Assistants Attorney General, for appellee Michigan Public Service Commission. *Lawrence B. Lindemer, Allen B. Bass,* and *Paula H. Mills,* and *Loomis, Ewert, Ederer, Parsley, Davis & Gotting,* for appellee Consumers Power Company. Case below, Court of Appeals No. 56548, order of March 24, 1981.

DELLINGER v HOLTON PUBLIC SCHOOLS. (Docket No. 66217.) Leave to appeal denied June 26, 1981. *Hoffman & Watts* for plaintiff-appellant. *O'Toole, Stevens, Johnson, Knowlton, Potter & Rolf* for defendants-appellees. Case below, Court of Appeals No. 78-2252, per curiam opinion (on remand) of June 4, 1980.

PEOPLE v RONALD WILSON. (Docket No. 61828.) The people's application for leave to appeal and defendant's application for leave to appeal as cross-appellant held in abeyance pending decision in *People v Thompson* and *People v Wright,* 409 Mich 672 (1980); the applications are considered June 26, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and reinstate the defendant's conviction of first-degree murder and his sentence therefor. This matter was tried before our decision in *People v Aaron, People v Thompson,* and *People v Wright,* 409 Mich 672, 734 (1980). We remand the case to the Court of Appeals for consideration of whether the other issues raised by the defendant on appeal constitute reversible error. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Ward S. Hamlin, Jr.,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service) for the people, appellant. State Appellate Defender, *Daniel J. Wright,* Assistant Defender, for the defendant-appellee-cross-appellant. Reported below: 84 Mich App 636.

Reconsideration denied 412 Mich 906.

LAPEER COMMUNITY SCHOOLS v BUCKEYE UNION INSURANCE COMPANY. (Docket No. 66446.) Leave to appeal denied June 26, 1981. *Preisel & Penzien* for plaintiffs-appellees. *Rodger W. Kittendorf* for defendants-appellants. Case below, Court of Appeals No. 49852, per curiam opinion of December 19, 1980.

MULVILHILL v DEPARTMENT OF LABOR. (Docket No. 66459.) Leave to appeal denied June 26, 1981. *McGinty, Halverson, Brown & Jakubiak, P.C.,* for plaintiff-appellee. *Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 52026, order of December 30, 1980.

SNOW v WORKERS' COMPENSATION APPEAL BOARD. (Docket No. 66407.) Leave to appeal denied June 26, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. *Lacey & Jones* for appellee Uniroyal, Inc. Case below, Court of Appeals No. 52669, order of December 12, 1980.

PEOPLE v ROBERT WILLIAMS. (Docket Nos. 66337, 66338.) Leave to appeal denied June 26, 1981. The denial is without prejudice to the right of the defendant to move the trial court for the production of a transcript of his September 3, 1975 competency hearing. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. Robert Lewis Williams, Jr., *in propria persona,* appellant. Case below, Court of Appeals No. 50704, order of November 20, 1980.

ZIMMER v BOWERS. (Docket No. 66322.) Leave to appeal denied June 26, 1981. *Shanahan & Scheid* for plaintiff-appellant. *Des Jardins, Des Jardins & Moorhead,* for defendants-appellees Danny, Patricia, and Basil Bowers. *Shulaw, Bowne & Omer, P.C.,* for defendants-appellees Xenia and Floyd Zimmer. Reported below: 102 Mich App 329.

SMITH v DAYTON-HUDSON CORPORATION. (Docket No. 66293.) Leave to appeal considered June 26, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiffs-appellees. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defen-

dant-appellant. Case below, Court of Appeals No. 51146, order of November 24, 1980.

MARKOWICZ v PAPPAS. (Docket No. 66283.) Leave to appeal denied June 26, 1981. *Bokos, Jones & Plakas, P.C.,* for defendant-appellant. Reported below: 102 Mich App 1.

PEOPLE v HUBBARD. (Docket No. 66375.) Leave to appeal denied June 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. *Lawrence Baron* for defendant-appellant. Case below, Court of Appeals No. 48883, order of October 23, 1980.

PEOPLE v CARTWRIGHT. (Docket No. 66399.) Leave to appeal denied June 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. *Bell & Hudson, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 49681, per curiam opinion of October 3, 1980.

PEOPLE v HOPKINS. (Docket No. 66427.) Leave to appeal considered June 26, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the defendant's sentence and remand the case to the Recorder's Court for the City of Detroit for resentencing. *People v Berry,* 409 Mich 774 (1980). We retain no jurisdiction. Warren Hopkins, *in propria persona,* appellant. Case below, Court of Appeals No. 43191, order of January 21, 1980.

MATTSON v WHITE PINE COPPER COMPANY. (Docket No. 66489.) Leave to appeal denied June 26, 1981. *Santini, Jacobs, McDonald & Silc, P.C.,* for plaintiff-appellee. *Weis & Cossi, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 52484, order of January 8, 1981.

STATE OF MICHIGAN v RENAISSANCE CONTINUING CARE CENTER, INC. (Docket No. 67251.) Leave to appeal denied June 26, 1981. Wayne County Neighborhood Legal Services, *Robert Twitty,* for intervening-

plaintiff-appellant John Doe. *Frimet, Bellamy & Gilchrist, P.C.,* for defendant-appellee Renaissance Continuing Care Center, Inc. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Walter V. Kron* and *Marvin L. Bromley,* Assistants Attorney General, for defendant-appellee Department of Public Health. Case below, Court of Appeals No. 57484, order of May 8, 1981.

PEOPLE v GIBSON. (Docket No. 64328.) Leave to appeal considered June 26, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's felony-firearm conviction and remand the case to Wayne Circuit Court for a new trial on the charge of felony-firearm. The trial court's instructions on this charge were erroneous. *People v Johnson,* 411 Mich 50 (1981). We retain no jurisdiction. Leonardo Gibson, *in propria persona,* appellant. Reported below: 94 Mich App 172.

HERRON v STAFFORD CORPORATION. (Docket No. 66205.) Leave to appeal denied June 26, 1981. *Ripple, Chambers & Steiner, P.C.,* for plaintiff-appellee. *Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* for defendants-appellants Stafford Corporation and Michigan State Accident Fund. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Caleb B. Martin, Jr.,* for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 45537, order of November 14, 1980.

KOLON v PAX-ELM-J. (Docket No. 66413.) Leave to appeal denied June 26, 1981. *Bayer, Goren, Bornbein, Gropman & Kaplan, P.C.,* for plaintiffs-appellees. *Bonisteel, Bailey & Sikorski* for defendants-appellants. Case below, Court of Appeals No. 48275, per curiam opinion of December 18, 1980.

GORLEWSKI v UNITED STATES STEEL CORPORATION. (Docket No. 66461.) Leave to appeal denied June 30, 1981. *Menmuir, Zimmerman, Rollert & Kuhn* for defendant-appellant. Case below, Court of Appeals No. 52378, order of December 30, 1980.

BUTLER v BOOTH NEWSPAPERS, INC. (Docket No. 66410.) Leave to appeal denied June 30, 1981 because the Court is not persuaded that the question presented should now be reviewed by this Court. *William D. Haynes, P.C.,* for plaintiff-appellee. *O'Rourke, Goldstein, Joseph &*

Kelly, P.C., for defendant-appellant. Case below, Court of Appeals No. 48507, per curiam opinion of December 19, 1980.

PEOPLE v DANIEL WILLIAMS. (Docket No. 66415.) Leave to appeal denied June 30, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 51289, per curiam opinion of December 22, 1980.

DULLINGER v HUBENY. (Docket No. 66464.) Leave to appeal denied June 30, 1981. *Fisher, Omdahl & Tousignant* for defendants-appellants. Case below, Court of Appeals No. 48978, per curiam opinion of December 19, 1980.

MCCULLOUGH v GENERAL MOTORS CORPORATION. (Docket No. 66958.) Leave to appeal denied June 30, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiffs-appellants. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 52667, order of March 16, 1981.

PEOPLE v DONNY ANDERSON. (Docket No. 66370.) Leave to appeal denied June 30, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Warner,* Prosecuting Attorney, and *Judith K. Simonson,* Assistant Prosecuting Attorney, for the people. *Robert S. Engel,* Assistant Public Defender, for defendant-appellant. Case below, Court of Appeals No. 46455, per curiam opinion of December 4, 1980.

PEOPLE v VICTOR JONES. (Docket No. 66065.) Leave to appeal considered June 30, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate defendant's sentences and we remand the matter to the Recorder's Court for the City of Detroit for resentencing in conformity with *People v Berry,* 409 Mich 774, 781 (1980). We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Terence R. Flanagan,* Assistant De-

fender, for defendant-appellant. Case below, Court of Appeals No. 47864, memorandum opinion of October 9, 1980.

STANTON v BUTCHER. (Docket No. 66319.) Leave to appeal denied June 30, 1981. *Robert E. Butcher; Weisman, Trogan & Young, P.C.;* and *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 50533, order of December 3, 1980.

PEOPLE v STANLEY CLARK. (Docket No. 67393.) Leave to appeal considered June 30, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 57766, order of June 2, 1981.

FORMELLA v CIBA-GEIGY CORPORATION. (Docket No. 66333.) Leave to appeal denied June 30, 1981. *Barr & Walker* for plaintiffs-appellants. *Harvey, Kruse, Westen & Milan, P.C.,* for defendant-appellee. Reported below: 100 Mich App 649.

WILLIAMS v DETROIT BOARD OF EDUCATION. (Docket No. 66509.) Leave to appeal denied June 30, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. Case below, Court of Appeals No. 50531, order of January 7, 1981.

BLUEMLEIN v SZEPANSKI. (Docket No. 66525.) Leave to appeal denied June 30, 1981. *Koepke & Dill* for plaintiff-appellant. *Jerome E. Burns, P.C.,* for defendants-appellees. Reported below: 101 Mich App 184.

PEOPLE v GARCIA SMITH. (Docket No. 66528.) Plaintiff-appellant's application for leave to appeal held in abeyance pending decision in *People v Rogers,* 411 Mich 202 (1981); leave to appeal denied June 30, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people, appellant.

Myron E. Sanderson for defendant-appellee. Case below, Court of Appeals No. 47496, per curiam opinion of January 9, 1981.

PEOPLE v TERRELL WILSON. (Docket No. 66532.) Leave to appeal denied June 30, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecutng Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. Terrell Wilson, *in propria persona,* appellant. Case below, Court of Appeals No. 52244, order of December 30, 1980.

Justice LEVIN would grant leave to appeal to consider the retroactivity of *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980), for the reasons set forth in his dissenting statement in *People v Lonchar, ante,* 923.

FREYBLER v GALLMEYER LIVINGSTON COMPANY. (Docket No. 66540.) Leave to appeal denied June 30, 1981. *Miller, Johnson, Snell & Cummiskey* for defendants-appellants. Case below, Court of Appeals No. 52892, order of January 14, 1981.

LARNER v LUNDBERG SCREW PRODUCTS. (Docket No. 66543.) Leave to appeal denied June 30, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Smith, Haughey, Rice & Roegge, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 51235, order of January 23, 1981.

PEOPLE v BEETS. (Docket No. 67126.) Leave to appeal denied June 30, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people, appellant. *Thick & Bush* for defendant-appellee. Reported below: 105 Mich App 350.

RINALDI v BRONSON. (Docket No. 67357.) Leave to appeal denied June 30, 1981. *Hall, Andary & Bilicki, P.C.,* for plaintiffs-appellants. *Cooper, Shifman, Gabe & Quinn* for defendants-appellees. Case below, Court of Appeals No. 57812, order of June 2, 1981.

PEOPLE v THOMAS JONES. (Docket No. 67138.) Leave to appeal denied June 30, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people, appellant.

Edwards & Edwards for defendant-appellee. Reported below: 105 Mich App 269.

MICHIGAN NATIONAL BANK OF DETROIT v MOLSON. (Docket No. 67314.) Leave to appeal denied June 30, 1981. Lester Molson, *in propria persona,* defendant-appellant. Case below, Court of Appeals No. 56974, order of May 7, 1981.

FITZGERALD, J., not participating.

PEOPLE v MAURICE TAYLOR. (Docket No. 65717.) Leave to appeal considered June 30, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the defendant's habitual-offender sentence. *People v Fountain,* 407 Mich 96 (1979), and *People v Young,* 410 Mich 363 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. Maurice Taylor, *in propria persona,* appellant. Case below, Court of Appeals No. 47972, order of August 7, 1980.

PEOPLE v COOKE. (Docket No. 66422.) Leave to appeal denied June 30, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. William R. Cooke, *in propria persona,* appellant. Case below, Court of Appeals No. 50161, order of October 8, 1980.

PEOPLE v DEMETRIUS FREEMAN. (Docket No. 65907.) Leave to appeal considered June 30, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we set aside the defendant's plea-based convictions of armed robbery and felony-firearm. The trial court did not inform the defendant that the maximum sentence for armed robbery is life imprisonment or that possession of a firearm in the course of a felony carries a mandatory two-year term of imprisonment. *People v Jones,* 410 Mich 407 (1981). We remand the case to the Recorder's Court for the City of Detroit for further proceedings. Demetrius R. Freeman, *in propria persona,* appellant. Case below, Court of Appeals No. 50390, order of August 13, 1980.

RAYHALL v FESIK. (Docket No. 66518.) Leave to appeal denied June 30, 1981. *Nine & Maister* for plaintiff-appellee. *Romulus Di Teodoro* for defendants-appellants. Case below, Court of Appeals No. 44496, per curiam opinion of July 28, 1980.

LENZOTTI v FORD MOTOR COMPANY. (Docket No. 66392.) Leave to appeal denied June 30, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Carl G. Meyers* and *Hayim I. Gross* for defendant-appellee. Case below, Court of Appeals No. 51809, order of December 16, 1980.

COHAN v RIVERSIDE PARK PLACE CONDOMINIUM ASSOCIATION, INC. (Docket No. 67476.) Leave to appeal and motion for bail considered July 1, 1981 and, pursuant to GCR 1963, 853.2(4), they are treated as a motion to stay the trial court April 1, 1981 order that the plaintiff's apartment be inspected. The motion is granted. The case is remanded to the Washtenaw Circuit Court which shall order Bruce E. Cohan, M.D., freed pending resolution on appeal of the underlying issues of the case. This stay is conditioned on the continued diligent pursuance by the plaintiff of the appeal on the underlying issues. *Baxter & Hammond* for plaintiff-appellant. *Laird, Grace & Chin* for defendants-appellees. Case below, Court of Appeals No. 58358, order of June 24, 1981.

RYAN, J., dissents.

WILLIAMS, J., not participating.

PEOPLE v LANGWORTHY. (Docket No. 65320.) Leave to appeal granted July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people. *Jeffrey Caminsky* and *Richard A. Smith* for defendant-appellant. Case below, Court of Appeals No. 78-4674, per curiam opinion of May 21, 1980.

SOUTHLAND CORPORATION v LIQUOR CONTROL COMMISSION. (Docket No. 66145.) Leave to appeal denied July 14, 1981. *Meyer & Kirk* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *A. C. Stoddard* and *Larry F. Brya,* Assistants Attorney General, for defendant-appellee. Case below, Court of Appeals No. 44997, per curiam opinion of September 18, 1980.

ROOSA v CHANDLER. (Docket No. 66137.) Leave to appeal granted July 14, 1981. Order granting leave vacated and motion by defendant-appellee to set aside summary judgment and remand for further proceedings granted December 22, 1981. *Frank Landon Young* and *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* for plaintiff-appellant. *Fraser, Trebilcock, Davis & Foster, P.C.,* for defendant-appellee Bernard D. Billman. Case below, Court of Appeals No. 45293, per curiam opinion of October 27, 1980.

CARDENAS v CHAVEZ. (Docket No. 66418.) Leave to appeal granted July 14, 1981. *Peter D. Houk,* Prosecuting Attorney, and *Bruce Kilmer,* Chief, Family Support Division, for plaintiff-appellant. *Church, Wyble, Kritselis, Anderson & Robinson* for defendant-appellee. Case below, Court of Appeals No. 47508, per curiam opinion of December 18, 1980.

PEOPLE v NICHOLSON. (Docket No. 67058.) Leave to appeal and cross-appeal denied July 14, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harvey A. Koselka,* Prosecuting Attorney, for the people, appellant-cross-appellee. *Schwartz, Cavanaugh, Bickford, Werber & Fell, P.C.,* for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 56697, order of March 26, 1981.

PEOPLE v SULLIVAN. (Docket No. 66224.) Leave to appeal denied July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Derrick A. Carter,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 23905, per curiam opinion of August 10, 1977.

PEOPLE v THOMPSON. (Docket No. 66384.) Leave to appeal denied July 14, 1981 because the Court is not persuaded that the questions presented should be reviewed by this Court, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn Schmidt,* Assistant Prosecuting Attorney, for

the people. J. B. Thompson, *in propria persona,* appellant. Case below, Court of Appeals No. 28941, order of July 21, 1977.

In re LAPOINT ESTATE, LAPOINT v YOUNG. (Docket No. 66379.) Leave to appeal denied July 14, 1981. *William A. Garrett* for plaintiff-appellant. *James E. McCormick* for defendant-appellee. Case below, Court of Appeals No. 51067, order of December 10, 1980.

STOCKDALE v JAMISON and CORBETT v JAMISON. (Docket Nos. 66163-66165.) Leave to appeal granted July 14, 1981. *Ripple, Chambers & Steiner, P.C.,* for plaintiffs-appellees Frank Stockdale, Dorothy Stockdale, and Donald L. Corbett. *Willingham, Coté, Hanslovsky, Griffith & Foresman, P.C.,* for garnishee-defendant-appellant Farm Bureau Insurance Group. Reported below: 99 Mich App 534.

PLOUGH v CITY OF MUSKEGON. (Docket No. 66290.) Leave to appeal granted July 14, 1981. *McCroskey, Libner, VanLeuven, Feldman, Cockrane & Brock, P.C.,* for plaintiff-appellant. *Cholette, Perkins & Buchanan* for defendants-appellees. Case below, Court of Appeals No. 47205, memorandum opinion of November 26, 1980.

TEAMSTERS UNION LOCAL 214 v 60TH DISTRICT COURT. (Docket No. 66359.) Leave to appeal granted July 14, 1981. *Howard L. Shifman* and *Habush, Habush & Davis, S.C.,* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Michael J. Hodge,* Assistant Attorney General, for defendant-appellant. Reported below: 102 Mich App 216.

PEOPLE v MACK. (Docket No. 66982.) Leave to appeal denied July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, *Janis L. Blough,* Chief Appellate Attorney, and *Judd R. Spray,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellee. Reported below: 104 Mich App 560.

PEOPLE v SLAVIK. (Docket No. 66642.) Leave to appeal denied July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Annette M. Olejarz,* Assistant Prosecuting Attorney, for the people.

Thomas J. Demetriou for defendant-appellant. Case below, Court of Appeals No. 45155, per curiam opinion of December 17, 1980.

PEOPLE v COOKS. (Docket No. 67213.) Leave to appeal denied July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people, appellant. *Marjory B. Cohen* for defendant-appellee. Case below, Court of Appeals No. 52597, order of March 16, 1981.

JOHNSON v SALEM TOWNSHIP. (Docket No. 66144.) Leave to appeal considered July 14, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, the matter is remanded to the trial court for findings of fact on whether the storage building can be feasibly used for a use permitted in an AR-Agricultural Residential district and, if not, whether storage of plastic hose therein would imperil the zoning plan. *Strefling & Brode, P.C.,* for plaintiff-appellant. *Dobson, Griffin & Westerman, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 46860, per curiam opinion of October 29, 1980.

Motion for rehearing is treated as a motion for reconsideration and is denied November 25, 1981.

PEOPLE v SPEARMAN. (Docket No. 63257.) Leave to appeal denied July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Robert F. Davisson,* Assistant Prosecuting Attorney, for the people. *Gerald A. Fisher & Associates* for defendant-appellant. Case below, Court of Appeals No. 77-217, per curiam opinion of April 3, 1979.

JORDAN v DEPUTY WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. (Docket No. 66451.) Leave to appeal denied July 14, 1981. Ronald L. Jordan, *in propria persona,* plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Mark I. Leach,* Assistant Attorney General, for defendant-appellee. Case below, Court of Appeals No. 54727, order of December 30, 1980.

WAYNE COUNTY HEALTH DEPARTMENT v OLSONITE CORPORATION. (Docket No. 65802.) Leave to appeal denied July 14, 1981. *William L. Cahalan,* Prosecuting Attorney, and *Donald A. Campbell* and *Joseph B. Klein,* Assistants Prosecuting Attorney, for plaintiff-appellee. *Honigman, Miller, Schwartz & Cohn* for defendant-appellant. Case below,

Court of Appeals No. 47753, memorandum opinion of August 22, 1980.

PEOPLE v HALE. (Docket Nos. 66553, 66648.) Leave to appeal and cross-appeal considered July 14, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. Due to the failure of the trial court to properly instruct on the offense of assault with a dangerous weapon, MCL 750.82; MSA 28.277, we vacate the conviction of assault with a dangerous weapon. *People v Joeseype Johnson,* 407 Mich 196; 284 NW2d 718 (1979). That reversal moots defendant's claim that he has been twice convicted in violation of his constitutional right against being placed in double jeopardy. We therefore remand to the Clare Circuit Court for entry of a judgment of conviction of the offense of resisting arrest, MCL 750.479; MSA 28.747. If, however, the prosecuting attorney is persuaded that the ends of justice would be better served, upon notification to the trial court before entry of such judgment, the trial court shall grant a new trial at which this defendant may not be convicted of both assault with a dangerous weapon and resisting arrest. *People v Jankowski,* 408 Mich 79; 289 NW2d 674 (1980). In all other respects, leave to appeal is denied. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas P. McLaughlin, Jr.,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. Richard Hale, *in propria persona,* and State Appellate Defender, *Ronald S. Bretz,* Assistant Defender, for defendant-appellee-cross-appellant. Reported below: 103 Mich App 273.

In re BAY COUNTY PROSECUTOR (BAY COUNTRY PROSECUTOR v BAY COUNTY DISTRICT JUDGE). (Docket No. 66405.) Leave to appeal denied July 14, 1981. *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Rasdale,* Assistant Prosecuting Attorney, for plaintiff-appellant. *Brian M. Kennedy* for defendant-appellee. Reported below: 102 Mich App 543.

WILSON v GENERAL MOTORS CORPORATION. (Docket No. 66402.) Leave to appeal denied July 14, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellee. Reported below: 102 Mich App 476.

KILCREASE v CAMPBELL'S MOBIL SERVICE. (Docket No. 66343.) Leave to appeal considered July 14, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse in part the judgment of the Workers' Compensation Appeal Board. The plaintiff is not entitled to benefits after February 10, 1979, since he has admitted that he returned to work on that day and there is no record evidence of any disability after that date. Leave to appeal is otherwise denied. We retain no jurisdiction. *Marcus, Ruck, Flynn & Wells, P.C.,* for plaintiff-appellee. *Anderson, Green & Vincent, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 51485, order of November 20, 1980.

PEOPLE v GREGORY PARKER. (Docket No. 66028.) Leave to appeal granted July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellant. Reported below: 100 Mich App 406.

BRIGGS v BRIGGS. (Docket No. 67245.) Leave to appeal considered July 14, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. Among the issues the Court of Appeals should consider is whether the record presents clear and convincing evidence that the change of custody is in the best interests of the child. MCL 722.27(c); MSA 25.312(7)(c). *Smith & Maher* for plaintiff-appellant. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 55849, order of May 3, 1981.

ATTORNEY GENERAL v DIAMOND MORTGAGE COMPANY. (Docket No. 66369.) Leave to appeal granted July 14, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Patrick F. Isom,* Assistant Attorney General, for plaintiff-appellant. *Barron & Knoppow* and *Lampert, Fried & Levitt* for defendants-appellees. Reported below: 102 Mich App 322.

PEOPLE v LUNDY. (Docket No. 65480.) Leave to appeal granted July 14, 1981. Roy Lee Lundy, *in propria persona,* appellant. Case below, Court of Appeals No. 46733, memorandum opinion of June 12, 1980.

VASSER v MUSKEGON FIRE DEPARTMENT. (Docket No. 66287.) Leave to appeal granted July 14, 1981. *McCroskey, Libner, VanLeuven, Feldman, Cochrane & Brock* for plaintiff-appellant. *Cholette, Perkins & Buchanan* for defendants-appellees. Case below, Court of Appeals No. 47004, memorandum opinion of November 12, 1980.

HOENEGGERS' & COMPANY, INC v ZEELAND FEEDER PIG, INC. (Docket No. 66216.) Leave to appeal considered July 14, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Landman, Luyendyk, Latimer, Clink & Robb* for plaintiff-appellee. *Randolph McCarthy, Jr., P.C.,* for defendants-appellants. Case below, Court of Appeals No. 49216, order of November 13, 1980.

SULLIVAN v PUBLIC SERVICE COMMISSION. (Docket No. 64418.) Leave to appeal denied July 14, 1981. *J. Andrew Domagalski* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Arthur E. D'Hondt,* Assistant Attorney General, for defendant-appellee Public Service Commission. *Alex H. Terzian, III,* and *David P. Van Note* for appellee Michigan Consolidated Gas Company. Reported below: 93 Mich App 391.

CLINE v ROCK. (Docket No. 66408.) Leave to appeal denied July 14, 1981. *Hiller, McCormick & Barnett* for plaintiff-appellant. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendants-appellees. Case below, Court of Appeals No. 48155, per curiam opinion of December 18, 1980.

PEOPLE v MARZOLF. (Docket No. 66425.) Leave to appeal denied July 14, 1981. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49964, order of December 12, 1980.

ALEXANDER v CITY OF NORTON SHORES. (Docket No. 67328.) Leave to appeal denied July 14, 1981. *Scholten & Fant* for plaintiffs-appellants. *Landman, Luyendyk, Latimer, Clink & Robb* for intervenor-defendant-appellee Modern Merchandising, Inc. Reported below: 106 Mich App 287.

In re WELDON, DOE v PROBATE JUDGE. (Docket No. 66213.) Leave to appeal denied July 22, 1981. *Frimet, Bellamy, Gilchrist & Jehle, P.C.,* for plaintiffs-appellees. Michigan Legal Services, *Gabe Kaimowitz,* for defendant-appellant Dahlari Weldon. Case below, Court of Appeals No. 48373, per curiam opinion of October 30, 1980.

LEVIN, J., would grant leave to appeal and states:

This is the third time that this case has been before this Court.

Under the order of the Monroe Circuit Court from which she appeals, Dahlari Weldon is denied *visitation* with the daughter whose legal as well as biological parent she still is and with whom she has been denied any meaningful association by an unusual web of legal circumstance.

In *In re Weldon,* 397 Mich 225; 244 NW2d 827 (1976), a majority of the Court agreed with Dahlari, albeit on the basis of comity with a decision of the United States District Court, that her parental rights had not been properly terminated. A majority also decided, agreeing with the foster parents, that the circuit court had erred in holding that the Child Custody Act did not apply and concluded therefore that Dahlari was not necessarily entitled to the return of her child, and remanded for determination whether custody of Maria should be awarded to Dahlari or to the foster parents.

At the hearing on remand, Dahlari testified that she was not seeking immediate custody of Maria but, rather, sufficient visitation to allow her to develop a relationship with the child. After the circuit court issued an opinion awarding custody to the foster parents and saying that Dahlari "should play no part in [the child's] life," Dahlari asked this Court, which had retained jurisdiction, to "grant a hearing including oral argument and submission of briefs to determine whether it should order modification of the decision of the court below which denies custody and visitation by the natural mother indefinitely". It appears that she concedes that the foster parents should retain custody of Maria for the foreseeable future but desires contact with her child. A four-Justice majority remanded Dahlari's appeal to the Court of Appeals for plenary consideration. In dissent, Chief Justice COLEMAN, joined by Justices FITZGERALD and RYAN, said that the extended proceedings "should come to rest in this Court" and indicated a willingness to grant Dahlari's motion for hearing. *In re Weldon,* 407 Mich 1152 (1979).

When this Court first entered the matter in 1974, Dahlari Weldon

was on the verge of regaining custody of Maria.[1] Had that reunion taken place then—when Maria was not quite three—whatever difficulties it posed might long ago have been resolved and a sound mother-child relationship established. Indeed, this Court initially denied leave to appeal. But we were persuaded to grant reconsideration and leave to appeal, leading 19 months later to the remand to circuit court for determination whether custody of Maria should be awarded to Dahlari or to the foster parents and a further delay of nearly two years before the circuit court issued its findings and conclusions on custody and visitation. In the meantime, Dahlari has, except for two visits in the fall of 1976, been denied the opportunity to see, know and interact with her daughter and to witness and assist her growth and maturation.

But for the termination order entered by the probate court in September, 1972—held not to have been properly entered—there would have been no occasion to consider the competing claim of the foster parents. But for the two years that the case was pending in this Court, the custodial decision might have been weighed differently.

We have a special responsibility to the mother and child whose relationship has been so affected by judicial intervention found to have been unwarranted and should give careful consideration to the mother's objections to a disposition which renders her legal relationship with her child meaningless.

I would grant leave to appeal to consider the issues raised by the circuit court's opinion on remand.

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[1] The factual background is stated in the opinions in *In re Weldon,* 397 Mich 225; 244 NW2d 827 (1976). The Chief Justice's opinion states the posture of the case when this Court intervened:

"March 6, 1974—While an appeal from the Federal district court order was pending in the Sixth Circuit Court, Monroe County Circuit Court found the Federal court order res judicata and declared all probate proceedings void, including adoption proceedings. It also found the Child Custody Act, MCL 722.21 *et seq.;* MSA 25.312(1) *et seq.,* to be inapplicable. It ordered Maria returned to Dahlari. This order was stayed by the Michigan Court of Appeals pending emergency application for leave to appeal.

* * *

"August 28, 1974—Michigan Court of Appeals denied plaintiffs leave to appeal the Michigan circuit court order because of the July 24, 1974 Federal district court order and vacated * * * stay of the order to return the baby to Dahlari providing order to enter.

"September 10, 1974—Michigan Supreme Court granted stay of order of Monroe circuit court dated March 6, 1974.

"January 24, 1975—Michigan Supreme Court granted leave to appeal. 393 Mich 795 (1975)." *In re Weldon, supra,* pp 246-247.

I

In my view, this case presents three significant questions:

i) How can or should factors (a) through (i) of § 3[2] of the Child Custody Act be applied where the issue is visitation rather than custody?

ii) May a parent whose parental rights have not been terminated and who has not abandoned the relationship and who has sought to preserve it be deprived of reasonable visitation of a child whose custody is awarded to another person absent a finding adequately supported in the evidence that visitation would be harmful to the child?

iii) Does the evidence in this case support a denial of visitation?

The Court of Appeals answered the first question in the affirmative; the other two questions have not been the subject of appellate consideration.

The Court of Appeals characterized Dahlari as arguing that "a natural parent can never be found unfit so as to be lawfully deprived of access to a child," and stated: "We disagree". I would also disagree with such a claim, but that is not the issue. The issue is on what rationale and on what showing may a circuit court deny all visitation to a parent whose parental rights have not been lawfully terminated.

The Court of Appeals, on the authority of *Cooper v Cooper,* 93 Mich App 220; 285 NW2d 819 (1979), said that the best interests of the

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[2] " 'Best interests of the child' means the sum total of the following factors to be considered, evaluated and determined by the court:

"(a) The love, affection and other emotional ties existing between the competing parties and the child.

"(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

"(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

"(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

"(e) The permanence, as a family unit, of the existing or proposed custodial home.

"(f) The moral fitness of the competing parties.

"(g) The mental and physical health of the competing parties.

"(h) The home, school and community record of the child.

"(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

"(j) Any other factor considered by the court to be relevant to a particular child custody dispute." MCL 722.23; MSA 25.312(3), since amended by 1980 PA 434 in particulars not relevant to this case.

child, as defined in the multi-factor analysis of the Child Custody Act (see fn 2) govern both custody and visitation rights, and that application of that analysis may result in extinguishing the visitation rights of a natural parent. In *Cooper,* a divorced father who was ordered to return his son to the boy's mother after his unsuccessful attempt to transform a summer visit into a change of custody fled with the child to two other jurisdictions, initiating custody proceedings in both of them. A Michigan trial court granted the mother's motion to modify the divorce judgment to deny the father all visitation. Holding that "the best interests of the child involved are of paramount importance" in determining visitation rights as well as custody, the Court of Appeals remanded the cause for a new hearing on visitation, saying:

"Complete denial of visitation is a very harsh remedy, and while we can understand the trial judge's wishes to write *finis* to this litigation, the trial court gave no reason for this action with the exception of stating that he did not trust defendant. Therefore, we do not know whether he was punishing the defendant or Larry [the son] or both." The *Cooper* panel, thus, indicated that absolute denial of visitation is a step to be taken only upon a record establishing adequate support and a reasoned basis for such a decision.

The Court of Appeals opinion in the instant case concluded by invoking the appeal-discouraging standard of review of § 8 of the Child Custody Act[3] and asserting that "in denying visitation rights to defendant [Dahlari] the trial court made specific findings of fact on the relevant [best-interests] criteria * * *".

The circuit judge did make findings under each of the § 3 best-interests criteria, stating, *inter alia,* that it is doubtful that Dahlari is capable of "love, affection and other emotional ties" with Maria, that Dahlari does not have capacity and disposition "to give the child love, affection and guidance" or "to provide the child with food, clothing, medical care or other remedial care," and that Dahlari is "incapable of providing or maintaining a stable, satisfactory environment for the child," and questioning Dahlari's moral fitness.

Those findings are almost certainly overstated even if they have some evidentiary support. The circuit judge's opinion makes unmistakably clear that he was not favorably impressed by Dahlari. But whatever his opinion of her potential as a parent, it is hardly likely that the evidence indicates that Dahlari is incapable of loving Maria

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[3] "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; MSA 25.312(8).

or of forming emotional bonds with her or is not disposed to do so. While Dahlari's financial resources are inferior to the foster parents' that does not mean that she would be incapable of or indifferent to meeting those needs in the course of a brief visit.

The judge did not specifically relate any of his findings to the issue of visitation—as distinguished from custody—although in a preceding section under the heading "Credibility" he said of Dahlari:

"As a child she chose to run but had no 'place to run.' She conceives herself as providing a place for [Maria] to run and would keep this thought foremost in the girl's mind. This type of mother-daughter relationship would serve to undermine the authority of the [Does] and the girl's self-discipline which is essential to child-raising. Dahlari's efforts to manage her own life have been a failure. She should play no part in [Maria's] life."

II

Although the Child Custody Act includes several references to visitation, it is clear that the central concern of the act is the resolution of *custody* disputes between two competing parties. In providing for reasonable visitation it is not necessary to choose between competing parties; usually all parties involved can be accommodated.

An examination of the § 3 best-interests criteria reveals that while they may be helpful in deciding *with whom a child should live,* it is difficult to conceive how these criteria should be applied in determining whether and how often the losing party in a custody dispute will be able to see the child. One can hardly suppose that the criteria, if intended to operate in deciding the extent of visitation at all, are intended to operate in exactly the same fashion; if they were, the losing party in a custody dispute would have no claim to visitation apart from what the prevailing party might voluntarily allow.

If the Legislature intended the Child Custody Act to provide a particular methodology for resolving disputes over visitation, it is far from evident. The circuit judge's opinion in this case gave no indication how he had applied the act or the multi-factor best-interests analysis to reach the conclusion that Dahlari should have no visitation. The Court of Appeals broad pronouncements that the best-interests criteria govern visitation as well as custody fail to give specific guidance.[4] The legislative intent respecting the handling of

[4] See *Cooper v Cooper,* 93 Mich App 220, 228; 285 NW2d 819 (1979); *Stevens v Stevens,* 86 Mich App 258, 270; 273 NW2d 490 (1978); *Stevenson v Stevenson,* 74 Mich App 656, 658-659; 254 NW2d 337 (1977); *Lorenz v Lorenz,* 70 Mich App 356, 358-359; 247 NW2d 569 (1976).

visitation issues is not clear, and it is past time for an appellate court to say how the act can and should be applied in such cases. I would grant leave to appeal to consider this question.

III

Although various forms of joint custody are gaining increasing acceptance, it is generally agreed, I think, that a child benefits from the security of a single custodial placement. But there is little reason to foreclose a child from contact with noncustodial adults who, by virtue of legally cognizable relationship, have a right to maintain ties with the child and to witness and participate in a limited way in the child's upbringing.

The Uniform Marriage and Divorce Act provides in § 407:

"[Visitation]

"(a) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would *endanger seriously* the child's physical, mental, moral, or emotional health.

"(b) The court may modify an order granting or denying visitation rights whenever modification would serve the best interest of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would *endanger seriously* the child's physical, mental, moral, or emotional health." (Emphasis supplied.) 9A ULA, Matrimonial, Family and Health Laws, pp 207-208.

The Commentary to this section states:

"[T]his section states the traditional rule for visitation rights. The general rule implies a 'best interest of the child' standard. * * * The section does make clear, however, that the judge must hold a hearing and made an *extraordinary finding* to deprive the noncustodial parent of all visitation rights. To preclude visitation completely, the judge must find that visitation would endanger 'seriously the child's physical, mental, moral, or emotional health.' These words are intended to mesh with other uniform legislation. See Uniform Juvenile Court Act, Section 47 [governing termination of parental rights]. Although the standard is necessarily somewhat vague, *it was deliberately chosen to indicate its stringency when compared to the 'best interest' standard traditionally applied to this problem.* The special standard was chosen to prevent the denial of visitation to the noncustodial parent on the basis of moral judgments about parental behavior which have no relevance to the parent's interest in or capacity to maintain a close and benign relationship to the child. The same onerous standard is applicable when the custodial parent tries to have the noncustodial parent's visitation privileges restricted or eliminated." (Emphasis supplied.) *Id.,* p 208.

Although pre-Child Custody Act cases also speak of visitation as governed by the best interests of the child, the language of the opinions evidences respect for a parent's interest in visitation. "Access to the child by the parent denied custody is an important right." *Kane v Kane,* 241 Mich 96, 99; 216 NW 437 (1927). "Where the interest of a child *demands* it, a parent may be denied the right of visitation." *Brown v Brown,* 335 Mich 511, 519; 56 NW2d 367 (1953) (emphasis supplied). In the rare case where visitation was actually forbidden to a parent, *e.g., Bowler v Bowler,* 355 Mich 686; 96 NW2d 129; 74 ALR2d 1068 (1959), it appears that the court believed that there was a clear risk that visitation might harm the children.

To abrogate the right of a parent to contact with her child without requiring the showing demanded in § 407 of the UMDA may well infringe a constitutional right. While there does not appear to be a constitutional jurisprudence specifically addressing parental visitation rights, the right to maintain contact with one's child through visitation is undeniably an aspect of the "cognizable and substantial" interest of a parent in the companionship, care, custody and management of his or her children. *Stanley v Illinois,* 405 US 645, 651-652; 92 S Ct 1208; 31 L Ed 2d 551 (1972). In *Quilloin v Walcott,* 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978),[5] a unanimous Court approvingly quoted from Justice Stewart's concurring opinion in *Smith v Organization of Foster Families for Equality & Reform,* 431 US 816, 862-863; 97 S Ct 2094; 53 L Ed 2d 14 (1977):

"We have little doubt that the Due Process Clause would be offended '[i]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness *and for the sole reason that to do so was thought to be in the children's best interest.*' " (Emphasis supplied.)

IV

When this case was remanded to the circuit court in 1976 for determination whether custody of Maria should be awarded to Dahlari or to the foster parents, a psychiatrist who examined Maria *recommended visitation* and, in conjunction with other experts involved in the case, *outlined a plan under which visitation should occur.* The psychiatrist requested that visitation cease while she

[5] In *Quilloin v Walcott,* 434 US 246; 98 S Ct 549; 54 L Ed 2d 511 (1978), the unwed father of an 11-year-old child whom he had often visited and irregularly supported, but of whom he had never sought actual or legal custody, unsuccessfully sought to block the adoption of his child by the child's stepfather on the ground that he should have the same authority to veto a proposed adoption that state law gave an unwed mother rather than having his rights terminated by application of a "best interest of the child" standard.

prepared her report. After the report was submitted, the case was not resolved for 17 months due to various delays agreed to by the parties, and visitation never resumed. A second report offered by the psychiatrist after the long delay recommended that there be no visitation on the basis that Maria "expressed no distress" at not seeing Dahlari and there was no need on Maria's part "developmentally to have visitation at this time."

To use the child's lack of distress or developmental need as criteria for denying visitation is not even to apply a "best interests" standard; if a parent seeking visitation over the custodian's objections must demonstrate an affirmative benefit to the child from visitation, many divorced parents would not be assured visitation with their children.

The psychiatrist's second report also stated:

"A serious concern about visitation, if it occurs at this time, *is the anger and mistrust which exists between [the foster parents and Dahlari].* If visitation should occur before these feelings are resolved, I feel it will be detrimental to Maria. In my 1976 report, I outlined a plan to help resolve these feelings in a way that would protect Maria. I would be glad to discuss this further with you." (Emphasis supplied.)

This anger and mistrust may be an unexpressed foundation of the judge's decision to deny visitation. No testimony was offered to show that visitation would be harmful to Maria, but it is known that the foster parents oppose visitation—or any place for Dahlari in the child's life. It appears that it is because of the foster parents' attitude that visitation is likely to engender tension, anxiety and negative comment in the child's environment, and that one may fear that visitation will unsettle a stable situation. There is no testimony that visitation could not become a positive experience for Maria if the foster parents were willing to cooperate toward that end.

If a parent were overseas fighting in a war and were listed as missing in action, or a businessman were held hostage for years by South American guerrillas, and the parent remaining at home died and custody were awarded to the grandparents, would a court deny visitation to the parent who returned home a number of years later or condition visitation on the approval of the grandparents? Would it not make a difference that the absent parent had been unable to maintain the relationship through no fault of his or her own? Suppose a parent who had been awarded custody remarried and visitation would be disruptive of the new relationship. A court would be unlikely to allow the custodian's opposition to stymie visitation in these situations.

V

Dahlari has consistently sought to regain custody of Maria since her parental rights were terminated. She remains Maria's legal as

well as biological parent, and by virtue of that status is entitled, absent a compelling showing, to enjoy the companionship of her child to at least a limited extent and to actualize the maternal feelings which she has for many years been allowed to express only through litigation.

I would grant leave to appeal.

POLLARD v BARKER-FOWLER ELECTRIC COMPANY. (Docket No. 66234.) Leave to appeal considered July 17, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order which remands the cause to the Workers' Compensation Appeal Board for reconsideration in light of *McClure v General Motors Corp (On Rehearing)*, 408 Mich 191 (1980), because the ruling of the Court in *McClure* is distinguishable from the instant case. We remand the case to the Court of Appeals for reconsideration of the defendants' application for leave to appeal. *Denfield, Timmer & Taylor* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 49946, order of November 18, 1980.

BROOKSIDE CENTER ASSOCIATION v J'S & B'S FOOD. (Docket No. 67430.) Leave to appeal considered July 23, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to the Court of Appeals for consideration as on leave granted. The stay previously entered by this Court shall continue on the conditions stated until the proceedings on appeal are concluded. *Josephson, Tennen & Haron* for plaintiff-appellee. *Fakhri W. Yono* for defendant-appellant. Case below, Court of Appeals No. 58183, order of June 12, 1981.

PEOPLE v TOLBERT. (Docket No. 66267.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people. Dennis Tolbert, *in propria persona,* appellant. Case below, Court of Appeals No. 49633, order of October 9, 1980.

PEOPLE v DEASE. (Docket No. 64219.) Leave to appeal considered July 28, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand this case to the Oakland Circuit Court for

the purpose of giving the prosecutor the opportunity to establish that the defendant procured, counseled, aided or abetted and so assisted the accomplice to obtain or retain possession of the firearm which the accomplice possessed during the commission of the felony. If the prosecutor is able to do so and there is no contrary evidence, the judgment of conviction of carrying or possessing a firearm during the commission of a felony shall be affirmed. If the prosecutor is unable to do so, the judgment of conviction of felony-firearm shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide this matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96; *People v Johnson* and *People v Tavolacci,* 411 Mich App 50 (1981). In all other respects, leave to appeal is denied. Ronald L. Dease, *in propria persona,* appellant. Case below, Court of Appeals No. 78-2645, per curiam opinion of November 26, 1979.

WATSON v DETROIT BOARD OF EDUCATION. (Docket No. 66450.) Leave to appeal denied July 28, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. Case below, Court of Appeals No. 52037, order of December 30, 1980.

RUDY v CITY OF LINCOLN PARK. (Docket No. 66467.) Leave to appeal denied July 28, 1981. David C. Rudy, *in propria persona,* plaintiff-appellant. *John A. Aloisi* for defendants-appellees. Case below, Court of Appeals No. 45374, order of December 26, 1980.

PEOPLE v MARK WILLIAMS. (Docket Nos. 66472, 66473.) Leave to appeal considered July 28, 1981. In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand defendant's plea-based conviction for armed robbery in Court of Appeals No. 47624 to the Recorder's Court for the City of Detroit. On remand the prosecutor shall be given an opportunity to establish the missing element of a felonious taking of property which might be the subject of larceny from complainant or in his presence. MCL 750.529; MSA 28.797. If he is able to do so and there is no contrary evidence, the judgment of conviction shall be affirmed. If the prosecutor is unable to establish the missing element, the judgment of conviction shall be set aside. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty plea and the court shall decide the matter in the exercise of its discretion. *Guilty Plea Cases,* 395 Mich 96, 128-129 (1975). We also order the court to resentence defendant on his two convictions for felony-firearm in a manner consistent with our decision in *People v Sawyer,* 410 Mich 531 (1981). In all other respects,

leave to appeal is denied. Mark A. Williams, *in propria persona,* appellant. Case below, Court of Appeals Nos. 47622, 47624, order of December 23, 1980.

HOLIDAY INNS, INC v JACKSON. (Docket No. 66479.) Leave to appeal denied July 28, 1981. Marvin H. Jackson and Louise C. Jackson, *in propriis personis,* defendants-appellants. *Honigman, Miller, Schwartz & Cohn* for defendant-appellee Bank of the Commonwealth. *Bodman, Longley & Dahling* for defendant-appellee Manufacturers National Bank. *Michael F. Simon* for defendant-appellee Russ Dawson, Inc. Case below, Court of Appeals No. 51741, order of January 6, 1981.

LEVIN and FITZGERALD, JJ., not participating.

FISHER v JACKSON. (Docket No. 66529.) Leave to appeal denied July 28, 1981. *William L. Fisher, in propria persona,* plaintiff-appellant. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendants-appellees. Case below, Court of Appeals No. 53264, order of January 23, 1981.

PEOPLE *ex rel* ACTING DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES v CHEBOYGAN CEMENT PRODUCTS, INC. (Docket No. 66548.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Frank J. Pipp* and *Russell E. Prins,* Assistants Attorney General, for plaintiff-appellee. *Patrick & Johnson, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 46639, memorandum opinion of January 15, 1981.

TSANG v BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY. (Docket No. 66575.) Leave to appeal denied July 28, 1981. *Hans Pfiffner* for plaintiff-appellant. *Patricia Eames, Elmer L. Roller,* and *Kenneth A. McKanders* for defendant-appellee. Case below, Court of Appeals No. 43164, order of November 24, 1980.

PEOPLE v EVANS. (Docket No. 66512.) Leave to appeal considered July 28, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate the Court of Appeals order certified November 6, 1978, and remand the case to the Recorder's Court for the City of Detroit for an evidentiary hearing and ruling on the claims in defendant's post-conviction motion filed on or about April 4,

1978. *People v Ginther,* 390 Mich 436 (1973). We do not retain jurisdiction. Amos Evans, *in propria persona,* appellant. Case below, Court of Appeals No. 78-721, order of November 6, 1978.

VILLAGE OF FRANKLIN v CITY OF SOUTHFIELD. (Docket No. 66526.) Leave to appeal denied July 28, 1981. *Feiler & Glass, P.C.,* for plaintiff-appellant Village of Franklin. *Maurice V. Victor, P.C.,* for plaintiff-appellant Lilyan Victor. *Sigmund A. Beras* for defendants-appellees. *Butzel, Keidan, Simon, Myers & Graham* for intervening defendant-appellee S. B. McLaughlin Associates, Inc. Reported below: 101 Mich App 554.

NADOLSKI v GENERAL MOTORS CORPORATION. (Docket No. 66562.) Leave to appeal denied July 28, 1981. *Robert L. O'Connell & Associates* for plaintiff-appellee. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 51014, order of January 19, 1981.

PEOPLE v EMANUEL RIVERA. (Docket No. 65211.) Defendant having filed a request for review of his conviction, this Court having issued an order to show cause why the case should not be remanded for an evidentiary hearing concerning the requirements of GCR 1963, 785.7(2) (410 Mich 913), and the prosecutor's answer having been considered on July 28, 1981, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals order of May 1, 1980 granting a motion to affirm and remand the case to the Recorder's Court for the City of Detroit for an evidentiary hearing concerning the requirements of GCR 1963, 785.7(2). *Guilty Plea Cases,* 395 Mich 96, 127 (1975). In all other respects, leave to appeal is denied. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. Emanuel Rivera, *in propria persona,* and *Elizabeth L. Jacobs,* for defendant-appellant. Case below, Court of Appeals No. 47131, order of May 1, 1980.

PEOPLE v TYE. (Docket No. 66571.) Leave to appeal denied July 28, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insuffi-

cient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(4). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. Thomas Tye, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3645, per curiam opinion of December 10, 1979.

PEOPLE v ROBERT MCCOY. (Docket No. 66587.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Edwin R. Brown,* Assistant Prosecuting Attorney, for the people. Robert McCoy, *in propria persona,* appellant. Case below, Court of Appeals No. 52982, order of January 23, 1981.

PEOPLE v MONASTERSKI and PEOPLE v MUNDE. (Docket Nos. 67209, 67210.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. *Steven Fishman* for defendant-appellee Raymond Monasterski. *Mark E. Weiss* for defendant-appellee John Munde. Reported below: 105 Mich App 645.

PEOPLE v FINCH. (Docket No. 67471.) Leave to appeal denied July 28, 1981. *Robert W. Larin* for defendant-appellant. Case below, Court of Appeals No. 58356, order of June 23, 1981.

PEOPLE v TERRY ANDERSON. (Docket No. 66640.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Rasdale,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48815, per curiam opinion of January 27, 1981.

COMPTON-CUMMINGS v FORD MOTOR COMPANY. (Docket No. 66580.) Leave to appeal denied July 28, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. *Hayim I. Gross* and

Carl G. Meyers, Senior Attorney, for defendant-appellee. Case below, Court of Appeals No. 50376, order of January 19, 1981.

PEOPLE v DENSON. (Docket No. 66626.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46654, orders of January 26, 1981 and January 29, 1981.

PEOPLE v ERNEST ALEXANDER. (Docket No. 66560.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *James L. McCarthy,* Assistant Prosecuting Attorney, for the people. Ernest Alexander, *in propria persona,* appellant. Case below, Court of Appeals No. 49673, order of January 8, 1981.

PEOPLE v LIGGINS. (Docket No. 65424.) Leave to appeal considered July 28, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reduce the defendant's sentence for his conviction of possession of a firearm in the commission of a felony from five years to two years, to run concurrently with the two-year sentence imposed for the defendant's conviction of possession of a firearm in the commission of a felony in Recorder's Court No. 79-01766. In all other respects, leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Case below, Court of Appeals No. 46398, order of March 28, 1980.

PEOPLE v GOINS. (Docket No. 66563.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46067, per curiam opinion of January 8, 1981.

MICHIGAN CONSOLIDATED GAS COMPANY v EL-AMEEN. (Docket No. 66591.) Leave to appeal denied July 28, 1981. *Lewis M. Slater* for plaintiff-appellee. Theodore El-Ameen, *in propria persona,* defendant-appellant. Case below, Court of Appeals No. 52342, order of January 28, 1981.

RUTHERFORD v KIMBERLY CLARK CORPORATION. (Docket No. 66557.) Leave to appeal denied July 28, 1981. *Wisti & Jaaskelainen* for plaintiff-appellant. *Vairo, Mechlin, Tomasi, Johnson & Manchester* for defendants-appellees. Case below, Court of Appeals No. 51104, order of January 22, 1981.

PEOPLE v LYTLE. (Docket No. 66482.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph T. Barberi,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Richard B. Ginsberg,* Assistant Defender, for defendant-appellant. Reported below: 102 Mich App 708.

PEOPLE v WALKER. (Docket No. 66531.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Robert Lee Walker, *in propria persona,* appellant. Case below, Court of Appeals No. 50585, order of January 8, 1981.

FITZGERALD, J., not participating.

LOWIN v CITY MESSENGER COMPANY. (Docket No. 66456.) Leave to appeal denied July 28, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Charfoos & Reiter, P.C.,* for defendants-appellees City Messenger Company and Michigan Mutual Insurance Company. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Morrison Zack,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 53063, order of December 26, 1980.

PEOPLE v MANCUSO and PEOPLE v SHUGAR. (Docket Nos. 67560-67563.) Leave to appeal denied July 28, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *James L. McCarthy,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals Nos. 58576-58579, order of July 2, 1981.

PEOPLE v TOMMY FREEMAN. (Docket No. 67013.) Leave to appeal considered July 28, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Court of Appeals and reinstate the defendant's conviction. We find that the record demonstrates that the defendant was sufficiently advised of his right of confrontation. *Guilty Plea Cases,* 395 Mich 96, 121-124 (1975). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 48675, per curiam opinion of March 23, 1981.

NICE v GENERAL MOTORS CORPORATION. (Docket No. 66579.) Leave to appeal denied July 28, 1981. *Ripple, Chambers & Steiner* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellee. Case below, Court of Appeals No. 48221, order of May 8, 1981.

PEOPLE v WINZELER. (Docket No. 66559.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people. John Lee Winzeler, *in propria persona,* appellant. Case below, Court of Appeals No. 48672, memorandum opinion of January 16, 1981.

CIAGLO v FANNING. (Docket No. 66355.) Leave to appeal denied July 28, 1981. *James Leonard Elsman* for plaintiffs-appellants. *Charles H. Brown* for defendant-appellee. Reported below: 101 Mich App 17.

BOGUSLAW v WRIGLEY SUPERMARKETS, INC. (Docket Nos. 66513, 66514.) Leave to appeal denied July 28, 1981. *Zeff & Zeff* for plaintiff-appellee. *Ronald C. Winiemko* for defendant-appellant Wrigley Supermarkets, Inc. *Dice, Sweeney, Sullivan & Feikens, P.C.,* for defendants-appellants Sanitas Security Service, Inc., and Charles Mims. Case below, Court of Appeals Nos. 78-3379, 78-3795, per curiam opinion of January 7, 1981.

LUICK v LUICK. (Docket No. 66593.) Leave to appeal denied July 28, 1981. *Crippen, Urquhart & Cmejrek* for plaintiff-appellee. *Tucker, Barbour & Mack* for defendant-appellant. Case below, Court of Appeals No. 47295, per curiam opinion of January 26, 1981.

COMMODITIES EXPORT COMPANY v CITY OF DETROIT. (Docket No. 66615.) Leave to appeal denied July 28, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Fischer, Franklin, Ford, Simon & Hogg* for intervening defendant-appellee Ammex, Inc. Reported below: 103 Mich App 205.

FULLER v CENTRAL HEATING COMPANY. (Docket No. 66629.) Leave to appeal denied July 28, 1981. *Richard E. Eaton* for plaintiff-appellee. *Hiller, Howard, Larky & Hoekenga* for defendant-appellant. Case below, Court of Appeals No. 49944, order of December 10, 1980.

OSTERHART v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE. (Docket No. 66658.) Leave to appeal denied July 28, 1981. *McCroskey, Libner, VanLeuven, Feldman, Cochrane & Brock, P.C.,* for plaintiff-appellant. Reported below: 103 Mich App 143.

PEOPLE v THOMAS. (Docket No. 67320.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Geoffrey H. Nickol,* Assistant Prosecuting Attorney, for the people, appellant. *David J. Hoffman* for defendant-appellee. Case below, Court of Appeals No. 47880, per curiam opinion of February 9, 1981.

PEOPLE v KALY. (Docket No. 67493.) Leave to appeal from denial of bail bond denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 58257, order of June 24, 1981.

PEOPLE v WILFORD ROGERS. (Docket No. 66326.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael R. Smith,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Peter H. Shumar* for defendant-appellant. Case below, Court of Appeals No. 49329, order of December 3, 1980.

PEOPLE v GEORGE BYRD. (Docket No. 66517.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn Schmidt,* Assistant Prosecuting Attorney, for the people. George Byrd, *in propria persona,* appellant. Case below, Court of Appeals No. 50464, order of January 14, 1981.

RILEY v DIRECT TRANSIT LINES, INC. (Docket No. 66544.) Leave to appeal denied July 28, 1981. *Williams, Klukowski, Wood, Drew & Fotieo, P.C.,* for plaintiffs-appellants. *Baxter & Hammond* for defendants-appellees. Case below, Court of Appeals No. 48784, per curiam opinion of January 13, 1981.

HOVEY v FERRO MANUFACTURING COMPANY. (Docket No. 66547.) Leave to appeal denied July 28, 1981. *Tucker & Kubin* for plaintiff-

appellee. *Philip S. Della Santina* for defendants-appellants. Case below, Court of Appeals No. 53564, order of January 23, 1981.

PEOPLE v EDGAR JOHNSON. (Docket No. 66586.) Leave to appeal denied July 28, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Edgar Johnson, *in propria persona,* appellant. Case below, Court of Appeals No. 53537, order of January 19, 1981.

KOWALCZYK v LAWYERS TITLE INSURANCE CORPORATION. (Docket No. 66594.) Leave to appeal denied July 28, 1981. *Jack C. Chilingirian* for plaintiff-appellant. *Frank Iannelli* for defendant-appellee. Case below, Court of Appeals No. 48617, per curiam opinion of December 5, 1980.

MARTENIES v MUSKEGON MOTOR SPECIALTIES COMPANY. (Docket No. 66614.) Leave to appeal denied July 28, 1981. *Bockoff & Zamler, P.C.,* for plaintiff-appellee. *Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* for defendants-appellants Muskegon Motor Specialties Company and Michigan State Accident Fund. *Richard L. Hedstrom* for defendant-appellee Liberty Mutual Insurance Company. Case below, Court of Appeals No. 52332, order of January 27, 1981.

PEOPLE v SUSZEK. (Docket No. 66653.) Leave to appeal considered July 28, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Alpena Circuit Court for resentencing. The defendant was denied his right of allocution. *People v Berry,* 409 Mich 774 (1980). In all other respects leave to appeal is denied. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Theodore O. Johnson,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Karla Kendall,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49814, per curiam opinion of January 28, 1981.

PATTYN v FREZZA. (Docket No. 64430.) Defendant-appellant's motion for reconsideration of this Court's order of November 21, 1980 (409 Mich 949) is granted July 28, 1981. Upon reconsideration, pursuant to GCR 1963, 853.2(4), we remand the case to the Macomb Circuit Court

for more specific findings of fact, particularly as to when possession of the house was to pass *(i.e.,* resolving the conflicting testimony that "the house *is* yours" and that "the house *will be* yours") and as to which house (that in Detroit or that in Warren) was the subject of the oral contract. The court's findings are to be filed with the clerk of this Court within 30 days. We retain jurisdiction. *Joseph E. Mihelich* for plaintiffs-appellees. *Joseph N. Impastato* for defendant-appellant. Case below, Court of Appeals No. 78-4976, memorandum opinion of December 13, 1979.

For subsequent order see 412 Mich 861.

PEOPLE v HAYNES. (Docket No. 66661.) Leave to appeal denied August 6, 1981. James Osborne Haynes, *in propria persona,* appellant. Case below, Court of Appeals No. 47399, order of November 25, 1980.

LATTIMORE v LAKEY FOUNDRY CORPORATION. (Docket No. 66678.) Leave to appeal denied August 6, 1981. *Marcus, Ruck, Flynn & Wells, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Caleb B. Martin, Jr.,* Assistant Attorney General, for defendant-appellee Self-Insurers' Security Fund. *Cholette, Perkins & Buchanan* for defendants-appellees Michigan Foundry Supply Company and CNA Insurance Company. Case below, Court of Appeals No. 53831, order of February 5, 1981.

RUBIN v WOODS. (Docket No. 66565.) Leave to appeal denied August 6, 1981. *David Colman* and *Cole & Tamsen* for plaintiffs-appellants. *Jaffe, Snider, Raitt, Garratt & Heuer* for defendants-appellees. Case below, Court of Appeals No. 52947, order of December 29, 1980.

PRATT v MILLER. (Docket No. 66625.) Leave to appeal denied August 6, 1981. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiff-appellant. *Foster, Swift, Collins & Coey, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 48746, per curiam opinion of January 27, 1981.

DEDENBACH v SNELL. (Docket No. 66650.) Leave to appeal denied August 6, 1981. *Barry & Pantel* for plaintiff-appellant. *Bromberg, Robinson, Shapero, Cohn & Burgoyne, P.C.,* for defendants-appellees Sheridan Snell, Carl S. Andrews, and Sturgeon Valley Lodge. *Brown, Branch & Prost* for defendant-appellee Paul Heber. Case below, Court of Appeals No. 48864, per curiam opinion of January 28, 1981.

PEOPLE v FRIDAY. (Docket No. 65501.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Barker* and *People v Lynn,* 411 Mich 291 (1981); leave to appeal considered August 6, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Monroe Circuit Court. On remand the circuit judge shall make findings of fact and conclusions of law concerning the asportation element of kidnapping. GCR 1963, 517.1; *People v Barker, supra.* The findings and conclusions shall be forwarded to this Court within 30 days of the date of this order. We retain jurisdiction. Said findings and conclusions having been considered by this Court, leave to appeal is denied November 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Gail Rodwan,* Assistant Defender, for defendant-appellant. Reported below: 98 Mich App 522.

RAHN v J L HUDSON COMPANY. (Docket No. 66616.) Leave to appeal denied August 6, 1981. *Levine & Benjamin, P.C.,* for plaintiff-appellee. *Mitseff, Baril & Abela, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 53328, order of February 5, 1981.

JOBA CONSTRUCTION COMPANY, INC v MONROE COUNTY DRAIN COMMISSIONER. (Docket No. 67461.) Leave to appeal considered August 6, 1981, and in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we vacate the Court of Appeals order certified June 8, 1981 and remand the case to the Court of Appeals for consideration as on leave granted of the questions raised in the parties' briefs as well as the question decided by the Court of Appeals in its June 8 order. As to the latter question, the parties shall be given an opportunity to brief the issue of whether the court or the arbitration tribunal is the proper forum to decide whether a party has waived the right to arbitration. See Anno, 26 ALR3d 604; 98 ALR3d 767. We do not retain jurisdiction. *John W. Mason* for plaintiff-appellee. *William J. Braunlich, Jr.,* for defendant-appellant. Case below, Court of Appeals No. 57402, order of June 8, 1981.

PEOPLE v MICHAEL CLARK. (Docket No. 66454.) Leave to appeal denied August 6, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn Schmidt,* Assistant Prosecuting Attorney, for plaintiff-appellee. State Appellate Defender, *Susan J. Smith,* Assistant Defender, for defen-

dant-appellant. Case below, Court of Appeals No. 46226, order of December 11, 1980.

PEOPLE v DORAN. (Docket No. 66307.) Leave to appeal considered August 6, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the defendant's habitual offender conviction and remand the case to the circuit court either for sentencing on the breaking and entering conviction, or for reinstatement of the breaking and entering sentence if one had been imposed before commencement of the habitual offender proceedings. *People v Young,* 410 Mich 363 (1981); *People v Fountain,* 407 Mich 96 (1979). In all other respects leave to appeal is denied. Michael Thomas Doran, *in propria persona,* appellant. Reported below: 100 Mich App 795.

SUPERIOR NATIONAL BANK & TRUST COMPANY v SMITH. (Docket No. 66406.) Leave to appeal denied August 6, 1981. *Feiler & Glass, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 43921, per curiam opinion of October 27, 1980.

PEOPLE v COATES. (Docket No. 64197.) Leave to appeal denied August 6, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. *Kraizman & Kraizman* for defendant-appellant. Case below, Court of Appeals No. 78-4909, per curiam opinion of October 18, 1979.

PEOPLE v RONALD HALL. (Docket No. 66675.) Leave to appeal denied August 6, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 43556, order of February 2, 1981.

PEOPLE v AARON. (Docket No. 65830.) Leave to appeal denied August 6, 1981. Walter Aaron, *in propria persona,* appellant. Reported below: 99 Mich App 650.

VILICAN-LEMAN & ASSOCIATES, INC v ST LUCIA INVESTMENT COMPANY. (Docket No. 66421.) Leave to appeal and cross-appeal denied August 6, 1981. *Hutson, Sawyer, Schenden & Chapman* for plaintiff-appellee-cross-appellant. *Scupholm, Underwood & Porritt* for defendants-appellants-cross-appellees. Case below, Court of Appeals No. 78-3385, per curiam opinion of December 17, 1980.

PEOPLE v MONCURE. (Docket No. 66542.) Leave to appeal denied August 6, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. Paul Moncure, *in propria persona,* appellant. Case below, Court of Appeals No. 53610, per curiam opinion of November 10, 1980.

BUSH v DEPARTMENT OF MILITARY AFFAIRS. (Docket No. 66623.) Leave to appeal denied August 6, 1981. *Plaszczak & Bauhof, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Robert S. Welliver,* Assistant Attorney General, for defendant-appellee. Case below, Court of Appeals No. 47389, per curiam opinion of January 26, 1981.

SCHUMAIER v LUCKHARDT. (Docket No. 66690.) Leave to appeal denied August 6, 1981. Frieda C. Schumaier, *in propria persona,* plaintiff-appellant. *Roesch, Schaberg & Baker* for defendants-appellees. Case below, Court of Appeals No. 45199, per curiam opinion of December 4, 1980.

VAN NORDEN v APPLIED ARTS CORPORATION. (Docket No. 66617.) Leave to appeal denied August 6, 1981. *Smith, Haughey, Rice & Roegge, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 53442, order of January 28, 1981.

PEOPLE v OSBORNE. (Docket No. 66631.) Leave to appeal denied August 6, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. Charles Edward Osborne, Jr., *in propria persona,* appellant. Case below, Court of Appeals No. 45493, memorandum opinion of August 21, 1980.

PEOPLE v KARJALA. (Docket No. 67104.) Leave to appeal denied August 6, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Lawrence R. Greene* for defendant-appellant. Case below, Court of Appeals No. 53313, order of April 16, 1981.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION. (Docket No. 67713.) Leave to appeal denied August 14, 1981, because the Court is not persuaded that the Court of Appeals abused its discretion in granting a stay. The denial of this application, however, is without prejudice to defendants' right to petition the Court of Appeals to modify its stay order with regard to the sale of pollution control securities or otherwise. It is further ordered, pursuant to GCR 1963, 865.1(7), that the Court of Appeals expedite the briefing schedule and schedule for oral argument in this case and in Court of Appeals Docket No. 57707. The motion to compel depositions is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson, Roderick S. Coy,* and *Patrick J. Devlin,* Assistants Attorney General, for plaintiff-appellee Attorney General. *Alan J. Barak* for plaintiff-appellee Michigan Citizens Lobby. *Arthur E. D'Hondt* and *Leo H. Friedman,* Assistants Attorney General, for defendant-appellant Public Service Commission. *Foster, Swift, Collins & Coey, P.C.,* and *Leon S. Cohan* and *Thomas A. Hughes,* Detroit Edison Company, Legal Department, for defendant-appellant Detroit Edison Company. Case below, Court of Appeals No. 59031, order of August 6, 1981.

LEVIN, J., dissents with the following statement in which COLEMAN, C.J., joins:

The Michigan Public Service Commission has authorized the Detroit Edison Company to issue common stock, long-term promissory notes and other securities. The proceeds would provide additional equity capital and reduce Edison's short-term debt.

The Attorney General and Michigan Citizens Lobby seek to block the issuance of those securities on the ground that the proceeds would facilitate the continued construction of the Enrico Fermi 2 nuclear generating plant and the Belle River I and II coal-fired plants, which they assert are unnecessary and unreasonably costly. The Public Service Commission ruled that the need for additional generating facilities and the reasonableness of their cost are not appropriate subjects of inquiry in a proceeding for the issuance of additional securities.

Detroit Edison asserts that it had arranged for the sale on August 7, 1981, of eight hundred million dollars of long-term notes and later this month or early in September of five million shares of common stock at a price exceeding $11 per share and thirty-six million dollars of pollution control bonds.

The Court of Appeals, on appeal by the Attorney General and Michigan Citizens Lobby, stayed the issuance of those securities and ordered that appeal consolidated with an earlier appeal in another cause brought by the Attorney General and Michigan Citizens Lobby wherein essentially the same legal issue is presented, *i.e.*, whether the scope of the inquiry in a proceeding seeking authority to sell securities must extend to the necessity for additional generating capacity and the reasonableness of its cost. (We remanded the earlier cause to the Court of Appeals on May 11, 1981 for its consideration on leave granted. The time for filing the brief of the Attorney General and Michigan Citizens Lobby has been extended to August 24, 1981. In that case, however, no stay of the sale of securities was granted, and the securities authorized by the commission were sold.)

Detroit Edison asserts that its short-term lines of credit have already been largely used and that, unless the stay is lifted within 30 days, it will find it necessary to suspend construction of the Fermi 2 and Belle River projects. Detroit Edison also asserts that the suspension of construction would result in substantial increased costs exceeding tens of millions of dollars and would delay the completion of the additional generating capacity. Additionally, it asserts that the delays in obtaining authority for the financing have added to its cost, due to the loss of a favorable financing market in May and June, and that further delay may add still more to the cost of financing, because, among other factors, a failure to complete the equity (common stock) financing may result in a down-grading of Edison's securities, and because Edison may be unable to find appropriate new market dates that do not conflict with issues scheduled by other utilities, corporations, and governmental authorities competing for available capital.

Although the Attorney General and Michigan Citizens Lobby assert that the Public Service Commission has "defied 70 years of statute and case law" in refusing to undertake the proposed inquiry into the need for and the reasonableness of the cost of the additional generating capacity, they have failed to provide any evidence that such inquiries have in the past been made as part of a securities issuance proceeding.

Upon examination of the precedents cited by the Attorney General and Michigan Citizens Lobby, it does not appear that there is pertinent case law supporting the proposition advanced by them. Rather,

the precedents support the position of Detroit Edison and the Public Service Commission that the proposed inquiry is neither appropriate nor statutorily mandated in a securities issuance case. Precedents cited by the Attorney General and Michigan Citizens Lobby from other jurisdictions construe statutes dissimilar to Michigan's utilities securities act and do not stand for the proposition that the Public Service Commission *must* include within the scope of its inquiry the issues of the necessity for the facilities or the reasonableness of their costs. The language of the statute suggests that it requires inquiry directed solely to the question of whether the financing is reasonably necessary for carrying out lawful purposes of the utility, and not to the necessity of the underlying projects. There is no evidence that the Public Service Commission erred in the administration of the statute, with which it is more familiar than either the Court of Appeals or this Court.

The posture of the matter indicates that this is not an appropriate time at which to raise an issue concerning the need for the additional generating capacity or its cost. More than one billion dollars has been invested in the construction of Fermi 2 and over two hundred fifty million dollars in Belle River. Staying the proposed and Public Service Commission authorized equity and long-term financing does not eliminate whatever indebtedness has already been incurred in the construction of those plants. It appears, rather, that staying the issuance of these securities is an indirect way of posing a question which might appropriately be raised in a proceeding initiated solely for the purpose of determining whether such facilities should be constructed or their construction continued or suspended.

The Public Service Commission has been aware for a number of years that these plants are under construction, as has the Attorney General. If the Attorney General questioned the wisdom of their construction, he could have commenced a proceeding seeking to have that question determined on its merits before the large expenditures were made and without having waited until Detroit Edison sought long-term financing. Detroit Edison asserts that such an inquiry can be initiated at any time in a separate proceeding.

If Detroit Edison could finance the continued construction of these facilities with short-term money, no question regarding the propriety of this construction could be raised in a securities issuance proceeding as the statute, apparently, does not require approval of short-term financing. This suggests that it is inappropriate to undertake such an inquiry in a securities issuance proceeding. The appropriateness of the inquiry that the Attorney General and Michigan Citizens Lobby seek to have made should not depend on whether the size or cost of generating facilities requires long-term financing. If the inquiry is

appropriate, it should be undertaken without regard to the timing of any long-term financing.

As a result of the stay, the Attorney General and Michigan Citizens Lobby may succeed in bringing about a suspension of the construction of new generating facilities without any determination on the merits by the Public Service Commission, the Court of Appeals or this Court that such a suspension should in fact occur. Neither the Attorney General nor Michigan Citizens Lobby provide any verbal or monetary assurance that, if the courts ultimately determine their position to be incorrect, any added financing or construction costs will be met by those who assert that the construction of these facilities should be suspended and their financing delayed while the legal question, apparently advanced for the first time about a year ago in the appeal now consolidated with the instant cause in the Court of Appeals, is litigated through the courts.

The Court of Appeals and this Court should consider the likelihood that in this or some other proceeding it will ultimately be determined that the construction of Fermi 2 and Belle River should be permanently terminated. Without substantial reason to believe that, following a hearing on the merits, the construction of those facilities will ultimately be permanently terminated, one should question the wisdom of halting their construction, with the attendant added cost and delay, even if an appellate court may, for the first time in this state, declare that a utility securities issuance proceeding must or may include consideration of the need for additional generating capacity or the reasonableness of the cost.

The argument that to lift the stay would preclude the Attorney General and Michigan Citizens Lobby from challenging the continued construction is unpersuasive. A refinancing of existing indebtedness does not add to the exposure. If it were to be determined in this or in a separate proceeding, after a hearing on the merits, that construction should be permanently terminated, any further use of the proceeds of the financing for such construction would no longer be authorized.

The Court of Appeals and this Court have the responsibility to finally determine within the next 30 days: (1) whether there is a substantial likelihood that the Attorney General and Michigan Citizens Lobby will prevail on appeal; (2) whether Detroit Edison is correct or not in asserting that, unless the stay is lifted, it must, because of a shortage of funds, suspend construction of these facilities; and (3) whether the delay in the completion of the financing may add appreciably to the costs of construction or financing.

Unless it appears that Detroit Edison can finance the continued construction of these facilities without equity and long-term financing,

that a delay in financing will not add appreciably to the cost of financing or construction, and that the Attorney General and Michigan Citizens Lobby are likely to prevail on appeal, the Court of Appeals or this Court should set aside the stay.

This Court is convening in Lansing on Monday, Tuesday and Wednesday of next week. It should set aside an hour and invite Detroit Edison, the Public Service Commission, the Attorney General and the Michigan Citizens Lobby to appear and to present additional evidence and argument regarding the subject matter. Although the issue is important, it is not complex. It appears that there are relatively few precedents. The Court could readily set aside the necessary time to hear argument, to consider the precedents and, upon due consideration, to finally decide and dispose of this matter before the Court recesses on August 28 without plans to reconvene again until mid-October. Such prompt disposition might permit the planned financing to proceed in early September.

WILLIAMS, J., dissents and states as follows:

In this basically important matter with impact far beyond the interests of the present case, I believe that the people of Michigan deserve (1) a meaningful ventilation and clarification of the apparently ineffective public utility regulatory system and (2) a considered judgment by this Court on the merits of the case before approving or disapproving a stay, inasmuch as either decision will in all probability render the final decision on the merits moot and ineffective. Therefore I dissent from the procedure of approving continuation of the stay of the Public Service Commission order without a better basis for judgment than the present record affords.

It shocks one's conscience that this case apparently presents, on the one hand, the spectacle of a utility having spent enormous sums of money in the almost complete construction of two conventional and one atomic power generating plant without, allegedly, there having been a public decision as to whether such plants were necessary for the generation of needed power and appropriate to be included in the utility's rate base, or whether such a decision was legally called for or, on the other hand, a utility having lawfully started construction of facilities and the plaintiffs belatedly intervening and seeking a stay after the decision of reasonableness of construction had been, or should have been, made, thereby preventing the utility from selling securities and completing construction of facilities necessary for public service. A *post hoc* decision that the plants or any part of them were unnecessary would either leave the rate payers with an unwontedly swollen rate base or the utility impoverished and its ability to serve the public impaired.

Unknown is the cause of this spectacle, either of needed energy capacity being delayed by an unwise stay or of enormous sums of money spent on unneeded capacity, in either case to the possible jeopardy of the rate payer. It is unknown whether the utility went ahead in violation of the law, or whether the defenders of the rate payers were dilatory in presenting their suit, or whether the Public Service Commission malfunctioned, or whether the underlying utility regulatory system provides no method for timely resolution of these matters, or even no method for resolution at all.

In addition, while the utility has not been altogether convincing in proving that continuation of the stay will cause it irreparable harm, it is quite possible that this is the case. On the other hand, it is clear that if the stay is lifted and the bonds sold, the plaintiffs' case has become moot. As a consequence, it is apparent that either decision on this collateral motion will for its impact on this case be just about as conclusive as the final decision on the merits.

In short, the Michigan Supreme Court today may have approved continuation of the stay in complete compliance with legal technicalities and wisdom but without fully considering the underlying realities with their possibly broad impact upon Michigan industry and individual consumers as well as neglecting to consider whether the basic Michigan utility law is really fit for modern conditions when it spews up such an anomalous and unwholesome situation as confronts us today.

Therefore I would have heard emergency arguments on the basic merits before deciding whether or not to continue the stay.

COTTON v KAMBLY. (Docket No. 66225.) Leave to appeal denied August 19, 1981 because the Court is not persuaded that the question presented should now be reviewed by this Court. *Marjory B. Cohen* for plaintiff-appellee. *Dice, Sweeney, Sullivan & Feikens, P.C.,* for defendant-appellant. Reported below: 101 Mich App 537.

LEVIN, J., would grant leave to appeal and states:

The Court of Appeals held that plaintiff's complaint stated a cause of action against a physician and his employer for inducing her to engage in sexual intercourse with him "during the course or under the guise" of psychiatric treatment.

Many sexual relationships grow out of a preceding relationship which could be characterized as giving rise to some obligation of care lest the relationship be abused and one party or another injured. Opinions will differ regarding what relationships should give rise to an actionable obligation to refrain from sexualizing the relationship,

when the relationship has been abused and what damages are recoverable.

Is the student who abandons his or her interest in law or medicine because of an unsatisfactory affair with a professor less injured than a person whose marriage difficulties were compounded by an affair with a psychiatrist? To be sure, a psychiatrist is generally consulted by a vulnerable patient who seeks the psychiatrist's objective, professional advice about an emotional problem. But lawyers are often consulted on personal matters by divorce and other clients, as are ministers of religion by parishioners.

The sexualization of the relationship might even be initiated and fostered by the one who has sought the professional's aid or counsel and who subsequently seeks to maintain an action for malpractice or for breach of the relationship.

If there is, in particular circumstances, a cause of action for having had consensual intercourse with a competent adult, then possibly persons other than physicians who allow a mentor relationship to become sexualized may be subject to liability for asserted breach of the relationship. For that is what is involved, not negligence.

The Court of Appeals relied on *Roy v Hartogs,* 85 Misc 2d 891; 381 NYS2d 587 (1976), a decision of a divided three-judge court (the "appellate term" of the New York Supreme Court) on appeal from the Civil Court of New York City. The dissenter suggested that, if it be a breach of a physician's oath to have consensual intercourse with a patient, the physician can be dealt with by the licensing and board certifying authorities.

If sexual harassment is involved, then the newly created statutory duty, MCL 37.2103(h); MSA 3.548(103)(h), 1980 PA 202, has been violated.

While this Court does not ordinarily grant an interlocutory appeal, I would, because of the novelty and importance of the question presented by the instant case, grant leave to appeal at this time.

CLARK v CADILLAC GAGE. (Docket No. 66510.) Leave to appeal granted August 20, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Eileen D. Zielesch,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Reported below: 101 Mich App 513.

DEPARTMENT OF CIVIL RIGHTS *ex rel* JONES v DEPARTMENT OF CIVIL SERVICE. (Docket No. 66368.) Leave to appeal denied August 20, 1981 because the Court is not persuaded that the questions presented

should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Michael A. Lockman* and *Dianne Rubin,* Assistants Attorney General, for plaintiff-appellee. *MacLean, Seaman, Laing & Guilford* for defendant-appellant. *Keywell & Rosenfeld* for Blue Cross and Blue Shield of Michigan, and *Marcoux, Allen, Beaman & Cheney, P.C.,* for McGraw-Edison Company as amici curiae. Reported below: 101 Mich App 295.

MAYHEW v BERRIEN COUNTY ROAD COMMISSION. (Docket No. 67486.) Leave to appeal prior to decision by the Court of Appeals granted August 20, 1981 on application of plaintiff-appellant. *Sloan, Benefiel & Farrer* for plaintiff-appellant. Case below, Court of Appeals No. 58092.

PEOPLE v LOVE. (Docket Nos. 66197, 66198.) Leave to appeal denied August 20, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter E. Deegan,* Prosecuting Attorney, and *Peter R. George,* Chief Appellate Attorney, for the people. State Appellate Defender, *Janet Tooley,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals Nos. 43820, 43821, per curiam opinion of November 6, 1980.

Reconsideration denied March 16, 1982.

CITY OF GRAND RAPIDS v IMPENS. (Docket No. 66378.) Leave to appeal granted August 20, 1981. *Philip A. Balkema,* City Attorney, and *Julie Ann Woods,* Assistant City Attorney, for plaintiff-appellee. *Karl V. Bush* for defendant-appellant. Case below, Court of Appeals No. 52118, order of December 10, 1980.

ENDYKIEWICZ v STATE HIGHWAY COMMISSION. (Docket No. 66488.) Leave to appeal granted August 20, 1981. *Kutinsky, Davey & Solomon* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Carl K. Carlsen* and *Clive D. Gemmill,* Assistants Attorney General, for defendant-appellee. *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* for the Michigan Trial Lawyers Association as amicus curiae. *William G. Reamon, P.C.,* as amicus curiae. Reported below: 102 Mich App 662.

VARGO v SVITCHAN. (Docket Nos. 66101, 66102.) Leave to appeal granted August 20, 1981. *Alspector, Sosin, Mittenthal & Barson, P.C.,* for plaintiffs-appellants. *Harvey, Kruse & Westen, P.C.,* for defendants-appellants George Svitchan and Ernest Mayoros. *Frank J.*

Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *George H. Weller* and *William E. Molner,* Assistants Attorney General, as amicus curiae. Reported below: 100 Mich App 809.

Appeal dismissed on stipulation April 30, 1982.

PEOPLE v HOFFMAN. (Docket No. 66174.) Leave to appeal considered August 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal we vacate defendant's habitual offender sentence, *People v Fountain,* 407 Mich 96 (1979); *People v Young,* 410 Mich 363 (1981). Defendant's conviction and sentence for breaking and entering with intent to commit larceny is reinstated. In all other respects leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. *George S. Buth* for defendant-appellant. Case below, Court of Appeals No. 78-4416, per curiam opinion of November 6, 1980.

BURDICK v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. (Docket No. 66360.) Leave to appeal denied August 25, 1981. *Seth R. Burwell* for plaintiffs-appellants. *Smith & Brooker, P.C.,* for defendant-appellee State Farm Mutual Automobile Insurance Company. *Otto & Otto* for defendant-appellee Auto-Owners Insurance Company. Case below, Court of Appeals No. 50611, order of December 2, 1980.

PEOPLE v KOZLOW. (Docket No. 66662.) Leave to appeal denied August 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Wilson,* Assistant Attorney General, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. Joseph Kozlow, *in propria persona,* appellant. Case below, Court of Appeals No. 51125, order of January 28, 1981.

MCCANN v DELTA TUBE & FABRICATING CORPORATION. (Docket No. 66684.) Leave to appeal denied August 25, 1981. *Levine & Benjamin, P.C.,* for plaintiff-appellant. *Nelson, Payne & Peterson* for defendants-appellees. Case below, Court of Appeals No. 54422, order of February 4, 1981.

WAYNE COUNTY PROSECUTOR v RECORDER'S COURT JUDGE (PEOPLE v ARTHUR HARRIS). (Docket No. 67407.) Leave to appeal denied August 25, 1981. *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant

Prosecuting Attorney, for plaintiff-appellant. Case below, Court of Appeals No. 54929, order of May 26, 1981.

CARTER METROPOLITAN CHRISTIAN METHODIST EPISCOPAL CHURCH v LIQUOR CONTROL COMMISSION. (Docket Nos. 67468, 67469.) Leave to appeal denied August 25, 1981. *Milstein & Jablin* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *A. C. Stoddard* and *Richard I. Rubin,* Assistants Attorney General, for defendant-appellee Liquor Control Commission. *Jaffe, Snider, Raitt, Garratt & Heuer* for defendant-appellee Zia George Jalaba. Reported below: 107 Mich App 22.

PEOPLE v KEVIN HOUSTON. (Docket No. 67642.) Leave to appeal denied August 25, 1981 because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. *Bell & Hudson, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 58415, order of July 14, 1981.

PEOPLE v SOLTIS. (Docket No. 66639.) Leave to appeal considered August 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we correct the trial court's order of conviction and sentence to show that the defendant was convicted of delivery of phencyclidine, rather than possession of phencyclidine. Leave to appeal is otherwise denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Philip J. Crowley,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Rabette & O'Dea, P.C.,* for defendant-appellant. Reported below: 104 Mich App 53.

PEOPLE v MORGAN and PEOPLE v RILEY. (Docket Nos. 67330, 67331.) Leave to appeal considered August 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and remand this case to the Recorder's Court for a new trial. The trial judge failed to clearly explain to the jury the elements of the lesser-included offense it was to consider. We retain no jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B.*

Wetherholt, Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendants-appellants. Reported below: 99 Mich App 733.

WOLVERINE COMMERCIAL DEVELOPMENT CORPORATION v BORON OIL COMPANY. (Docket No. 65515.) Leave to appeal denied August 25, 1981. *Loomis, Ewert, Ederer, Parsley, Davis & Gotting* for plaintiffs-appellants Bruce J. Maguire, Jr., Robert R. Zoeller, and Natalie M. Zoeller. *Foster, Swift, Collins & Coey, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 45200, per curiam opinion of May 22, 1980.

COHEN v HONIGMAN, MILLER, SCHWARTZ & COHN. (Docket No. 63141.) Plaintiffs-appellants' application for leave to appeal held in abeyance pending decision in *Sam v Balardo,* 411 Mich 405; leave to appeal denied August 25, 1981. *Morris H. Goodman* for plaintiffs-appellants. *Honigman, Miller, Schwartz & Cohn* for defendants-appellees. Case below, Court of Appeals No. 78-1419, per curiam opinion of April 20, 1979.

PEOPLE v CLARK HURD. (Docket No. 66693.) Leave to appeal denied August 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Faintuck, Shwedel, Wolfram, McDonald & Zipser* for defendant-appellant. Case below, Court of Appeals No. 48719, per curiam opinion of January 26, 1981.

PEOPLE v PELICHET. (Docket No. 62957.) The people's application for leave to appeal held in abeyance pending decision in *People v Wilder,* 411 Mich 328 (1981); leave to appeal considered August 25, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment which set aside the defendant's felony-firearm conviction and reinstate his conviction for possession of a firearm in the commission of a felony. *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374; 280 NW2d 793 (1979). In all other respects leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,*

Assistant Prosecuting Attorney, for the people, appellant. *Beverly Clark* for defendant-appellee. Case below, Court of Appeals No. 77-1285, per curiam opinion of March 21, 1979.

PEOPLE v CHARLES GRIFFIN. (Docket No. 66677.) Leave to appeal denied August 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Karla Kendall,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 54251, order of February 2, 1981.

QUADNAU v CHILINGIRIAN and CHILINGIRIAN v QUADNAU. (Docket Nos. 66682, 66683.) Leave to appeal denied August 25, 1981. *Biernat, Bucci & Golski* for appellees Arthur J. Quadnau, Malcolm F. Sinclair, and Hazel G. Sinclair. *Jack C. Chilingirian, in propria persona,* appellant. Case below, Court of Appeals Nos. 48497, 48498, per curiam opinion of December 12, 1980.

In re THOMAS ESTATE, FIRST NATIONAL BANK v BLOCKER. (Docket No. 66723.) Leave to appeal denied August 25, 1981. *O'Connor & Rushla* for appellee First National Bank of Cassopolis. Issac Blocker, *in propria persona,* appellant. Case below, Court of Appeals No. 46512, order of August 20, 1980.

PEOPLE v SEALS. (Docket No. 66743.) Leave to appeal denied August 25, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 48709, order of February 18, 1981.

PEOPLE v BLOUNT and PEOPLE v MISSOURI. (Docket Nos. 65600, 65603.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Arthur Jay Weiss* for defendants-appellants. Case below, Court of Appeals Nos. 77-4222, 77-4224, per curiam opinion of July 25, 1980.

PEOPLE v DUANE ROGERS. (Docket No. 65643.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Schefman & Fenton* for defendant-appellant. Case below, Court of Appeals No. 77-4273, per curiam opinion of July 25, 1980.

PEOPLE v DAVIS LEE. (Docket No. 66649.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Terence R. Flanagan,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 53272, order of January 27, 1981.

PEOPLE v MARVIN JOHNSON. (Docket No. 67309.) Leave to appeal denial of bail bond denied August 26, 1981. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48041, order of April 14, 1981.

KAVANAGH and LEVIN, JJ., would enter an order directing the setting of bail in the amount of $10,000.

PEOPLE v MIX. (Docket No. 66740.) Leave to appeal considered August 26, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the Court of Appeals judgment that the arrest was unlawful. The anonymous informant's tips were somewhat corroborated by independent police investigation. That, together with the defendant's and his accomplice's similarity to witness descriptions of the suspects, supplied probable cause to arrest the defendant and his accomplice. Since the arrest was valid, the subsequent search warrants were also properly issued. We remand the case to the Court of Appeals for consideration of defendant's other issues raised on appeal. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people, appellant. *Warren H. Siegel* for defendant-appellee. Case below, Court of Appeals No. 46848, per curiam opinion of February 9, 1981.

PEOPLE v WOODFORK. (Docket No. 63307.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Aaron,* 409 Mich 672 (1980), and *People v Wilder,* 411 Mich 328 (1981); leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people. *David Melkus* for defendant-appellant. Reported below: 47 Mich App 631.

FITZGERALD, J., not participating.

PEOPLE v BUTTS. (Docket No. 60250.) The people's application for leave to appeal and defendant's application for leave to cross-appeal held in abeyance pending decision in *People v Wilder,* 411 Mich 328 (1981); leave to appeal and cross-appeal are considered August 26, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the conviction of first-degree felony murder, we reinstate the conviction of armed robbery, and we remand to the trial court. If the prosecuting attorney is persuaded that the ends of justice would be better served by retrial for first-degree felony murder, he may so advise the trial court and the conviction of armed robbery shall also be vacated and a new trial on both charges may be conducted. *People v Wilder, supra.* It is to be noted that defendant Butts was a codefendant with Ronald Wilder at trial. Accordingly, the same relief afforded to Wilder is extended to Butts. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people, appellant-cross-appellee. *John E. McSorley* for defendant-appellee-cross-appellant. Reported below: 85 Mich App 435.

PEOPLE v KREGGER and PEOPLE v MAXWELL. (Docket Nos. 64598, 64599.) The people's and defendants' applications for leave to appeal held in abeyance pending decision in *People v Barker* and *People v Slayton,* 411 Mich 291 (1981); the application by defendants is considered August 26, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendants' convictions for kidnapping and remand the case to the Branch Circuit Court for new trial on the ground that the trial court erred in charging the jury that the asportation element of kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the commission of the underlying coequal offense of first-degree criminal sexual conduct. Despite the absence of an objection to the instruction, we conclude that the issue has been preserved because the defendants

raised the issue in their appeal of right in the Court of Appeals, the Court of Appeals did not preclude the defendants from raising the issue for lack of objection, and this Court formally held the case in abeyance pending decision in *People v Barker, supra.* The application by the people for leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John Livesay,* Prosecuting Attorney, and *Leonard. J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *Eric Goodwin* for defendants-appellees-cross-appellants. Case below, Court of Appeals Nos. 78-3454, 78-3470, per curiam opinion of January 25, 1980.

BUNGARD v LAKEVILLE COMMUNITY SCHOOLS. (Docket No. 66417.) Leave to appeal denied August 26, 1981. *Peter R. Barbara & Associates, P.C.,* and *Otis, Peters, Becker & Pietsch, P.C.,* for plaintiff-appellant. *Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.,* and *Gromek, Bendure & Thomas* for defendant-appellee. Case below, Court of Appeals No. 49467, per curiam opinion of December 19, 1980.

PEOPLE v ROLAND. (Docket No. 63574.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Arthur J. Tarnow* for defendant-appellant. Case below, Court of Appeals No. 78-1354, per curiam opinion of July 25, 1979.

LEVIN, J., states:

I would reduce the degree of defendant's conviction to manslaughter and remand for resentencing. The failure to instruct on involuntary manslaughter deprived Roland of jury consideration of his alternative theory because that was the only type of manslaughter that could possibly accord with the testimony. Defense counsel's failure to seek an appropriate manslaughter instruction indicates that there is justification for Roland's claim on appeal that he was denied the effective assistance of counsel.

PEOPLE v BERUTTI and PEOPLE v TANCEUSZ. (Docket Nos. 66685, 66686.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *David A. King,* Assistant Prosecuting Attorney, for the people. *Richard M. Lustig* for defendants-

appellants. Case below, Court of Appeals Nos. 51584, 51585, memorandum opinion of December 23, 1980.

PEOPLE v JANIGA. (Docket No. 66588.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lynn Chard,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48552, memorandum opinion of January 16, 1981.

PEOPLE v CALVIN SMITH. (Docket No. 67325.) Leave to appeal and cross-appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 48207, per curiam opinion of May 8, 1981.

PEOPLE v PRUETT. (Docket No. 67479.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people, appellant. *Leo Stevens* for defendant-appellee. Case below, Court of Appeals No. 51266, per curiam opinion of April 16, 1981.

CROSBY v STERNER SHEET METAL & ROOFING COMPANY. (Docket Nos. 66561, 66572.) Leave to appeal denied August 26, 1981. *Smith, Bovill, Fisher & Meyer, P.C.,* for plaintiff-appellee. *Davidson, Breen & Doud, P.C.,* for defendants-appellants Sterner Sheet Metal & Roofing Company and Zurich Insurance Company. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard F. Zapala,* Assistant Attorney General, for defendant-appellant Second Injury Fund. Reported below: 103 Mich App 76.

PEOPLE v RUCINSKI. (Docket No. 67654.) Leave to appeal denied August 26, 1981. The order of August 14, 1981 staying trial proceedings in the Dickinson Circuit Court is vacated. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert G.*

Foster, Prosecuting Attorney, *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. Case below, Court of Appeals No. 55960, per curiam opinion of July 15, 1981.

PEOPLE v SAMUEL ALLEN. (Docket No. 64631.) The people's application for leave to appeal and defendant's application for leave to cross-appeal ordered held in abeyance pending decision in *People v Wilder,* 411 Mich 328 (1981), and *People v Vaughn,* 409 Mich 463 (1980); leave to appeal and cross-appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. *Alvin C. Sallen* for defendant-appellee-cross-appellant. Reported below: 94 Mich App 539.

BOYD v ST LAWRENCE COMMUNITY MENTAL HEALTH CLINIC. (Docket No. 66336.) Leave to appeal considered August 26, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Court of Appeals and remand the case to that Court for reconsideration under the proper standard of review. The circuit court orders appealed from dismissed the case for lack of progress and denied a motion for reinstatement. Both decisions were discretionary ones, reviewable for abuse. *Reynolds v Dobbertin,* 366 Mich 162, 164 (1962). The Court of Appeals was "persuaded that a less drastic measure * * * was warranted" and "that the motion for reinstatement was improperly denied". 100 Mich App 677, 679-680. It did not claim there was any abuse of discretion and found none. The Court of Appeals clearly erred in the standard of review it used in this case. We retain no further jurisdiction. *Barr & Walker* for plaintiff-appellee. *Smith, Haughey, Rice & Roegge* for defendant-appellant. Reported below: 100 Mich App 677.

LEVIN, J., would deny leave to appeal and says:

While the opinion of the Court of Appeals did not specifically characterize the judge's refusal to reinstate as an abuse of discretion —it spoke less heavily simply saying that the motion for reinstatement was "improperly denied"—the reasons set forth in its opinion are consistent with and would support a determination by it that there was an abuse of discretion in failing to order reinstatement. I would in those circumstances indulge the assumption that the correct reviewing standard was applied unless, and this is not such a case, there is evidence that an incorrect standard was applied.

NICHOLS v NICHOLS. (Docket No. 67524.) Leave to appeal denied August 26, 1981. *Daniel J. Kelly* for plaintiff-appellee. *Joseph J. Mellon* for defendant-appellant. Reported below: 106 Mich App 584.

PEOPLE v CHARLES SPRINGER and PEOPLE v HAMMER. (Docket No. 67362.) Leave to appeal considered August 26, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand the case to Recorder's Court for the City of Detroit so that the judge who tried this case may rule on the defendants' motion for directed verdict. The Court of Appeals September 26, 1979 order directing that the jury be instructed on the offense of felonious assault did not preclude the judge from considering the defendants' motion for directed verdict. On remand, if the trial judge denies the motion for directed verdict, retrial should proceed in accordance with the order granting a new trial. We retain no further jurisdiction. *Lippitt, Harrison, Perlove, Friedman, Zack & Whitfield* for defendants-appellants. Case below, Court of Appeals No. 47973, order of September 26, 1979.

PEOPLE v HERBERT. (Docket No. 66630.) Leave to appeal denied August 26, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. Steven Herbert, *in propria persona,* appellant. Case below, Court of Appeals No. 54044, order of January 28, 1981.

PEOPLE v DOLSEN. (Docket No. 67115.) Leave to appeal considered August 26, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgments of the Court of Appeals and the Wayne Circuit Court and remand the case to the Wayne Circuit Court for a new trial. Erroneous instructions on presumed intent may have prevented jury consideration of lesser-included offenses and therefore were not harmless beyond a reasonable doubt. *People v Wright,* 408 Mich 1 (1980). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellant. Reported below: 102 Mich App 378.

BULKOWSKI v AHONEN LUMBER COMPANY. (Docket No. 64935.) Leave to appeal denied August 27, 1981. *Tercha & Daavettila* for plaintiff-appellant. *Vairo, Mechlin, Tomasi, Johnson & Manchester* for defendants-appellees Ahonen Lumber Company and Employers Insurance of Wausau. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Patrick O. Landy,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 47323, order of March 19, 1981.

NATIONAL UNION OF POLICE OFFICERS, LOCAL 502, AFL-CIO v WAYNE COUNTY BOARD OF COMMISSIONERS. (Docket No. 67827.) Leave to appeal considered August 27, 1981 and a stay of trial court proceedings is granted while the Court considers the application for leave to appeal. To aid the Court in its examination of the application, the Court of Appeals is ordered to provide the Court with a statement of reasons for denial of the appellant's motion for stay pending appeal. The statement of reasons shall be filed with the clerk of this Court within ten days of the certification date of this order. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *Bodman, Longley & Dahling* for defendant-appellant. Case below, Court of Appeals No. 59313, order of August 21, 1981.

PEOPLE v NABERS. (Docket No. 67048.) Leave to appeal considered August 28, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgment of the Court of Appeals that the arrest was unlawful. The anonymous informant's tips were somewhat corroborated by independent police investigation. That, together with the defendant's and his accomplice's similarity to witness descriptions of the suspects, supplied probable cause to arrest the defendant and his accomplice. Since the arrest was valid, the subsequent search warrants were also properly issued. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Lander C. McLoyd,* Assistant Defender, for defendant-appellee. Reported below: 103 Mich App 354.

ARNOLD TRANSIT COMPANY v CITY OF MACKINAC ISLAND. (Docket No. 65982.) Leave to appeal granted August 28, 1981. The order of this Court of June 5, 1981 restraining defendant from enforcing the provisions of the Ferry Boat Code is continued until this Court disposes of this case, provided that plaintiffs resume from the date of discontinuance the payments into the escrow accounts of a sum equal to the amount due under the provisions of the Ferry Boat Code. See

paragraphs 4, 5, and 6 of the stipulation between the parties dated July 2, 1979. Leave to cross-appeal and motion for reconsideration and clarification of the order of this Court of June 5, 1981 are denied. *Lester N. Turner, P.C.,* for plaintiffs-appellants-cross-appellees. *Fraser, Trebilcock, Davis & Foster, P.C.,* for defendant-appellee-cross-appellant. Reported below: 99 Mich App 266.

WILLIAMS and FITZGERALD, JJ., not participating.

PARKER MOTOR FREIGHT, INC v PUBLIC SERVICE COMMISSION. (Docket Nos. 67371, 67427.) Leave to appeal considered August 28, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the preliminary injunction entered by the circuit court on July 28, 1981, pursuant to the Court of Appeals order of July 22, 1981. See *Michigan Consolidated Gas Co v Public Service Commission,* 389 Mich 624 (1973); *Michigan Consolidated Gas Co v Public Service Commission,* 405 Mich 803 (1979). We remand the case to the Ingham Circuit Court with directions that the court expedite consideration of its review of the decision of the Public Service Commission. We do not retain jurisdiction. *Eames, Wilcox, Mastej & Bryant* and *McGinty, Halverson, Brown & Bryant* for plaintiffs-appellees. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Arthur E. D'Hondt* and *Michael C. Levine,* Assistants Attorney General, for defendant-appellee Public Service Commission. *Matheson, Bieneman, Parr, Schuler & Ewald* and *Farhat, Burns, Story & Stafford, P.C.,* for intervening-defendant-appellant Central Transport, Inc. Case below, Court of Appeals No. 57548, order of June 1, 1981.

BLAIR MOODY, JR., J., dissents: Even if the Court of Appeals order reversing the circuit court's initial denial of a preliminary injunction did not adequately explain the basis for finding error in that decision, the appropriate remedy in this case would be to remand to the Court of Appeals for reconsideration and for explanation of the standard used in reviewing the trial court's decision. Pending such reconsideration the preliminary injunction should remain in effect.

PIPERIDES v KRUEGER-DETROIT DIVISION OF LEAR SIEGLER, INC. (Docket No. 66545.) Leave to appeal considered September 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Charles G. Gale* for plaintiff-appellant. *Ulanoff, Ross, Summer, LaKritz, Wesley & Bloom, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 54134, order of January 28, 1981.

CHASE v STATE BOUNDARY COMMISSION. (Docket Nos. 66610, 66620.) Leave to appeal denied September 2, 1981. *Bauckham, Reed, Lang, Schaefer & Travis, P.C.,* for plaintiffs-appellees. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Milton I. Firestone* and *Christopher J. Dembowski,* Assistants Attorney General, for defendant-appellant. *Lampert, Fried & Levitt, P.C.,* for intervening defendant-appellant City of Novi. Reported below: 103 Mich App 193.

MICHIGAN MUTUAL INSURANCE COMPANY v SHAHEEN. (Docket No. 66466.) Leave to appeal denied September 2, 1981. *Thomas & Delaney* for plaintiff-appellant. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C.,* for defendant-appellee William A. Shaheen, Sr. *Norman N. Gottlieb* for defendant-appellee Kassab Daher. Case below, Court of Appeals No. 43340, per curiam opinion of November 7, 1980.

JACOBS v ALPENA CIRCUIT JUDGE. (Docket No. 66720.) Leave to appeal denied September 2, 1981. *James Edward Jacobs* and *Thomas A. Nickels, in propriis personis,* plaintiffs-appellants. *Smith & Brooker, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 54188, order of February 11, 1981.

PEOPLE v GRIGSBY. (Docket No. 66656.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellant. Reported below: *(On Remand)* 99 Mich App 672.

PEOPLE v BLACKBURN. (Docket No. 67055.) Leave to appeal considered September 2, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we remand this case to the Recorder's Court for the City of Detroit. On remand the trial court shall provide the defendant with requested portions of the transcript of the aborted trial. We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Frank J. Bernacki,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 54002, order of April 2, 1981.

PITONIAK v BORMAN'S, INC. (Docket No. 66990.) Leave to appeal denied September 2, 1981. *Levine & Benjamin, P.C.,* for plaintiff-appellee. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendants-appellants. Reported below: 104 Mich App 718.

WARREN v MOTOR WHEEL CORPORATION. (Docket No. 67234.) Leave to appeal denied September 2, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellee. *John R. Brown* and *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendant-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Eileen D. Zielesch,* Assistant Attorney General, opposing defendant-appellant's application for leave to appeal. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for General Motors Corporation as amicus curiae. Case below, Court of Appeals No. 50697, per curiam opinion of April 28, 1981.

HELTON v GENERAL MOTORS CORPORATION. (Docket No. 66761.) Leave to appeal denied September 2, 1981. *Levine & Benjamin* for plaintiff-appellee. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendant-appellant. Case below, Court of Appeals No. 53380, order of January 13, 1978.

PILLEN v GENERAL MOTORS CORPORATION. (Docket No. 66753.) Leave to appeal denied September 2, 1981. *MacDonald, FitzGerald & MacDonald* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 53056, order of December 30, 1980.

WASILEWSKI v CONSOLIDATED LITHO, INC. (Docket No. 66671.) Leave to appeal denied September 2, 1981. *Larry S. Davidow* for plaintiff-appellant. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 50424, order of September 9, 1980.

PEOPLE v GERALD GRANT. (Docket No. 66633.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Earl H. Morgan, Jr.,* Prosecuting Attorney, and *Nick O. Holowka,* Chief Assistant Prosecuting Attor-

ney, for the people. Gerald Bernard Grant, *in propria persona,* appellant. Reported below: 102 Mich App 368.

PEOPLE v ROGAN. (Docket No. 66334.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *David G. Edick,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 47732, order of December 1, 1980.

PEOPLE v SPARKS. (Docket No. 61319.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Fred R. Hunter, III,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Stephen L. Haslett* for defendant-appellant. Reported below: 82 Mich App 44.

LEVIN and BLAIR MOODY, JR., JJ., would grant leave to appeal.

PEOPLE v MCGREEVY. (Docket No. 66574.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 45433, per curiam opinion of January 8, 1981.

SYLVAN GLENS HOMEOWNERS ASSOCIATION v MCFADDEN. (Docket No. 66573.) Leave to appeal denied September 2, 1981. *Faintuck, Shwedel, Wolfram, McDonald & Zipser* for plaintiff-appellant. Reported below: 103 Mich App 118.

PEOPLE v STEVEN LEE. (Docket No. 66448.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Mardi Crawford,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 78-4456, per curiam opinion of July 25, 1980.

HALL v HALL. (Docket No. 66612.) Leave to appeal considered September 2, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the circuit court order of March 7, 1980, and remand this case to the circuit court for an evidentiary hearing on the allegations of the petition to set aside the judgment of divorce. We retain no further jurisdiction. *Johnson & Johnson* for plaintiff-appellee. *Rappleye, Wilkins & Arcada* for defendant-appellant. Case below, Court of Appeals No. 50492, memorandum opinion of January 16, 1981.

PEOPLE v CHANEY. (Docket No. 66203.) The people's application for leave to appeal held in abeyance pending decision in *People v Lynn* and *People v Barker,* 411 Mich 291 (1981); leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant. *Angela R. Sims* for defendant-appellee. Case below, Court of Appeals No. 78-444, per curiam opinion of October 24, 1980.

DOGARIU v FRANK'S NURSERY SALES, INC. (Docket No. 66475.) Leave to appeal denied September 2, 1981. *Rothe, Mazey, Mazey & Hamburger, P.C.,* for plaintiffs-appellants. *Jack H. Erps* and *Ellen C. Nowicki* for defendant-appellee. Case below, Court of Appeals No. 46420, per curiam opinion of January 8, 1981.

PEOPLE v GADDIS. (Docket No. 61104.) Leave to appeal considered September 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's armed robbery conviction. *People v Wilder,* 411 Mich 328 (1981). In all other respects leave to appeal is denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn M. Schmidt,* Assistant Prosecuting Attorney, for the people. Chester T. Gaddis, Jr., *in propria persona,* appellant. Case below, Court of Appeals No. 28844, per curiam opinion of October 26, 1977.

PEOPLE v YOWELL. (Docket No. 61217.) Leave to appeal considered September 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's armed robbery conviction. *People v Wilder,* 411 Mich 328 (1981). In all other respects

leave to appeal is denied. Donjuarell Yowell, *in propria persona,* appellant. Case below, Court of Appeals No. 28938, per curiam opinion of October 26, 1977.

IN THE MATTER OF PRIEST, LAPEER COUNTY DEPARTMENT OF SOCIAL SERVICES v PRIEST. (Docket No. 67595.) Leave to appeal denied September 2, 1981. *Earl H. Morgan,* Prosecuting Attorney, for plaintiff-appellee. *Thomas & Rapp* for defendant-appellant Frances Priest. Case below, Court of Appeals No. 57247, order of June 22, 1981.

WOODINGTON v WAYNE COUNTY. (Docket No. 66756.) Leave to appeal considered September 2, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and reinstate the June 20, 1980 order of the Workers' Compensation Appeal Board denying defendant's motion for leave to file a delayed appeal. We find the conclusion of the Court of Appeals that the board abused its discretion in denying the motion to be clearly erroneous. *Stempien & Stempien, P.C.,* for plaintiff-appellant. *George H. Cross,* Wayne County Corporation Counsel, and *Gerald E. Tilles,* Assistant Corporation Counsel, for defendant-appellee. Case below, Court of Appeals No. 52767, order of January 14, 1981.

PEOPLE v CHANEY. (Docket No. 67139.) Leave to appeal considered September 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse defendant's armed robbery and felony-firearm convictions and remand the case to the Recorder's Court for the City of Detroit for a new trial. *People v Kangas,* 366 Mich 201; 113 NW2d 865 (1962), *Zaitzeff v Raschke,* 387 Mich 577; 198 NW2d 309 (1972), and *People v Heard,* 388 Mich 182; 200 NW2d 73 (1972). See also *People v Cain,* 409 Mich 858 (1980). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. Joseph Chaney, *in propria persona,* appellant. Case below, Court of Appeals No. 78-444, per curiam opinion of October 24, 1980.

COLEMAN, C.J., and FITZGERALD and BLAIR MOODY, JR., JJ., would deny leave to appeal.

PEOPLE v JOHNNIE JOHNSON. (Docket No. 66444.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert*

A. Derengoski, Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. *Alvin C. Sallen* for defendant-appellant. Case below, Court of Appeals No. 46026, per curiam opinion of November 24, 1980.

ARDMAN v DETROIT-MACOMB HOSPITAL ASSOCIATION. (Docket No. 67565.) Leave to appeal denied September 2, 1981, because the Court is not persuaded that the question presented should now be reviewed by this Court. *Donald J. Morbach & Associates, P.C.,* for plaintiff-appellant. *Kitch, Suhrheinrich, Smith, Saurbier & Drutchas, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 57815, order of June 19, 1981.

WRIGHT v DOTSON. (Docket No. 66356.) Leave to appeal denied September 2, 1981. *William F. Delhey,* Prosecuting Attorney, and *Ann Mattson,* Assistant Prosecuting Attorney, for plaintiff-appellee. *Edwards & Edwards* for defendant-appellant. Case below, Court of Appeals No. 44377, order of December 8, 1980.

DRAPER v CHRYSLER CORPORATION. (Docket No. 66480.) Leave to appeal denied September 2, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Lacey & Jones* for defendant-appellee. Case below, Court of Appeals No. 53150, order of January 8, 1981.

ADAMSON v MUSKEGON MOTOR SPECIALTIES. (Docket No. 66519.) Leave to appeal denied September 2, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant. *Richard L. Hedstrom* for defendants-appellees. Case below, Court of Appeals No. 53003, order of January 8, 1981.

ALLINGER v KELL. (Docket No. 66552.) Leave to appeal considered September 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment in part and remand the case to the circuit court for further proceedings. Summary judgment is inappropriate. The record in these proceedings, brought in the trial court pursuant to GCR 1963, 117.2(1), will not permit the conclusion reached by the Court of Appeals that defendants acted within, or were protected by, the statutory authority of the medical examiner. While this conclusion might be appropriate upon consideration of supported motions for summary judgment

pursuant to GCR 1963, 117.2(3), the record does not present such circumstances and the question involved requires consideration of underlying facts. In all other respects leave to appeal is denied. We retain no jurisdiction. *Green, Renner, Weisse, Rettig, Rademacher & Clark* for plaintiffs-appellants. *McDonald & Shortley* for defendant-appellee Fred H. Ayers, M.D. Reported below: 102 Mich App 798.

PEOPLE v HOOKS. (Docket No. 66520.) Leave to appeal denied September 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *Bornstein, Wishnow, Shaye & Schneiderman* for defendant-appellant. Reported below: 101 Mich App 673.

PEOPLE v ROBERTS. (Docket No. 65091.) Leave to appeal considered September 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's conviction and remand the case to Recorder's Court for the City of Detroit for a new trial. The judge's instruction precluding a jury request for the rereading of testimony was reversibly erroneous. *People v Howe,* 392 Mich 670 (1974); *People v Henry Smith,* 396 Mich 109 (1976). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *David G. Edick,* Assistant Prosecuting Attorney, for the people. Gregory Roberts, *in propria persona,* appellant. Case below, Court of Appeals No. 29188, order of February 7, 1977.

PEOPLE v ROY RICE. (Docket No. 67467.) Leave to appeal denial of bail bond denied September 2, 1981. *Nicholas Smith, P.C.,* for defendant-appellant. Case below, Court of Appeals Nos. 50097, 50098, order of April 20, 1981.

PEOPLE v DRISKELL. (Docket Nos. 66441, 66442.) Leave to appeal denied September 10, 1981. Eugene Driskell, *in propria persona,* appellant. Case below, Court of Appeals Nos. 51259, 51260, order of November 13, 1980.

PEOPLE v BECKLEY. (Docket No. 66619.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A.*

Derengoski, Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people. *James D. Murphy, Jr.,* for defendant-appellant. Case below, Court of Appeals No. 77-3458, order of May 3, 1978.

WORTELBOER v STORY & CLARK PIANO COMPANY. (Docket No. 66679.) Leave to appeal denied September 10, 1981. *Marcus, Ruck, Flynn & Wells, P.C.,* for plaintiff-appellant. *Kluczynski, Girtz & Vogelzang* for defendants-appellees. Case below, Court of Appeals No. 51865, order of February 5, 1981.

PEOPLE v PETERSON. (Docket No. 65772.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy L. Cronin,* Assistant Prosecuting Attorney, for the people. *Bell & Hudson, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 46162, per curiam opinion of July 8, 1980.

SHIEMKE v HURON CEMENT. (Docket No. 66462.) Leave to appeal denied September 10, 1981. *Kasoff, Young, Gottesman, Kovinsky, Friedman & Walkon, P.C.,* for plaintiff-appellee. *Davidson, Breen & Doud, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 53088, order of January 9, 1981.

HOFFMAN v GENERAL MOTORS CORPORATION. (Docket No. 66802.) Leave to appeal denied September 10, 1981. *Rosenberg & Vigiletti, P.C.,* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 53515, order of February 24, 1981.

PEOPLE v KINCAID. (Docket No. 66809.) Leave to appeal denied September 10, 1981, because the Court is not persuaded that the question presented should be reviewed by this Court, because the issue raised appears to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals,

and *Carolyn M. Schmidt,* Assistant Prosecuting Attorney, for the people. Waymon Kincaid, *in propria persona,* appellant. Case below, Court of Appeals No. 77-151, order of August 31, 1977.

PEOPLE v BEACH. (Docket No. 67745.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert H. Cleland,* Prosecuting Attorney, and *C. Denton Wolf,* Chief Appellate Attorney, for the people. *Bush, Luce, Henderson & Bankson* for defendant-appellant. Case below, Court of Appeals No. 58626, order of August 6, 1981.

PEOPLE v YATOOMA. (Docket No. 66710.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lynn Chard,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 50747, order of January 28, 1981.

THREE LAKES ASSOCIATION v KESSLER. (Docket No. 66530.) Leave to appeal denied September 10, 1981. *Jaffe, Snider, Raitt, Garratt & Heuer, P.C.,* for plaintiff-appellant. Reported below: 101 Mich App 170.

FERGUSON v YINGLING. (Docket No. 66632.) Leave to appeal denied September 10, 1981. *Marovich & Stroba* for plaintiff-appellant. *Huston & Manske* for defendants-appellees. Case below, Court of Appeals No. 49030, per curiam opinion of January 28, 1981.

ENGLE v HENRY DEKONING CONSTRUCTION COMPANY. (Docket No. 66674.) Leave to appeal considered September 10, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand this case to the Workers' Compensation Appeal Board with instructions that it apply MCL 418.833(1); MSA 17.237(833)(1) to plaintiff's award of compensation. In all other respects leave to appeal is denied. We retain no jurisdiction. *Egnor, Hamilton & Muth* for plaintiff-appellee. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 53822, order of February 4, 1981.

JACKSON v GENERAL MOTORS CORPORATION. (Docket No. 66722.) Leave to appeal and cross-appeal denied September 10, 1981. *Tanielian & Bohan, P.C.,* for plaintiff-appellant-cross-appellee. *Otis M. Smith,* General Counsel, *Willard W. Wallace,* Attorney-in-Charge, Workers' Compensation, and *William Nole Evans,* for defendant-appellee-cross-appellant. Case below, Court of Appeals No. 54398, order of February 12, 1981.

ADAMOWICZ v R B INDUSTRIES. (Docket No. 66823.) Leave to appeal denied September 10, 1981. *The Jaques Admiralty Law Firm, P.C.,* for plaintiff-appellee. *Franklin, Petrulis, Lichty & Mellon, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 54203, order of February 24, 1981.

STEVENS v HOLY CROSS HOSPITAL. (Docket No. 64533.) Leave to appeal denied September 10, 1981. *Lopatin, Miller, Bindes, Freedman, Bluestone, Erlich & Rosen* for plaintiffs-appellants. *Garan, Lucow, Miller, Seward, Cooper & Becker* and *Gromek, Bendure & Thomas,* for defendant-appellee Holy Cross Hospital. *Sullivan, Ranger, Ward & Bone* for defendant-appellee Janusz Subczynski. *Shureman, Frakes, Glass & Wulfmeier* for defendants-appellees Robert Isgut and Raymond Wysocki. *Tyler & Canham, P.C.,* for defendant-appellee Mallinckrodt Chemical Works. Case below, Court of Appeals No. 78-2977, per curiam opinion of January 11, 1980.

PEOPLE v MCKINNEY. (Docket No. 66752.) Leave to appeal considered September 10, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's conviction. *People v Clabin,* 411 Mich 472 (1981). State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48809, order of September 4, 1980.

PEOPLE v ROBERT C PALMER. (Docket No. 66755.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *William D. Bond,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Ronald J. Bretz,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 46413, per curiam opinion of February 19, 1981.

WAYNE COUNTY SHERIFF v WAYNE COUNTY BOARD OF COMMISSIONERS. (Docket No. 67697.) Leave to appeal denied September 10, 1981. *Bodman, Longley & Dahling* for defendants-appellants. Case below, Court of Appeals No. 58874, order of July 30, 1981.

PEOPLE v THORP. (Docket No. 66736.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48546, per curiam opinion of February 10, 1981.

WALKER'S AMUSEMENTS, INC v CITY OF LATHRUP VILLAGE. (Docket No. 65936.) Leave to appeal denied September 10, 1981. *Kenneth A. Webb* for plaintiff-appellant. *James H. McCrory* for defendants-appellees. Reported below: 100 Mich App 36.

PEOPLE v PROVIENCE. (Docket No. 66799.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *Steve Gonzales,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Reported below: 103 Mich App 69.

PEOPLE v DUDLEY. (Docket No. 66730.) Leave to appeal considered September 10, 1981. In lieu of granting leave to appeal, we remand the matter to the trial court for entry of a judgment order of sentence which contains no directive to the Department of Corrections with regard to future transfer of the defendant within the penal system. We do not retain jurisdiction. Gregory Andre Dudley, *in propria persona,* appellant. Case below, Court of Appeals No. 47089, per curiam opinion of February 20, 1981.

GRUNOW v SECRETARY OF STATE. (Docket No. 66735.) Leave to appeal denied September 10, 1981. *Jack C. Chilingirian* for plaintiffs-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harry G. Iwasko, Jr.,* and *Robert Ianni,* Assistants Attorney General, for defendants-appellees. Case below, Court of Appeals No. 46779, per curiam opinion of December 4, 1980.

PEOPLE v GENE WARD. (Docket No. 66775.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Annette M. Olejarz,* Assistant Prosecuting Attorney, for the people. *Bennett S. Engelman* for defendant-appellant. Case below, Court of Appeals No. 47112, memorandum opinion of November 12, 1980.

PEOPLE v JEMISON. (Docket Nos. 66776, 66777.) Leave to appeal denied September 10, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. Willie Niola Jemison, *in propria persona,* appellant. Case below, Court of Appeals Nos. 78-2772, 78-2773, order of October 9, 1979.

PEOPLE v RUFFIN. (Docket No. 66795.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Warner,* Prosecuting Attorney, and *Judith K. Simonson,* Assistant Prosecuting Attorney, for the people. Tommie Lee Ruffin, *in propria persona,* appellant. Case below, Court of Appeals No. 49431, memorandum opinion of December 23, 1980.

In re SEMEYN ESTATE, SEMEYN v SEMEYN. (Docket No. 66797.) Leave to appeal considered September 10, 1981, and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration as on leave granted. *Dunn, Dunn & Schouten* for plaintiffs-appellants. *Law, Weathers & Richardson* for defendant-appellee. Case below, Court of Appeals No. 52844, order of February 18, 1981.

PEOPLE v HALBERG. (Docket No. 66807.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attor-

ney, *Robert C. Williams,* Chief Appellate Counsel, and *David W. King,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Lynn Chard,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 51862, per curiam opinion of February 24, 1981.

PEOPLE v CARR. (Docket No. 66829.) Leave to appeal denied September 10, 1981, because the Court is not persuaded that the question presented should now be reviewed by this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the people. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49967, order of February 26, 1981.

PEOPLE v REGINALD KING. (Docket No. 67534.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 48084, per curiam opinion of April 14, 1981.

PEOPLE v HILLCREST CHRISTIAN NURSING HOME, INC. (Docket No. 67571.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Edwin M. Bladen* and *Donald E. Erickson,* Assistants Attorney General, for the people, appellant. Case below, Court of Appeals No. 54587, order of June 19, 1981.

ORTMAN v VACRI LAND DEVELOPMENT, INC. (Docket No. 67637.) Leave to appeal denied September 10, 1981. *William A. Ortman, in propria persona,* plaintiff-appellant. Case below, Court of Appeals No. 56341, order of July 7, 1981.

KAVANAGH, J., not participating.

MICHIGAN TECHNOLOGICAL UNIVERSITY v PUBLIC SERVICE COMMISSION. (Docket No. 67732.) Leave to appeal denied September 10, 1981. *McLellan, Schlaybaugh & Whitbeck* for plaintiff-appellant. *Frank J.*

Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Arthur E. D'Hondt* and *Leo H. Friedman,* Assistants Attorney General, for defendant-appellee Public Service Commission. *Loomis, Ewert, Ederer, Parsley, Davis & Gotting* for intervening defendant-appellee Upper Peninsula Power Company. Court of Appeals No. 58791, order of August 5, 1981.

PEOPLE v RICKY PARKER. (Docket No. 62048.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people. Ricky Parker, *in propria persona,* appellant. Case below, Court of Appeals No. 77-2933, memorandum opinion of August 11, 1978.

PEOPLE v STOLZE. (Docket No. 66627.) Leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L. Milbourn,* Chief Appellate Attorney, and *Robert John Berlin,* Assistant Prosecuting Attorney, for the people. William Frank Stolze, *in propria persona,* appellant. Reported below: 100 Mich App 511.

THOMAS v DETROIT BOARD OF EDUCATION. (Docket No. 66742.) Leave to appeal denied September 10, 1981. *Dietrich & Cassavaugh, P.C.,* for plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Morrison Zack,* Assistant Attorney General, for defendant-appellee Second Injury Fund. Case below, Court of Appeals No. 54161, order of February 3, 1981.

BROWN v DEPARTMENT OF CORRECTIONS. (Docket No. 67410.) Leave to appeal denied September 10, 1981. *Brenda J. Maxwell* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Andrew D. Quinn,* Assistant Attorney General, for defendant-appellant. Case below, Court of Appeals No. 50051, per curiam opinion of May 26, 1981.

COHAN v RIVERSIDE PARK PLACE CONDOMINIUM ASSOCIATION, INC. (Docket No. 67449.) Leave to appeal denied September 10, 1981, because the acceptance by the Court of Appeals of claims of appeal in Docket Nos. 58321 and 58358 moots any error which may have

occurred when it denied leave to appeal in Docket No. 57091. *Baxter & Hammond* for plaintiff-appellant. *Laird, Grace & Chin* for defendants-appellees. Case below, Court of Appeals No. 57091, order of June 4, 1981.

BROCKWAY v TECUMSEH PRODUCTS COMPANY. (Docket No. 66673.) Leave to appeal considered September 10, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for defendants-appellants. Case below, Court of Appeals No. 53798, order of February 4, 1981.

PONTIOUS v E W BLISS COMPANY. (Docket No. 66503.) Leave to appeal denied September 10, 1981. *Donald J. Morbach* for third-party-plaintiff-appellee Tepco, Inc. *Moore, Sills, Poling, Wooster & Sinn, P.C.,* for third-party-defendant-appellant D. M. P. Manufacturing Corporation. Reported below: 102 Mich App 718.

PEOPLE v BRANSFORD. (Docket No. 61974.) The people's application for leave to appeal held in abeyance pending decision in *People v Wilder,* 411 Mich 328 (1981); leave to appeal denied September 10, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert T. Monk,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 77-5101, order of May 19, 1978.

TURCOTTE v CITY OF STAMBAUGH. (Docket No. 66660.) Leave to appeal denied September 10, 1981. *Wisti & Jaaskelainen* for plaintiff-appellant. *Weis & Cossi* for defendants-appellees City of Stambaugh and Home Indemnity Insurance Company. *McNeil, Louw & Torreano* for defendant-appellee Transamerica Insurance Company. Case below, Court of Appeals No. 54330, order of February 5, 1981.

VAN NOORD v JOHNSTON. (Docket No. 66659.) Leave to appeal denied September 10, 1981. *Schmidt, Howlett, Van't Hof, Snell & Vana* for plaintiff-appellant. *Varnum, Riddering, Wierengo & Chris-*

tenson for defendants-appellees. Case below, Court of Appeals No. 50354, per curiam opinion of January 29, 1981.

CROSS v DEPARTMENT OF CORRECTIONS. (Docket No. 66940.) Leave to appeal denied September 10, 1981. *Hall, Andary & Bilicki, P.C.,* for plaintiff-appellee. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stephen F. Schuesler,* Assistant Attorney General, for defendant-appellant. Reported below: 103 Mich App 409.

NATIONAL UNION OF POLICE OFFICERS, LOCAL 502, AFL-CIO v WAYNE COUNTY BOARD OF COMMISSIONERS. (Docket No. 67827.) Defendant-appellant's motion for immediate consideration having been granted, and a stay of trial court proceedings having been ordered pending this Court's consideration of the application for leave to appeal, and the Court having received the Court of Appeals statement of reasons for denial of the appellant's motion for stay pending appeal, the application for leave to appeal is considered September 15, 1981. It is ordered on the Court's own motion, pursuant to GCR 1963, 865.1(7), that leave to appeal prior to decision by the Court of Appeals is granted. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellee. *Bodman, Longley & Dahling* for defendant-appellant. Case below, Court of Appeals No. 59313, order of August 21, 1981.

COLEMAN, C.J., and WILLIAMS, J., not participating.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION. (Docket No. 67944.) On the Court's own motion, pursuant to GCR 1963, 865.1(7), leave to appeal prior to decision by the Court of Appeals is granted September 15, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson,* Assistant Attorney General, for intervenor plaintiff-appellant Attorney General. *Alan J. Barak* for intervenor plaintiff-appellant Michigan Citizens Lobby. *Arthur E. D'Hondt, Wallace T. Hart,* and *Leo H. Friedman,* Assistants Attorney General, for defendant-appellee Public Service Commission. *Leon S. Cohan, Solomon Bienenfeld,* and *Raymond O. Sturdy, Jr.,* for defendant-appellee Detroit Edison Company. Case below, Court of Appeals No. 57707.

COLEMAN, C.J., and WILLIAMS, J., not participating.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION. (Docket No. 67945.) On the Court's own motion, pursuant to GCR 1963, 865.1(7), leave to appeal prior to decision by the Court of Appeals is granted September 15, 1981. The stay provisions of the order of the Court of Appeals of August 6, 1981, as modified by that Court on August 20, 1981, shall remain in effect until further order of this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson, Roderick S. Coy,* and *Patrick J. Devlin,* Assistants Attorney General, for plaintiff-appellant Attorney General. *Alan J. Barak* for plaintiff-appellant Michigan Citizens Lobby. *Arthur E. D'Hondt* and *Leo H. Friedman,* Assistants Attorney General, for defendant-appellee Public Service Commission. *Leon S. Cohan, Thomas A. Hughes,* and *Foster, Swift, Collins & Coey, P.C.,* for defendant-appellee Detroit Edison Company. Case below, Court of Appeals No. 59031, order of August 6, 1981, as modified by that Court on August 20, 1981.

COLEMAN, C.J., and WILLIAMS, J., not participating.

This cause having been argued by counsel and submitted for decision, and the Court being persuaded that a stay of proceedings is no longer appropriate, that portion of this Court's order of September 15, 1981, which ordered that the stay provisions of the order of the Court of Appeals of August 6, 1981, as modified by its order of August 20, 1981, should remain in effect until further order of this Court, is vacated October 16, 1981 and the said order of the Court of Appeals, as modified, is also vacated. In all other respects the cause remains submitted for decision by this Court.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION. (Docket No. 67938.) Leave to appeal prior to decision by the Court of Appeals is granted September 15, 1981. The stay of proceedings sought by the appellants is granted until the further order of this Court. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Hugh B. Anderson, Roderick S. Coy,* and *Patrick J. Devlin,* Assistants Attorney General, for plaintiff-appellant Attorney General. *Deborah K. Canja* for plaintiff-appellant Michigan Citizens Lobby. *Arthur E. D'Hondt* and *Don L. Keskey,* Assistants Attorney General, for defendant-appellee Public Service Commission. *Lawrence B. Lindemer, Allen B. Bass, Paula H. Mills,* and *Loomis, Ewert, Ederer, Parsley, Davis & Gotting* for defendant-appellee Consumers Power Company. Case below, Court of Appeals No. 59492, order of September 14, 1981.

Justice LEVIN agrees with the decision of the Court to grant leave in the underlying case prior to decision by the Court of Appeals.

However, for the reasons he expressed in *Attorney General v Public Service Comm,* 411 Mich 1028 (1981), he would deny a stay.

COLEMAN, C.J., and WILLIAMS, J., not participating.

This cause having been argued by counsel and submitted for decision and the Court being persuaded that a stay of proceedings is no longer appropriate, that portion of this Court's order of September 15, 1981, which granted a stay of proceedings until further order of this Court, is vacated October 16, 1981. In all other respects the cause remains submitted for decision by this Court.

COMMUTER TAX ASSOCIATION OF METROPOLITAN DETROIT v CITY OF DETROIT. (Docket Nos. 67898, 67979.) Defendant's second emergency application for leave to appeal prior to decision by the Court of Appeals is considered September 22, 1981. It appearing that the Court of Appeals entered a final judgment on September 21, 1981 and the defendant having requested that its emergency application be treated as an application for leave to appeal from that judgment, we so treat it and it is denied. Pursuant to GCR 1963, 865.1(7), we will not accept for filing any further application or motion for reconsideration from the parties in this case. *Carlin, Ranno & Goethel* for plaintiffs. *Honigman, Miller, Schwartz & Cohn* and *Sylvester Delaney,* Deputy Corporation Counsel, *Kay Schloff,* Supervising Assistant Corporation Counsel, and *Robert Rhoades,* Assistant Corporation Counsel, for defendant. Reported below: 109 Mich App 667.

COLEMAN, C.J., and WILLIAMS, J., not participating.

KASSIN v ARC-MATION, INC. (Docket No. 64349.) Leave to appeal granted July 15, 1980 (409 Mich 868). Appeal dismissed September 24, 1981, with prejudice and without costs, upon stipulation by the parties. *Sommers, Schwartz, Silver & Schwartz, P.C.,* for plaintiff-appellee. *Beier, Howlett, McConnell, Googasian & McCann* for defendant-appellant Oxford Precise Casting, Inc. Case below, Court of Appeals No. 78-3031, per curiam opinion of December 10, 1979.

PEOPLE v DASKE. (Docket No. 64645.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Assistant Prosecuting Attorney, for the people.

James Daske, *in propria persona,* appellant. Case below, Court of Appeals No. 78-3576, per curiam opinion of December 26, 1979.

LEVIN, J., would grant leave to appeal.

PEOPLE v CLAASSEN. (Docket No. 66382.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Pulley,* 411 Mich 523 (1981); leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Gary L. Walker,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48844, per curiam opinion of November 10, 1980.

PEOPLE v WISNER. (Docket No. 66416.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Pulley,* 411 Mich 523 (1981); leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48085, memorandum opinion of November 26, 1980.

LANTING v JENISON PUBLIC SCHOOLS. (Docket No. 66607.) Leave to appeal denied October 13, 1981. *Foster, Swift, Collins & Coey, P.C.,* for plaintiff-appellant. *Thrun, Maatsch & Nordberg, P.C.,* for defendants-appellees. Reported below: 103 Mich App 165.

PUSTAY v GENTELIA. (Docket No. 66878.) Leave to appeal denied October 13, 1981. *Fox & Fletcher, P.C.,* for defendant-appellant Ann Arbor Trust Company. Reported below: 104 Mich App 250.

PEOPLE v ESCAMILLA. (Docket No. 66897.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George B. Mullison,* Prosecuting Attorney, and *Thomas J. Rasdale,* Assistant Prosecuting Attorney, for the people. *Monash & Monash, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 49320, per curiam opinion of March 10, 1981.

COHEE v GENERAL MOTORS CORPORATION. (Docket No. 66898.) Leave to appeal denied October 13, 1981. *Rosenberg & Vigiletti, P.C.,* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 54093, order of March 10, 1981.

PEOPLE v JOHNNIE HOLMES. (Docket No. 66903.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *John H. MacFarlane,* Chief Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 47192, memorandum opinion of March 13, 1981.

COLEMAN, C.J., not participating.

GROSSE POINTE QUALITY FOOD COMPANY v NAJOR. (Docket No. 67631.) Leave to appeal denied October 13, 1981. *Lawrence J. Stockler, P.C.,* for plaintiff-appellant. *Provizer, Eisenberg, Lichtenstein & Pearlman, P.C.,* for defendants-appellees Moyed Najor and Starlite Supermarket, Inc. Case below, Court of Appeals No. 58332, order of June 29, 1981.

SWIDEREK v FORD MOTOR COMPANY. (Docket No. 66739.) Leave to appeal denied October 13, 1981. *Bindes & Biber* for plaintiff-appellant. *Anthony P. Marchese,* Supervisory Counsel, and *Hayim I. Gross* for defendant-appellee. Case below, Court of Appeals No. 51386, order of January 8, 1981.

STAFFORD v BART EDMUND, INC. (Docket No. 66760.) Leave to appeal denied October 13, 1981. *Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* for defendants-appellants. Case below, Court of Appeals No. 54592, order of February 18, 1981.

BAUSS v MATTHEWS. (Docket No. 66784.) Leave to appeal denied October 13, 1981. *Sempliner, Thomas & Tiplady* for plaintiff-appellant. *Lizza & Mulcahy, P.C.,* for defendants-appellees. Case below, Court of Appeals No. 54599, order of February 18, 1981.

PEOPLE v LEROY WASHINGTON. (Docket No. 66828.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting

Attorney, and *Kay F. Pearson,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 47848, per curiam opinion of January 27, 1981.

ANDREEN v CADILLAC OVERALL SUPPLY COMPANY. (Docket No. 66850.) Leave to appeal denied October 13, 1981. *McCroskey, Libner, VanLeuven, Feldman, Cochrane & Brock* for plaintiff-appellant. *Smith, Haughey, Rice & Roegge* for defendants-appellees. Case below, Court of Appeals No. 54725, order of March 2, 1981.

MOBERG v GENERAL MOTORS CORPORATION. (Docket No. 66880.) Leave to appeal denied October 13, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Anderson, Green & Vincent, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 54891, order of March 6, 1981.

PEOPLE v HICKS. (Docket No. 62865.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Wilder,* 411 Mich 328 (1981); leave to appeal denied October 13, 1981. *Carl Ziemba* for defendant-appellant. Reported below: 88 Mich App 675.

EVANS v GREENE. (Docket Nos. 66744, 66745.) Leave to appeal denied October 13, 1981. *Zeff & Zeff* for plaintiff-appellee. *Patterson & Patterson, Whitfield, Manikoff, Ternan and White* for defendant-appellant Frank Greene. *Wilson, Portnoy, Basso & Leader* for defendant-appellant St. Joseph Mercy Hospital. Case below, Court of Appeals No. 47233, per curiam opinion of February 9, 1981.

SAWYER v AMERICAN METALS. (Docket No. 66832.) Leave to appeal denied October 13, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *James R. Hale* for defendants-appellees American Metals and Mutual Insurance Company of Grand Rapids. *Cholette, Perkins & Buchanan* for defendant-appellee Grand Rapids Brass. *Smith, Haughey, Rice & Roegge* for defendants-appellees General Automatic Machine Products and Home Insurance Company. *Anderson, Green & Vincent, P.C.,* for defendants-appellees Permaneer Michigan Corporation and American Insurance Company. Case below, Court of Appeals No. 52560, order of February 25, 1981.

PEOPLE v GUAJARDO. (Docket No. 65035.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people. *Beverly Clark* for defendant-appellant. Case below, Court of Appeals No. 78-988, per curiam opinion of March 6, 1980.

CARD v CHRYSLER CORPORATION. (Docket No. 66901.) Leave to appeal denied October 13, 1981. *Cockrel, Cooper, Spearman & King* for plaintiff-appellee. *Lacey & Jones* for defendant-appellant. Case below, Court of Appeals No. 55094, order of March 10, 1981.

PEOPLE v GAVAL. (Docket No. 67564.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Lawrence J. Bunting,* Assistant Prosecuting Attorney, for the people, appellant. Case below, Court of Appeals No. 49811, memorandum opinion of June 11, 1981.

NICKERT v STEWART. (Docket No. 67671.) Leave to appeal denied October 13, 1981. *Joselyn, Rowe, Jamieson, Grinnan, Callahan & Hayes, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 51208, per curiam opinion of July 13, 1981.

PEOPLE v PANGBURN. (Docket No. 67695.) Leave to appeal denied October 13, 1981. Jack Frederick Pangburn, *in propria persona,* appellant. Case below, Court of Appeals No. 57814, order of July 22, 1981.

In re KETTUNEN. (Docket No. 67880.) Leave to appeal denied October 13, 1981, because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Field & Miller* and *DeVries & Lamb, P.C.,* for appellant Kettunen. *Narregan Law Offices, P.C.,* for appellee 9th District Judge. *James J. Gregart,* Prosecuting Attorney, and *Elliot G. Lande,* Assistant Prosecuting Attorney, for the people. Case below, Court of Appeals No. 59323, order of August 13, 1981.

ALVAREZ v GREAT LAKES DREDGE & DOCK COMPANY, ACOSTA v GREAT LAKES DREDGE & DOCK COMPANY, and SURRENT v GREAT LAKES DREDGE & DOCK COMPANY. (Docket Nos. 66301-66303.) Defendant's application for leave to appeal held in abeyance pending decision in *Anderson v Great Lakes Dredge & Dock Co,* 411 Mich 619 (1981), leave to appeal considered October 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand the cases to the Wayne Circuit Court for further proceedings consistent with the above-cited case. *The Jaques Admiralty Law Firm, P.C.,* for plaintiffs-appellees. *Vandeveer, Garzia, Tonkin, Kerr & Heaphy, P.C.,* for defendant-appellant. Case below, Court of Appeals Nos. 44229-44231, memorandum opinion of November 26, 1980.

GAGE v FORD MOTOR COMPANY. (Docket No. 66363.) Leave to appeal denied October 13, 1981. *Sommers, Schwartz, Silver & Schwartz, P.C.,* for plaintiff-appellee William C. Gage. *Johnson, Campbell & Moesta, P.C.,* for plaintiff-appellee Great American Insurance Company. *Harvey, Kruse, Westen & Milan, P.C.,* for defendant-appellant. Reported below: 102 Mich App 310.

PEOPLE v JERRY ADAMS. (Docket No. 66469.) Leave to appeal considered October 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this matter to the Recorder's Court for the City of Detroit for a new probation violation hearing. See Judge BRONSON's dissents in *People v Darrell,* 72 Mich App 710; 250 NW2d 751 (1976), and *People v Hooks,* 89 Mich App 124; 279 NW2d 598 (1979). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. Jerry Adams, *in propria persona,* appellant. Reported below: 102 Mich App 509.

PEOPLE v HURST. (Docket Nos. 66484-66487.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people. Norwood W. Hurst, *in propria persona,* appellant. Case below, Court of Appeals Nos. 49708-49711, order of January 7, 1981.

NOVAK v NOVAK. (Docket No. 67651.) Leave to appeal denied October 13, 1981. *Best, Arnold, Gleeson & Best, P.C.,* for plaintiff-appellee. *Jerome A. Susskind, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 53781, per curiam opinion of July 15, 1981.

PEOPLE v DINSMORE. (Docket No. 66694.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Artis M. Noel,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Carl Ziemba* for defendant-appellant. Reported below: 103 Mich App 660.

JOHNSON v MARQUETTE GENERAL HOSPITAL, INC. (Docket No. 66785.) Leave to appeal denied October 13, 1981. *Wisti & Jaaskelainen* for plaintiff-appellant. *Vairo, Mechlin, Tomasi, Johnson & Manchester* for defendants-appellees. Case below, Court of Appeals No. 54343, order of February 25, 1981.

PEOPLE v TALSMA. (Docket No. 66843.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George Van Kula,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. *Cholette, Perkins & Buchanan* for defendant-appellant. Case below, Court of Appeals No. 51401, order of February 25, 1981.

PEOPLE v DANIELS. (Docket No. 66853.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people. Patrick Henry Daniels, *in propria persona,* appellant. Case below, Court of Appeals No. 52815, order of March 2, 1981.

AUGER v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE. (Docket No. 66910.) Leave to appeal denied October 13, 1981. *Sumpter & Loznak, P.C.,* for plaintiff-appellant. *Williams, Coulter, Cunningham, Davison & Read* for defendant-appellee. Case below, Court of Appeals No. 52913, memorandum opinion of March 13, 1981.

RARICK v GOODYEAR TIRE & RUBBER COMPANY. (Docket No. 66911.) Leave to appeal denied October 13, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Wilfred F. Curley* for defendants-appellees. Case below, Court of Appeals No. 51290, per curiam opinion of March 11, 1981.

PEOPLE v TURNBOW. (Docket No. 66943.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Case below, Court of Appeals No. 51007, per curiam opinion of March 26, 1981.

PEOPLE v JACQUELINE MCDONALD. (Docket No. 67641.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Timothy A. Baughman,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Stuart B. Lev,* Assistant Defender, for defendant-appellee. Case below, Court of Appeals No. 46963, per curiam opinion of July 9, 1981.

GARB-KO, INC v CITY OF MIDLAND. (Docket No. 67755.) Leave to appeal denied October 13, 1981. *Durance & Rhead* for plaintiff-counter-defendant-appellant. *John J. Rae,* Midland City Attorney, for defendant-counter-plaintiff-appellee. Case below, Court of Appeals No. 52013, per curiam opinion of June 23, 1981.

PEOPLE v GREGORY GRIFFIN. (Docket Nos. 67770, 67771.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people, appellant. *Thomas A. Law* for defendant-appellee. Case below, Court of Appeals Nos. 49254, 49255, per curiam opinion of July 29, 1981.

PEOPLE v FREDDY BARKER. (Docket No. 63870.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A.*

George Best, II, Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 77-3417, order of March 27, 1979.

PEOPLE v O'NEAL. (Docket Nos. 64381, 64382.) Leave to appeal considered October 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to Recorder's Court for the City of Detroit for resentencing. The defendant was not afforded his right of allocution pursuant to GCR 1963, 785.8(2) and 785.9. *People v Berry,* 409 Mich 774 (1980). In all other respects leave to appeal is denied. We retain no jurisdiction. Gary O'Neal, *in propria persona,* appellant. Case below, Court of Appeals Nos. 78-3800, 78-3801, memorandum opinion of November 29, 1979.

PEOPLE v ALLRED. (Docket No. 65874.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49134, order of July 21, 1980.

PEOPLE v HENDERSON. (Docket No. 66424.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Pulley,* 411 Mich 523 (1981); leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *R. Steven Whalen,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals Nos. 51166, 51167, order of November 13, 1980.

PEOPLE v BOBBIE COBB. (Docket No. 66641.) Defendant's application for leave to appeal held in abeyance pending decision in *People v Pulley,* 411 Mich 523 (1981); leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 48436, per curiam opinion of January 13, 1981.

HARPER WOODS FEDERATION OF TEACHERS v HARPER WOODS BOARD OF EDUCATION. (Docket No. 66652.) Leave to appeal denied October 13, 1981. *Fieger & Fieger, P.C.,* for plaintiff-appellee. *Miller, Canfield, Paddock & Stone* for defendants-appellants. Reported below: 103 Mich App 649.

PEOPLE v KEMP. (Docket No. 66666.) Leave to appeal considered October 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the defendant's conviction under MCL 800.283; MSA 28.1623. *People v Clabin,* 411 Mich 472 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Assistant Prosecuting Attorney, for the people. Nathaniel Kemp, *in propria persona,* appellant. Case below, Court of Appeals No. 51302, order of January 16, 1981.

PEOPLE v MCCLURKIN. (Docket No. 66764.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *John H. MacFarlane,* Chief Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49965, memorandum opinion of February 13, 1981.

COLEMAN, C.J., not participating.

PEOPLE v DAVID T JOHNSON. (Docket No. 66798.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Harvey A. Koselka,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. David Torres Johnson, *in propria persona,* appellant. Case below, Court of Appeals No. 50159, memorandum opinion of February 13, 1981.

BERKOMPAS v OTTERBEIN. (Docket No. 66834.) Leave to appeal considered October 13, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals order of February 27, 1981, and remand the case to the Court of Appeals for consideration as on leave granted. *Varnum, Riddering, Wierengo & Christenson* for plaintiffs-appellants. Case below, Court of Appeals No. 54531, order of February 27, 1981.

CARPENTER v LANSING DROP FORGE. (Docket No. 66844.) Leave to appeal denied October 13, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Munroe & Nobach, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 54876, order of February 26, 1981.

PATTERSON v BENDIX CORPORATION. (Docket No. 66948.) Leave to appeal denied October 13, 1981. *McCroskey, Libner, VanLeuven, Feldman, Cochrane & Brock* for plaintiff-appellant. *Lilly, Piatt & Doyle* for defendants-appellees. Case below, Court of Appeals No. 54865, order of February 25, 1981.

PEOPLE v WYATT. (Docket No. 66939.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Kim Robert Fawcett,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 52395, order of March 18, 1981.

PEOPLE v RALPH BROWN. (Docket Nos. 66919-66921.) Leave to appeal considered October 13, 1981. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the cases to the Recorder's Court for the City of Detroit for resentencing consistent with *People v Sawyer,* 410 Mich 531 (1981). The resentencing proceeding shall be conducted in accordance with GCR 1963, 785.8. We do not retain jurisdiction. Ralph Anthony Brown, *in propria persona,* appellant. Case below, Court of Appeals Nos. 50351, 52450, 52708, per curiam opinion of February 11, 1981.

PEOPLE v EXPOSE. (Docket No. 66453.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. *Bell & Hudson, P.C.,* for defendant-appellant. Case below, Court of Appeals No. 48123, order of December 8, 1980.

PEOPLE v BUSHONG. (Docket No. 64739.) Defendant's application for leave to appeal having been ordered held in abeyance pending decision in *People v Pulley,* 411 Mich 523 (1981), leave to appeal denied October 13, 1981. Gary Steven Bushong, *in propria persona,* appellant. Case below, Court of Appeals No. 44283, order of October 1, 1979.

IN THE MATTER OF BEAUDOIN, BEAUDOIN v BEAUDOIN. (Docket No. 67648.) Leave to appeal denied October 13, 1981. *Thomas E. Nelson,* for petitioner-appellant Patricia Beaudoin. Case below, Court of Appeals No. 53244, per curiam opinion of June 24, 1981.

PEOPLE v MARCHLEWICZ. (Docket No. 63887.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L. Milbourn,* Chief Appellate Lawyer, and *Robert John Berlin,* Assistant Prosecuting Attorney, for the people. Bernard Marchlewicz, *in propria persona,* appellant. Case below, Court of Appeals No. 52995, order of February 18, 1981.

NIEMI v KEARSLEY BOARD OF EDUCATION. (Docket No. 66796.) Leave to appeal denied October 13, 1981. *David Melkus* and *Foster, Swift, Collins & Coey, P.C.,* for plaintiff-appellant. *Thomas & Delaney* for defendant-appellee. Reported below: 103 Mich App 818.

BERNARD v JOHNSON. (Docket No. 66830.) Leave to appeal denied October 13, 1981. *Rappleye, Wilkins & Arcaro* for plaintiff-appellant. *Reading & Etter* for defendants-appellees. Reported below: 104 Mich App 37.

PEOPLE v GARLAND. (Docket No. 66860.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Joseph G. Harris, Jr.,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. State Appellate Defender, *Rolf E. Berg,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49999, per curiam opinion of March 11, 1981.

PEOPLE v DANIEL RIVERA. (Docket No. 66862.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *Janis L. Blough,* Chief Appellate Attorney, for the people. *Charles Campbell* for defendant-appellant. Case below, Court of Appeals No. 45201, memorandum opinion of January 15, 1981.

SMITH v MARKS. (Docket No. 66874.) Leave to appeal denied October 13, 1981. *Kelman, Loria, Downing, Schneider & Simpson* for plaintiff-appellant. *Dickinson, Wright, McKean, Cudlip & Moon* for defendant-appellee. Case below, Court of Appeals No. 55118, order of March 10, 1981.

PEOPLE v PATRICK JONES. (Docket No. 67194.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. *Frank J. Eamon* for defendant-appellant. Case below, Court of Appeals No. 46936, per curiam opinion of February 20, 1981.

PEOPLE v HAINES. (Docket No. 67805.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Frank R. Del Vero,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *J. David Reck* for defendant-appellee. Reported below: 105 Mich App 213.

PEOPLE v SHINA and PEOPLE v SESI. (Docket Nos. 66504, 66505.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko* and *Don W. Atkins,* Assistants Prosecuting Attorney, for the people. *F. Philip Colista* and *Robert W. Palmer* for defendant-appellant Shina. *Elizabeth R. Schwartz* for defendant-appellant Sesi. Reported below: 101 Mich App 256.

PEOPLE v HUDDLESTON. (Docket No. 66733.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attor-

ney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Chari Grove,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 49966, per curiam opinion of February 11, 1981.

PEOPLE v HENRY CALDWELL. (Docket No. 66902.) Leave to appeal denied October 13, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John H. MacFarlane,* Prosecuting Attorney, and *Gerald L. Charland,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *F. Martin Tieber,* Deputy Defender, for defendant-appellant. Case below, Court of Appeals No. 48680, per curiam opinion of March 9, 1981.

COLEMAN, C.J., not participating.

GAUNA v GENERAL MOTORS CORPORATION. (Docket No. 66638.) Leave to appeal denied November 2, 1981. *Sablich, Ryan, Rapaport, Bobay & Pollok, P.C.,* for plaintiff-appellant. *Anderson, Green & Vincent, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 52895, order of February 4, 1981.

PEOPLE v WHALEY. (Docket No. 65912.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people. *Charles P. Reisman* for defendant-appellant. Case below, Court of Appeals No. 44909, per curiam opinion of September 22, 1980.

PEOPLE v LOUKAS. (Docket Nos. 66805, 66806.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Carolyn M. Schmidt,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals Nos. 48495, 48496, per curiam opinion of February 10, 1981.

FIZER v JENNINGS. (Docket No. 67011.) Leave to appeal denied November 2, 1981. Charles Fizer and Roger Muldavin, *in propriis personis,* plaintiffs-appellants. *Menmuir, Zimmerman, Rollert & Kuhn*

for defendant-appellee. Case below, Court of Appeals No. 51477, memorandum opinion of March 26, 1981.

LEE v HARPER HOSPITAL. (Docket No. 67728.) Leave to appeal denied November 2, 1981. *Lakin, Worsham & Victor, P.C.,* for plaintiff-appellee. *Franklin, Petrulis, Lichty & Mellon, P.C.,* for defendants-appellants. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Eileen D. Zielesch,* Assistant Attorney General, for intervening defendant-appellee Attorney General. *Conklin, Benham, McLeod, Ducey & Ottaway, P.C.,* for Michigan Self-Insurer's Association as amicus curiae. *Clark, Klein & Beaumont* for Michigan Manufacturers Association as amicus curiae. Case below, Court of Appeals No. 48578, order of July 20, 1981.

PEOPLE v MAHADAY. (Docket No. 67636.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. *Charles Campbell* for defendant-appellant. Case below, Court of Appeals No. 47462, per curiam opinion of July 9, 1981.

PEOPLE v STEWART. (Docket No. 67921.) Leave to appeal denial of bail bond denied November 2, 1981. *Arthur J. Tarnow* for defendant-appellant. Case below, Court of Appeals No. 56332, order of August 12, 1981.

KMH EQUIPMENT COMPANY v CHAS J ROGERS, INC. (Docket No. 66957.) Leave to appeal denied November 2, 1981. *Pevos & Pevos* for plaintiff-appellant. *John R. Cobau* for defendants-appellees William H. Leoni, Charles Lawson, Darin & Armstrong, Inc., and Barton-Malow Company. *Honigman, Miller, Schwartz & Cohn* for defendant-appellee Walbridge, Aldinger Company. Reported below: 104 Mich App 563.

LIDDELL v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE. (Docket No. 66643.) Leave to appeal and to cross-appeal denied November 2, 1981. *Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.,* for plaintiff-appellant-cross-appellee. *Dickinson, Mourad, Brandt, Hanlon & Becker* and *Gromek, Bendure & Thomas,* for defendant-appellee-cross-appellant. Reported below: 102 Mich App 636.

KRZESOWIAK v LARSON. (Docket No. 66778.) Leave to appeal denied November 2, 1981. *Sumpter & Loznak, P.C.,* for plaintiff-appellant. *Carpenter, Fenner, Barney & Hofmann* for defendant-appellee. Case below, Court of Appeals No. 49739, per curiam opinion of February 23, 1981.

PEOPLE v BARFIELD. (Docket No. 66833.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce* and *Timothy L. Cronin,* Assistants Prosecuting Attorney, for the people. Woodrow Barfield, *in propria persona,* appellant. Case below, Court of Appeals No. 54382, order of February 26, 1981.

PEOPLE v SNYDER. (Docket No. 66916.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Artis M. Noel,* Prosecuting Attorney, and *G. Scott Stermer,* Chief Assistant Prosecuting Attorney, for the people. Frank Jefferson Snyder, *in propria persona,* appellant. Case below, Court of Appeals No. 50187, order of November 20, 1980.

WHITE v HILEMAN MOTORS, INC. (Docket Nos. 66836, 66953.) Leave to appeal denied November 2, 1981, because the Court is not persuaded that the questions presented should now be reviewed by this Court. *Maceroni, Maceroni & Trickey, P.C.,* and *Gromek, Bendure & Thomas* for plaintiff-appellant. *Dykema, Gossett, Spencer, Goodnow & Trigg* for defendants-appellants Hileman Motors, Inc., and Roper Corporation. Case below, Court of Appeals Nos. 54849, 55215, order of March 24, 1981.

PEOPLE v DAVID JOHNSON. (Docket No. 66954.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, and *Carol S. Irons,* Chief Appellate Attorney, for the people. *Idema & Pawlowski* for defendant-appellant. Reported below: 104 Mich App 629.

SIMKUS v MARATHON OIL COMPANY. (Docket No. 66837.) Leave to appeal denied November 2, 1981. *Butzel, Long, Gust, Klein & Van Zile* for defendant-appellant. Case below, Court of Appeals No. 54248, order of February 26, 1981.

PEOPLE v PARSHAY. (Docket No. 66886.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *James Krogsrud,* Assistant Defender, and *John Nussbaumer,* Research Attorney, for defendant-appellant. Reported below: 104 Mich App 411.

BERRYMAN v WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. (Docket No. 66978.) Leave to appeal denied November 2, 1981. Phillip Wayne Berryman, *in propria persona,* plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Keith D. Roberts* and *J. Peter Lark,* Assistants Attorney General, for defendants-appellees. Case below, Court of Appeals No. 51853, order of February 18, 1981.

MACK v WAYNE STATE UNIVERSITY. (Docket No. 68058.) Leave to appeal considered November 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we vacate the Court of Appeals order of September 29, 1981, and remand the case to the Court of Appeals for consideration of defendants' emergency application for leave to appeal. We conclude that the order of September 29, 1981 fails to acknowledge the findings of fact and conclusions of law in the trial court's opinion of September 21, 1981. We retain no jurisdiction. *Steven Stelmach, Jr.,* and *Norman L. Zemke* for plaintiff-appellant. *Vesta Svenson* for defendants-appellees. Case below, Court of Appeals No. 60047, order of September 29, 1981.

PEOPLE v WALTER ARMSTRONG. (Docket No. 64896.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. *George Stone* for defendant-appellant. Case below, Court of Appeals No. 78-3201, per curiam opinion of January 11, 1980.

PEOPLE v HOLLIDAY. (Docket No. 66873.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Angela Baryames,* Assistant Prosecuting Attorney, for the

people. State Appellate Defender, *Peter Jon Van Hoek,* Assistant Defender, for defendant-appellant. Case below, Court of Appeals No. 43717, per curiam opinion of August 14, 1980.

PEOPLE v RAY. (Docket No. 66945.) Leave to appeal denied November 2, 1981. Herman Oliver Ray, *in propria persona,* appellant. Case below, Court of Appeals No. 54526, order of March 17, 1981.

PEOPLE v PAYNE. (Docket No. 66912.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Janice M. Joyce,* Assistant Prosecuting Attorney, for the people. *Charles R. King* for defendant-appellant. Case below, Court of Appeals No. 47936, per curiam opinion of January 27, 1981.

ARNDT v AHEE. (Docket No. 66944.) Leave to appeal denied November 2, 1981. *Carol A. Levitte* for plaintiff-appellee. *Faintuck, Shwedel, Wolfram, McDonald & Zipser* for defendant-appellant. Case below, Court of Appeals No. 47589, per curiam opinion of March 23, 1981.

DEPARTMENT OF LABOR v PANEL CONTROLS CORPORATION. (Docket No. 66991.) Leave to appeal considered November 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the March 18, 1981 order of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's appeal of right. *Gherardini v Ford Motor Co,* 394 Mich 430; 231 NW2d 643 (1975). We do not retain jurisdiction. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Charles F. Keeley,* Assistant Attorney General, for plaintiff-appellee. *Butzel, Long, Gust, Klein & Van Zile* for defendant-appellant. Case below, Court of Appeals No. 66421, order of March 18, 1981.

PAPORA v PAPORA. (Docket No. 67802.) Leave to appeal denied November 2, 1981. *Meyers, Hemming & Polaczyk* for defendant-appellant. Case below, Court of Appeals No. 50800, per curiam opinion of August 10, 1981.

PEOPLE v ULLAH. (Docket No. 67863.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A.*

Derengoski, Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *William T. Morris,* Assistant Prosecuting Attorney, for the people, appellant. *Elliot D. Margolis* for defendant-appellee. Case below, Court of Appeals No. 51313, per curiam opinion of August 11, 1981.

PEOPLE v PETTWAY. (Docket No. 64617.) Leave to appeal denied November 2, 1981. State Appellate Defender, *Mardi Crawford,* Assistant Defender, and *Clinton Lovett,* Research Attorney, for defendant-appellant. Reported below: 94 Mich App 812.

PEOPLE v HARMAN. (Docket No. 65674.) Leave to appeal considered November 2, 1981 and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the defendant's conviction and remand the case to the Wayne Circuit Court for a new trial. *People v Goldsmith,* 411 Mich 555 (1981). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Michael F. Bakaian,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *Sheila N. Robertson,* Assistant Defender, for defendant-appellant. Reported below: 98 Mich App 541.

PEOPLE v SIMPSON. (Docket No. 66896.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *James S. Sexsmith,* Senior Assistant Prosecuting Attorney, for the people. A. J. Simpson, *in propria persona,* appellant. Case below, Court of Appeals No. 44946, per curiam opinion of March 6, 1981.

MARTS v PLYMOUTH COMMUNITY SCHOOL DISTRICT. (Docket No. 66908.) Leave to appeal considered November 2, 1981 and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the State Teacher Tenure Commission with directions that it make specific findings of fact and conclusions of law based on the record already made. *Beebee v Haslett Public Schools,* 401 Mich 954 (1977); *Sutherby v Gobles Board of Education,* 401 Mich 833 (1977). We do not retain jurisdiction. *Hiller, Howard, Larky & Hoekenga* for plaintiff-appellant. *Clark, Hardy, Lewis, Fine & Pollard, P.C.,* for defendant-appellee. Case below, Court of Appeals No. 47424, per curiam opinion of March 9, 1981.

JACOBS v WAYNE CIRCUIT JUDGE. (Docket No. 66909.) Leave to appeal denied November 2, 1981. *Donald E. Gratrix* for plaintiff-appellant. *Francis B. Crowley* for defendant-appellee. Case below, Court of Appeals No. 52157, order of January 7, 1981.

GOSDZINSKI v WALBRO CORPORATION. (Docket No. 66959.) Leave to appeal denied November 2, 1981. *Davidson, Breen & Doud, P.C.,* for plaintiff-appellant. *O'Neill, Ackerman, Wallace, Doyle & Jones* for defendant-appellee Walbro Corporation. *Neal & Lengauer* for defendants-appellees Walbro Corporation and St. Paul Mercury Insurance Company. Case below, Court of Appeals No. 55358, order of March 23, 1981.

PEOPLE v LINDA HAMILTON. (Docket No. 66983.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people. *Milton R. Henry* for defendant-appellant. Case below, Court of Appeals No. 46159, per curiam opinion of March 19, 1981.

HISCOCK v WHITCOMB. (Docket No. 67032.) Leave to appeal denied November 2, 1981. *Lilly & Domeny, P.C.,* for plaintiff-appellant. *Hoffman & Watts* for defendant-appellee. Case below, Court of Appeals No. 47066, per curiam opinion of January 9, 1981.

PEOPLE v MENDOZA. (Docket No. 67910.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Randy H. Smith,* Prosecuting Attorney, and *Mary C. Smith,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people, appellant. *G. R. Pete Frye* for defendant-appellee. Reported below: 108 Mich App 733.

DIRECTOR, STATE POLICE v ROSE PARK BAPTIST CHURCH. (Docket No. 67961.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *William Molner,* Assistant Attorney General, for plaintiff-appellee. *Annis, Annis & Telman* and *Gibbs & Craze* for defendants-appellants. Case below, Court of Appeals No. 59536, order of September 4, 1981.

DIRECTOR, STATE POLICE v NORTHSTAR BAPTIST CHURCH. (Docket No. 67975.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Brenda E. Turner,* Assistant Attorney General, for plaintiff-appellee. *Annis, Annis & Telman* and *Gibbs & Craze* for defendants-appellants. Case below, Court of Appeals No. 53982, per curiam opinion of August 27, 1981.

PEOPLE v MICHAEL WEAVER. (Docket No. 66763.) Leave to appeal denied November 2, 1981, because the Court is not persuaded that the questions presented should be reviewed by this Court, because the issues raised appear to have no merit, because the affidavit concerning the delay is insufficient in light of prompt review available under Administrative Order 1977-4, and because the delay was more than six months. GCR 1963, 853.2(3). *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *George N. Parris,* Prosecuting Attorney, *Don L. Milbourn,* Chief Appellate Attorney, and *Joseph G. Wetzel,* Assistant Prosecuting Attorney, for the people. Michael Alan Weaver, *in propria persona,* appellant. Case below, Court of Appeals No. 45633, memorandum opinion of June 12, 1980.

PEOPLE v BURL WILLIAMS. (Docket No. 66810.) Leave to appeal denied November 2, 1981. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Conrad J. Sindt,* Prosecuting Attorney, and *Steven Gonzales,* Assistant Prosecuting Attorney, for the people. Burl Williams, *in propria persona,* appellant. Case below, Court of Appeals No. 52703, order of February 5, 1981.

COLEMAN, C.J., not participating.

SANFORD v DIRECTOR, DEPARTMENT OF CORRECTIONS. (Docket No. 66835.) Leave to appeal denied November 2, 1981. George Harry Sanford, *in propria persona,* plaintiff-appellant. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Peter J. Treleaven,* Assistant Attorney General, for defendant-appellee. Case below, Court of Appeals No. 52561, order of December 29, 1980.

SPECIAL ORDERS

In this section will be published orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

MARCH 31, 1981

PROPOSED ADOPTION OF GCR 1963, 794. On order of the Court, this is to advise that the Court is considering a proposal to adopt new GCR 1963, 794. Before determining whether it should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

RULE 794. JURISDICTION: FELONIES AND MISDEMEANORS ARISING FROM SAME CRIMINAL TRANSACTION.

If the circuit court has jurisdiction to try a defendant who is charged with a felony or a misdemeanor not cognizable by the district court, it also has jurisdiction to try any misdemeanor cognizable by the district court or ordinance violation, if the misdemeanor or ordinance violation arises from the same criminal transaction.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: It is not uncommon for a defendant to be charged with both a felony and a misdemeanor arising out of the same criminal transaction. If the prosecution undertakes separate prosecutions, one in circuit court and the other in district court, the defendant may attempt to interpose the defense of double jeopardy. Several appellate decisions have discussed the worth of this defense. The purpose of this rule is to invest the circuit court with jurisdiction to

try all offenses arising out of a single transaction, thus avoiding this troublesome issue.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

APRIL 8, 1981

PROPOSED MCR 2.213, 3.101, 3.102, 3.103, AND 3.408 (PROPOSED AMENDMENT OF GCR 1963, 708, 718, 735, AND 738-739). On order of the Court, this is to advise that the Court is considering whether to adopt proposed Michigan Court Rules 2.213, 3.101, 3.102, 3.103, and 3.408. Before determining whether they should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposals, the texts of which are as follows:

RULE 2.213. TRANSFER OF ACTIONS ON FINDING OF LACK OF JURISDICTION.

(A) Transfer to Court Which Has Jurisdiction.

(1) When the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action but that some other court of this state would have jurisdiction of the action, the court shall order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own motion, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue.

(2) As a condition of transfer, the court shall require the plaintiff to pay the statutory filing fee applicable to the court to which the case is to be transferred, and to pay reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.

(3) If the plaintiff does not pay the filing fee to the clerk of the court transferring the case and submit proof to the clerk of the payment of any other costs imposed within 28 days after entry of the order of transfer, the clerk shall notify the judge who entered the order, and the judge shall dismiss the action for lack of jurisdiction. The clerk shall notify the parties of the entry of the dismissal.

(4) After the plaintiff pays the fee and costs, the clerk of the court transferring the case shall promptly forward to the clerk of the court to which the case is transferred the original papers filed in the action and the filing fee and shall send written notice of this action to the parties. If part of the action remains pending in the transferring

court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.

(B) Procedure After Transfer.

(1) The action proceeds in the court to which it is transferred as if it had been originally filed there. If further pleadings are required or allowed, the time for filing them runs from the date the clerk sends notice that the file has been forwarded under subrule (A)(4). The court to which the case is transferred may order the filing of new or amended pleadings.

(2) If a defendant had not been served with process at the time the case was transferred, the plaintiff must obtain the issuance of a new summons by the court to which the action is transferred.

(3) A waiver of jury trial in the court in which the case was originally filed is ineffective after transfer. A party who had waived trial by jury may demand a jury trial after transfer by filing a demand and paying the applicable jury fee within 28 days after the clerk sends the notice that the file has been forwarded under subrule (A)(4). A demand for a jury trial in the court in which the case was originally filed is preserved after transfer. If the jury fee had been paid, the clerk shall forward it with the file to the clerk of the court to which the case is transferred.

(C) Relation to Other Transfer Provisions. This rule does not affect transfers (pursuant to other rules or statutes) of actions over which the transferring court had jurisdiction.

RULE 3.101. GARNISHMENT.

(A) Designation of Parties. In this rule, "plaintiff" refers to any judgment creditor and "principal defendant" refers to any judgment debtor.

(B) Availability of Writ. This rule applies to writs of garnishment issued after judgment or after commencement of an action brought on a foreign judgment. Rule 3.102 governs prejudgment garnishments.

(C) Affidavit for Garnishment. The clerk of the court that entered the judgment or in which the action on the foreign judgment is pending may issue a writ of garnishment if the plaintiff files an affidavit stating

(1) that a judgment has been entered against the principal defendant and remains unsatisfied;

(2) the amount of the judgment and the amount remaining unpaid;

(3) that the plaintiff has good reason to believe that the judgment will remain unsatisfied unless the writ is issued; and

(4) that the affiant knows or has good reason to believe that

(a) a named person has control of property belonging to the defendant or

(b) a named person is indebted to the principal defendant.

(D) Writ of Garnishment. The writ of garnishment must have attached or include a copy of the garnishment affidavit, and must

(1) direct the garnishee to

(a) file with the court clerk within 7 days after the service of the writ on him a disclosure under oath indicating his liability (as specified in subrule [F]) to the principal defendant;

(b) deliver no tangible or intangible property to the principal defendant, unless allowed by statute or court rule;

(c) pay no obligation to the principal defendant, unless allowed by statute or court rule; and

(d) promptly provide the principal defendant with a copy of the writ and affidavit by personal delivery or by first class mail;

(2) direct the principal defendant to refrain from disposing of any negotiable instrument representing a debt of the garnishee or of any negotiable instrument of title representing property, in which he or she claims an interest, held in the possession or control of the garnishee;

(3) inform the principal defendant that unless the principal defendant moves to set aside the writ, answers, or otherwise defends within 14 days after the writ issues, an order may enter requiring the garnishee to deliver the garnished property or pay the obligation to be applied to the satisfaction of the plaintiff's claim; and

(4) command the process server to serve the writ and to file a proof of service.

(E) Service of the Writ.

(1) The writ of garnishment and a copy for the principal defendant must be served on the garnishee in the manner provided for the service of a summons and complaint in MCR 2.105.

(2) The service of the writ of garnishment on the principal defendant restrains the principal defendant from disposing in any way of any negotiable instrument representing a debt of the garnishee or of any negotiable document of title representing property in which he or she claims an interest, held in the possession or control of the garnishee, except to the extent authorized by statute or court rule.

(F) Liability of Garnishee.

(1) Subject to the provisions of the garnishment statute and any setoff permitted by these rules, the garnishee is liable for

(a) all tangible or intangible property belonging to the principal defendant in the garnishee's possession or control when the writ is

served on the garnishee, unless the property is represented by a negotiable document of title held by a bona fide purchaser for value other than the principal defendant;

(b) all negotiable documents of title and all goods represented by negotiable documents of title belonging to the principal defendant if the documents of title are in the garnishee's possession when the writ is served on the garnishee;

(c) all corporate share certificates belonging to the principal defendant in the garnishee's possession or control when the writ is served on the garnishee;

(d) except for debts evidenced by negotiable instruments or representing the earnings of an employee, all debts, whether or not due, owing by the garnishee to the principal defendant when the writ is served on the garnishee;

(e) all debts owing by the garnishee evidenced by negotiable instruments held or owned by the principal defendant when the writ of garnishment is served on the principal defendant and brought before the court before their negotiation to a bona fide purchaser for value;

(f) the earnings of the principal defendant as provided by subrule (H);

(g) all judgments in favor of the principal defendant against the garnishee in force when the writ is served on the garnishee;

(h) all tangible or intangible property of the principal defendant which, when the writ is served on the garnishee, the garnishee holds by conveyance, transfer, or title that is void as to creditors of the principal defendant, whether or not the principal defendant could maintain an action against the garnishee to recover the property; and

(i) the value of all tangible or intangible property of the principal defendant which, before the writ is served on the garnishee, the garnishee received or held by conveyance, transfer, or title that was void as to creditors of the principal defendant, but which the garnishee no longer held at the time the writ was served, whether or not the principal defendant could maintain an action against the garnishee for the value of the property.

(2) The garnishee is liable for no more than 1-1/4 times the amount of the judgment remaining unpaid as stated in the affidavit for the writ of garnishment. Property or debts exceeding 1-1/4 times the amount of the unpaid judgment may be delivered or paid to the principal defendant notwithstanding the garnishment.

(G) Disclosure. The garnishee must file and serve on the plaintiff a disclosure under oath within 7 days after the writ is served on him. The disclosure

(1) must reveal his liability to the principal defendant as specified in subrule (F),

(2) may claim any setoff that the garnishee would have had against the principal defendant if he had not been garnished, except for claims for unliquidated damages for wrongs or injuries, and

(3) must state the date on and describe the manner in which notice was given to the principal defendant under subrule (D)(1)(d).

If the garnishee is the principal defendant's employer and the indebtedness consists of earnings, instead of filing the disclosure required by this subrule, the garnishee must follow the procedures in subrule (H).

(H) Garnishment of Earnings.

(1) As used in this rule, "earnings" means compensation for personal services, whether denominated wages, salary, commission, bonus, or otherwise.

(2) On each regular payday occurring within 28 days after the service of the writ on the garnishee, the garnishee shall compute the exemption from garnishment to which the principal defendant is entitled by law and pay that amount to the principal defendant. The garnishee shall withhold the nonexempt amount subject to further order of the court.

(3) Within 7 days after the expiration of the period provided in section (2), the garnishee shall file a disclosure setting forth the earnings of the principal defendant for the period covered by the garnishment, the amount of exempt funds paid to the principal defendant, and the amount the garnishee has withheld subject to the garnishment.

(4) The plaintiff may seek an order of the court directing the garnishee to pay the funds to the plaintiff under subrule (L)(3), or the matter may proceed to trial under subrule (L). The other provisions of this rule apply to a disclosure under this subrule to the same extent as to a disclosure under subrule (G).

(5) A writ of garnishment served while earnings are being withheld pursuant to an earlier writ is ineffective and the employer may not withhold any earnings pursuant to the later writ. If the employer is served with a writ while an earlier writ is in effect, the employer shall file a disclosure revealing the existence and date of service of the earlier writ within 7 days after being served with the later writ.

(6) If an order directing payment of the judgment in installments is entered pursuant to MCL 600.6201-600.6251; MSA 27A.6201-27A.6251 while the earnings of the principal defendant are subject to a previously issued writ, the principal defendant may deliver a copy of the order to the garnishee and from that time no further money may be

withheld from the earnings of the principal defendant pursuant to that writ.

(I) Payment or Deposit in Court. The garnishee may on order of the court pay the indebtedness or deliver the property to the court clerk or secure the delivery of the property. The court clerk shall give the garnishee a receipt in complete discharge of all liability to the extent of the indebtedness paid or the property delivered or secured.

(J) Steps After Disclosure; Third Parties; Interpleader; Discovery.

(1) Within 14 days after service of the garnishee's disclosure, the plaintiff may serve the garnishee with written interrogatories or notice the deposition of the garnishee. The garnishee's testimony at the oral examination or answers to the written interrogatories become part of the disclosure.

(2) If the garnishee's disclosure declares that a named person other than the principal defendant and the plaintiff claims all or part of the indebtedness or property allegedly belonging to the defendant in the garnishee's possession or control, the court may order that the claimant be added as a defendant in the garnishment action under MCR 2.207. The garnishee may proceed under MCR 2.210 as in interpleader cases, and other claimants may move to intervene under MCR 2.209.

(3) The discovery rules apply to garnishment proceedings.

(4) The filing of a disclosure, the filing of answers to interrogatories, or the personal appearance by or on behalf of the garnishee in response to a demand for examination does not waive the garnishee's right at any time before judgment to question the jurisdiction of the court, the validity of the proceeding, or the plaintiff's right to judgment.

(K) Dissolution of Garnishment.

(1) At any time before judgment against the garnishee, the principal defendant may move to dissolve the garnishment. The general motion practice rules apply.

(2) When earnings have been garnished, if the plaintiff has not obtained a judgment for the nonexempt earnings held by the garnishee within 2 months after the filing of the disclosure under subrule (H)(3), the garnishment is dissolved without court order, and the garnishee shall pay the withheld earnings to the principal defendant without further liability to the plaintiff. However, the court may order the garnishment continued for good cause shown.

(3) Except as to a garnishment of earnings, if the plaintiff has not obtained a judgment against the garnishee within 6 months after the filing of the garnishee's disclosure, the garnishment is dissolved without court order and the garnishee may deliver the property or

pay the obligation to the principal defendant without further liability to the plaintiff. However, the court may order the garnishment continued for good cause shown.

(L) Determination of Garnishee's Liability.

(1) After the plaintiff has recovered a judgment against the principal defendant, the issue of the garnishee's liability and the claims and defenses of other parties are brought to trial in the same manner as other civil actions. If the principal defendant files a motion for new trial or appeals, the issue of the garnishee's liability is brought on for trial after the disposition of the motion or appeal, unless the court orders otherwise on good cause shown.

(2) The garnishment affidavit acts as the plaintiff's complaint against the garnishee. The facts stated in the disclosure must be accepted as true unless the plaintiff has served interrogatories or a demand for examination within the time allowed by subrule (J)(1) or another party has filed a pleading or motion denying the accuracy of the disclosure. If interrogatories have been served or oral examination demanded, the disclosure, the answers to the interrogatories, and the transcript of the examination are considered as an answer to the affidavit. Except as the facts of the affidavit are admitted by the disclosure, answers to interrogatories, or transcript of the examination, they are denied. Admissions have the effect of admissions in responsive pleadings. The principal defendant and other claimants added under subrule (J)(2) may plead their claims and defenses as in other civil actions. The garnishee's liability to the plaintiff is tried on the issues thus framed.

(3) After final judgment against the principal defendant and at least 7 days after the garnishee's disclosure was filed, the plaintiff may move for judgment against the garnishee to the extent of the admissions in his disclosure. The general motion practice rules govern notice (including notice to the garnishee and the principal defendant) and hearing on the motion.

(4) The issues between the plaintiff and garnishee are tried by the court unless the plaintiff or garnishee filed a demand for jury trial within 7 days after the filing of the disclosure, answers to interrogatories, or transcript of examination, whichever is filed last.

(5) On the trial of the issue of the garnishee's liability, the plaintiff may offer the record of the garnishment proceedings and other evidence supporting or controverting it. The garnishee may offer evidence not controverting the disclosure, or in the discretion of the court, may be allowed to show errors and mistakes in the disclosure.

(6) If it is determined that the garnishee is indebted to the principal defendant, but the time for payment has not arrived, a judgment may

not be entered until after the time of maturity stated in the verdict or finding.

(M) Judgment and Execution.

(1) Judgment may be entered against the garnishee for the payment of money or the delivery of specific property as the facts warrant. A money judgment against the garnishee may not be entered in an amount greater than 1-1/4 times the amount remaining unpaid as stated in the affidavit for the writ of garnishment. Judgment for specific property may be enforced only to the extent necessary to satisfy the judgment against the principal defendant.

(2) The judgment against the garnishee discharges him from all demands by the principal defendant for the money paid or property delivered in satisfaction of the judgment. If the garnishee is sued by the principal defendant for anything done under the provisions of these garnishment rules, the garnishee may introduce as evidence the judgment and the satisfaction.

(3) If the garnishee is chargeable for specific property which he holds for or is bound to deliver to the principal defendant, judgment may be entered and execution issued against the interest of the principal defendant in the property held by the garnishee for no more than is necessary to satisfy the judgment against the principal defendant. The garnishee must deliver the property indicated to the officer. The officer shall sell, apply, and account as in ordinary execution.

(4) If the garnishee is found to be under contract for the delivery of specific property to the principal defendant, judgment may be entered and execution issued against the interest of the principal defendant in the property held by the garnishee for no more than is necessary to satisfy the judgment against the principal defendant. The garnishee must deliver the property to the officer instead of the defendant according to the terms of the contract. The officer shall sell, apply, and account as in ordinary execution.

(5) If the garnishee is chargeable for specific property and refuses to expose it so that execution may be levied on it, the court may order the garnishee to show cause why general execution should not issue against him. Absent sufficient cause shown to the contrary, the court may order the issuance of execution against the garnishee in an amount not to exceed double the value of the specifically chargeable property.

(6) The court may issue execution against the principal defendant for the full amount due the plaintiff on his judgment against the principal defendant. Execution against the garnishee may not be ordered by separate writ but must always be ordered by indorsement on or by incorporation within the writ of execution against the

principal defendant. The court may order additional execution to satisfy the plaintiff's judgment as justice requires.

(7) Satisfaction of all or part of the judgment against the garnishee constitutes to the same extent satisfaction of a judgment against the principal defendant.

(N) Appeals. A judgment or final order in a garnishment suit may be set aside or appealed in the same manner and with the same effect as in other civil actions.

(O) Receivership.

(1) If on disclosure or trial of the issue of the garnishee's liability, it appears that when the writ was served the garnishee had in his or her possession

(a) a written promise for the payment of money or the delivery of property belonging to the principal defendant, or

(b) personal property belonging to the principal defendant,

the court may order the garnishee to deliver it to a person appointed as receiver.

(2) The receiver must

(a) collect the written promise for payment of money or for the delivery of property and apply the proceeds on any judgment in favor of the plaintiff against the garnishee and pay any surplus to the garnishee, and

(b) dispose of the property if an amount greater than any encumbrance on it can be obtained, and after paying the amount of the encumbrance, apply the balance to the plaintiff's judgment against the garnishee and pay any surplus to the garnishee.

(3) If the garnishee refuses to comply with the delivery order, the garnishee is liable for the amount of the written promise for the payment of money, the value of the promise for the delivery of property, or the value of the principal defendant's interest in the encumbered personal property. The facts of the refusal and the valuation must be included in the receiver's report to the court.

(4) The receiver shall report all actions pertaining to the promise or property to the court. The report must include a description and valuation of any property, with the valuation to be ascertained by appraisal on oath or in a manner the judge may direct.

(P) Costs and Fees.

(1) A fee of $5 must be paid to the garnishee at the time the writ is served.

(2) If the garnishee is not indebted to the principal defendant, does not hold any property subject to garnishment, and is not the principal

defendant's employer, the plaintiff is not entitled to recover the costs of that garnishment.

(3) Other costs and fees are as provided by law or these rules.

(Q) Failure to Disclose or Do Other Acts; Default; Contempt.

(1) If the garnishee fails to disclose or do a required act within the time limit imposed, a default may be taken as in other civil actions. A default judgment against a garnishee may not exceed the amount of the garnishee's liability as provided in subrule (F).

(2) If the garnishee fails to comply with a court order, the garnishee may be adjudged in contempt of court.

(3) In addition to other actions permitted by law or these rules, the court may impose costs, including reasonable attorney fees, on a garnishee whose default or contempt results in expense to other parties.

(R) When the state is the garnishee, the procedures provided by law apply. (See MCL 600.4061; MSA 27A.4061.)

(S) Judicial Discretion. On motion the court may by order extend the time for

(1) the garnishee's disclosure;

(2) the plaintiff's filing of written interrogatories;

(3) the plaintiff's filing of a demand for oral examination of the garnishee;

(4) the garnishee's answer to written interrogatories;

(5) the garnishee's appearance for oral examination; and

(6) the request for jury trial.

The order must be filed with the court clerk and served on the other parties.

RULE 3.102. GARNISHMENT BEFORE JUDGMENT.

(A) Availability of Prejudgment Garnishment.

(1) After commencing an action on a contract, the plaintiff may obtain a prejudgment writ of garnishment under the circumstances and by the procedures provided in this rule.

(2) A prejudgment garnishment may not be used,

(a) unless the defendant is subject to the jurisdiction of the court under chapter 7 of the revised judicature act, MCL 600.701 *et seq.;* MSA 27A.701 *et seq.;*

(b) to garnish a defendant's earnings; or

(c) to garnish property held or an obligation owed by the state or a governmental unit of the state.

(B) Affidavit for Garnishment. After commencing an action, the plaintiff may seek a writ of garnishment by filing an *ex parte* motion supported by an affidavit setting forth specific facts showing that

(1) the defendant is indebted to the plaintiff on a contract in a stated amount in excess of all setoffs,

(2) the defendant is subject to the jurisdiction of the state,

(3) after diligent effort the plaintiff cannot serve the defendant with process, and

(4) the affiant knows or has good reason to believe that a named person

(a) has control of property belonging to the defendant, or

(b) is indebted to the defendant.

On a finding that the writ is available under this rule and that the affidavit states a sufficient basis for issuance of the writ, the judge to whom the case is assigned may issue the writ.

(C) Writ of Garnishment. The writ of garnishment must have attached or include a copy of the garnishment affidavit, and must

(1) direct the garnishee to

(a) file with the court clerk within 7 days after the service of the writ on him a disclosure under oath indicating his liability (as specified in subrule [E]) to the principal defendant;

(b) deliver no tangible or intangible property to the principal defendant, unless allowed by statute or court rule;

(c) pay no obligation to the principal defendant, unless allowed by statute or court rule; and

(d) promptly provide the principal defendant with a copy of the writ and affidavit by personal delivery or by first class mail;

(2) direct the principal defendant to refrain from disposing of any negotiable instrument representing a debt of the garnishee or of any negotiable instrument of title representing property in which he or she claims an interest held in the possession or control of the garnishee;

(3) inform the principal defendant that unless the principal defendant moves to set aside the writ, or appears and submits to the jurisdiction of the court, an order may enter requiring the garnishee to deliver the garnished property or pay the obligation to be applied to the satisfaction of the plaintiff's claim; and

(4) command the process server to serve the writ and to file a proof of service.

(D) Service of the Writ. MCR 3.101(E) applies to prejudgment garnishment.

(E) Liability of Garnishee. MCR 3.101(F) applies to prejudgment garnishment except that the earnings of the defendant may not be garnished before judgment.

(F) Disclosure. The garnishee shall file and serve a disclosure as provided in MCR 3.101(G).

(G) Payment or Deposit in Court. MCR 3.101(I) applies to prejudgment garnishment.

(H) Dissolution of Prejudgment Garnishment. Dissolution of a prejudgment garnishment is governed by the rule for dissolution of attachments. MCR 3.103(H).

(I) Proceedings After Judgment.

(1) If the garnishment remains in effect until entry of judgment in favor of the plaintiff against the principal defendant, the garnished property or obligation may be applied to the satisfaction of the judgment in the manner provided in MCR 3.101(L) and (M).

(2) MCR 3.101(N) and (O) and MCR 3.103(I)(2) apply to prejudgment garnishment.

(J) Costs and Fees; Default; Contempt; Judicial Discretion. MCR 3.101(P), (Q), and (S) apply to prejudgment garnishment.

RULE 3.103. ATTACHMENT.

(A) Availability of Writ. After commencing an action, the plaintiff may obtain a writ of attachment under the circumstances and by the procedures provided in this rule. Attachment may not be used unless the defendant is subject to the jurisdiction of the court under chapter 7 of the revised judicature act. MCL 600.701 *et seq.;* MSA 27A.701 *et seq.*

(B) Issuance of Writ.

(1) The plaintiff may seek a writ of attachment by filing an *ex parte* motion supported by an affidavit setting forth specific facts showing that

(a) at the time of the execution of the affidavit the defendant is indebted to the plaintiff in a stated amount on a contract or judgment in excess of all setoffs,

(b) the defendant is subject to the judicial jurisdiction of the state, and

(c) after diligent effort the plaintiff cannot serve the defendant with process.

In an action brought on a tort claim, the plaintiff must follow the procedures prescribed in subrule (C).

(2) On a finding that the writ is available under this rule and that the affidavit states a sufficient basis for issuance of the writ, the judge to whom the case is assigned may issue the writ.

(3) The judge's order shall specify what further steps, if any, must be taken by the plaintiff to notify the defendant of the action and the attachment.

(C) Tort Actions.

(1) After commencement of a tort action, instead of the averment required by subrule (B)(1)(a), the affidavit in support of the motion must describe the injury claimed and state that the deponent in good faith believes that the defendant is liable to the plaintiff in a stated amount. The other requirements of subrule (B) apply.

(2) If the writ is issued the judge shall specify the amount or value of property to be attached.

(D) Contents of Writ. The writ of attachment must command the sheriff or other officer to whom it is directed

(1) to attach so much of the defendant's real and personal property that is not exempt from execution as is sufficient to satisfy the plaintiff's demand and costs, and

(2) to keep safely the property to satisfy any judgment that may be recovered by the plaintiff in the action until further order of the court.

(E) Execution of Writ; Subsequent Attachments.

(1) The sheriff or other officer to whom a writ of attachment is directed shall execute the writ by seizing and holding so much of the defendant's property not exempt from execution, wherever found within the county, as is sufficient to satisfy the plaintiff's demand and costs. If property is seized but it is not sufficient, then the officer shall seize other property of the defendant not exempt from execution, wherever found within the state, as is sufficient when added to that already seized to satisfy the plaintiff's demand and costs. The property seized must be inventoried by the officer, and appraised by two disinterested residents of the county in which the property was seized. After being sworn under oath to make a true appraisal, the appraisers shall make and sign an appraisal. The inventory and appraisal must be filed in the case and a copy served on the parties under MCR 2.107.

(2) In subsequent attachments of the same property while in the hands of the officer, the original inventory and appraisal satisfy the requirement of subrule (E)(1).

(F) Attachment of Realty, Stock.

(1) The officer may seize an interest in real estate by depositing a certified copy of the writ of attachment, including a description of the

land affected, with the register of deeds for the county in which the land is located. It is not necessary that the officer enter on the land or be within view of it.

(2) Shares of stock or the interest of a stockholder in a domestic corporation must be seized in the manner provided for the seizure of that property on execution.

(G) Animals or Perishable Property; Sale; Distribution of Proceeds.

(1) When any of the property attached consists of animals or perishable property, the court may order the property sold, and the money arising from the sale brought into court, to abide the order of the court.

(2) After the order for a sale is made, the officer having the property shall advertise and sell it in the manner that personal property of like character is required to be advertised and sold on execution. The officer shall deposit the proceeds with the clerk of the court in which the action is pending.

(3) If the plaintiff recovers judgment, the court may order the money to be paid to the plaintiff. If the judgment is rendered against the plaintiff or the suit is discontinued or the attachment is dissolved, the court shall order the money paid to the defendant or other person entitled to it.

(H) Dissolution of Attachment.

(1) Except in the case of an action brought on a foreign judgment, if the defendant submits to the jurisdiction of the court, the court shall dissolve the attachment.

(2) A person who owns, possesses, or has an interest in attached property may move at any time to dissolve the attachment. The defendant may move to dissolve the attachment without submitting to the jurisdiction of the court.

(a) When a motion for dissolution of attachment is filed, the court shall enter an order setting a time and place for hearing the motion, and may issue subpoenas to compel attendance of witnesses.

(b) The plaintiff must be served with notice under MCR 2.107 at least 3 days before the hearing unless the court's order prescribes a different notice requirement.

(c) At the hearing, the proofs are heard in the same manner as in a nonjury trial. If the court decides that the defendant was not subject to the jurisdiction of the state or that the property was not subject to or was exempt from attachment, it shall dissolve the attachment and restore the property to the defendant, and the attachment may be dissolved for any other sufficient reason. The court may order the costs of the dissolution proceeding to be paid by the losing party.

(3) If the action is dismissed or judgment is entered for the defendant, the attachment is dissolved.

(I) Satisfaction of Judgment.

(1) If the attachment remains in effect until the entry of judgment against the defendant, the attached property may be applied to the satisfaction of the judgment, including interest and costs, in the same manner as in the case of an execution.

(2) If the court does not acquire personal jurisdiction over the defendant, either by service or by the defendant's appearance, a judgment against the defendant is not binding beyond the value of the attached property.

RULE 3.408. INJUNCTIONS.

(A) Preliminary Injunctions.

(1) Except as otherwise provided by statute or these rules, an injunction may not be granted before a hearing on a motion for a preliminary injunction or on an order to show cause why a preliminary injunction should not issue.

(2) Before or after the commencement of the hearing on a motion for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the motion. Even when consolidation is not ordered, evidence received at the hearing for a preliminary injunction that would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. This provision may not be used to deny the parties any rights they may have to trial by jury.

(3) A motion for a preliminary injunction must be filed and noticed for hearing in compliance with the rules governing other motions unless the court orders otherwise on a showing of good cause.

(4) At the hearing on an order to show cause why a preliminary injunction should not issue, the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be entered, whether or not a temporary restraining order has been previously issued.

(B) Temporary Restraining Orders.

(1) A temporary restraining order may be granted without written or oral notice to the adverse party or the adverse party's attorney only if

(a) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect

notice or from the risk that notice will itself precipitate adverse action before an order can be issued;

(b) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required; and

(c) a permanent record or memorandum is made of any nonwritten evidence, argument, or other representations made in support of the application.

(2) A temporary restraining order granted without notice must

(a) be indorsed with the date and time of issuance;

(b) describe the injury and state why it is irreparable and why the order was granted without notice; and

(c) set a date for hearing at the earliest possible time on the motion for a preliminary injunction or order to show cause why a preliminary injunction should not issue.

(3) A temporary restraining order granted without notice must be filed forthwith in the clerk's office and entered of record.

(4) A motion to dissolve a temporary restraining order granted without notice takes precedence over all matters except older matters of the same character, and may be heard on 24 hours' notice. For good cause shown, the court may order the motion heard on shorter notice. The court may fix the time for the hearing at the time the restraining order is granted, without waiting for the filing of a motion to dissolve it, and may order consolidation of the hearing on a motion to dissolve a restraining order granted without notice with the hearing on a motion for a preliminary injunction or an order to show cause why a preliminary injunction should not issue. At a hearing on a motion to dissolve a restraining order granted without notice, the burden of justifying continuation of the order is on the applicant for the restraining order whether or not the hearing has been consolidated with a hearing on a motion for a preliminary injunction or an order to show cause.

(C) Form and Scope of Injunction. An order granting an injunction or restraining order

(1) must set forth the reasons for its issuance;

(2) must be specific in terms;

(3) must describe in reasonable detail, and not by reference to the complaint or other document, the acts restrained; and

(4) is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(D) Security.

(1) Before granting a preliminary injunction or temporary restraining order, the court may require the applicant to give security, in the amount the court deems proper, for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained.

(2) Security is not required of the state or of a Michigan county or municipal corporation or its officer or agency acting in an official capacity. As to other parties, if security is not required the order must specifically state why security is not required.

(3) Objection to Sufficiency of Surety; Justification. If the party enjoined deems the security insufficient and has had no prior opportunity to be heard, it may object to the sufficiency of the surety in the manner provided in MCR 3.115(E). The procedures provided in MCR 3.115(F) apply to the objection.

(4) Filing Bond. When a bond is required before the issuance of an injunction or temporary restraining order, the bond must be filed with the clerk before the sealing and delivery of the injunction or restraining order.

(E) Stay of Action. An injunction or temporary restraining order may not be granted in one action to stay proceedings in another action pending in another court if the relief requested may be sought in the other pending action.

(F) Denial of Application. When an application for a preliminary injunction or temporary restraining order is denied, but an order is not signed, an indorsement of the denial must be made on the complaint or affidavit, and the complaint or affidavit filed.

(G) Later Application After Denial of Injunction.

(1) If a circuit judge has denied an application for an injunction or temporary restraining order, in whole or in part, or has granted it conditionally or on terms, later application for the same purpose and in relation to the same matter may not be made to another circuit judge.

(2) If on an application in violation of section (1) an order is made, it is absolutely void and must be revoked by the judge making it, on due proof of the facts. A person making the later application contrary to this rule is subject to punishment for contempt.

(H) Motion for Injunction in Pending Actions. An injunction may also be granted before or in connection with final judgment on a motion filed after an action is commenced.

(I) Application to Special Actions. This rule applies to a special statutory action to obtain injunction only to the extent that it does not conflict with special procedures prescribed by the statute or the rules governing the special action.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: These proposals are numbered as they would appear if the proposed Michigan Court Rules (402A Mich) are adopted. If the proposed Michigan Court Rules are not adopted, these proposals would appear as GCR 1963, 708 (Transfer of Actions), 718 (Injunctions), 735 (Attachment), and 738-739 (Garnishment).

APRIL 15, 1981

IN THE MATTER OF BOHAN. (Docket No. 65081.) Leave to appeal denied. *Michael Alan Schwartz,* Grievance Administrator, and *William E. Lang,* Counsel to Grievance Administrator, for Attorney Discipline Board. *William W. Swor* for appellant.

APRIL 28, 1981

LEBLANC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. (Docket No. 62439.) Rehearing denied. *McLean & McCarthy* for plaintiff-appellant. *Weis & Cossi, P.C.,* for defendant-appellee. Reported at 410 Mich 173.

CAF INVESTMENT COMPANY v SAGINAW TOWNSHIP. (Docket Nos. 60744, 60745.) Rehearing denied. *Honigman, Miller, Schwartz & Cohn* for plaintiff-appellee. *Crane, Kessel & Crane* for defendant-appellant. Reported at 410 Mich 428.

PEOPLE v SAWYER. (Docket No. 64464.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,*

Principal Attorney, Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people, appellant. Reported at 410 Mich 531.

In re PRICHARD ESTATE, MURRELL v PARAGON TRANSPORT, INC. (Docket No. 64664.) Rehearing denied. *Matheson, Bieneman, Parr, Schuler & Ewald* and *Dickinson, Wright, McKean, Cudlip & Moon* for plaintiff-appellant-cross-appellee. *Simpson, Moran & Burnett* for defendant-appellee-cross-appellant. Reported at 410 Mich 587.

APRIL 30, 1981

PROPOSED ADOPTION OF PCR 202 AND 802 AND AMENDMENT OF PCR 106, 109, 201, 707, 709, 722, AND 801. On order of the Court, this is to advise that the Court is considering a proposal to adopt new Probate Court Rules 202 and 802 and to amend Probate Court Rules 106, 109, 201, 707, 709, 722, & 801. Before determining whether it should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

(The present language is to be repealed and replaced by the following language unless otherwise indicated below:)

RULE 106. PUBLICATION.

.1 (Unchanged.)

.2 Contents of Published Notice. If notice is given to a person by publication because the person's address or whereabouts is not known and cannot be ascertained after diligent inquiry, the published notice must include the name of the person to whom the notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the estate.

.3—.4 (Formerly .2 and .3, renumbered but otherwise unchanged.)

RULE 109. INTERESTED PARTIES DEFINED.

.1 Special Parties. In addition to parties named in PCR 109.2 with respect to specific proceedings, officers and representatives must be served according to law and court rules, including, but not limited to, the following:

(1)-(2) (Unchanged.)

(3) Administrator of Veterans' Affairs. On a petition for the appointment of a guardian or conservator when the proposed ward is

entitled to receive benefits from the veterans administration, the administrator of veterans' affairs must be served through the administrator's Michigan district counsel.

(4)-(5) (Unchanged.)

(6) Father of a Child Born Out of Wedlock. The natural father of a child born out of wedlock need not be served notice of proceedings as to which the child's parents are interested parties unless his paternity has been determined in a manner provided by law.

.2 Specific Proceedings. Subject to PCR 109.1 and PCR 105.8 and to a specific determination made by the court if the interested parties are not defined by statute or court rule, interested parties in a

(1)-(4) (Unchanged.)

(5) Proceeding for spouse's allowance if the spouse is the fiduciary are

a. Devisees of a testate estate

b. Trustee of a trust under the will and, if the trustee has not qualified, the beneficiaries

c. Heirs of an intestate estate

d. Persons whose claims have been duly filed and remain undetermined or unpaid

(6) Proceeding for examination of an account of a fiduciary or in regard to an election not to have hearings on periodic accounts are

a. Devisees of a testate estate

b. Trustee of a trust under the will and, if the trustee has not qualified, the beneficiaries

c. Heirs of an intestate estate

d. The ward and presumptive heirs of the ward in a conservatorship

e. Persons whose claims have been duly filed and remain undetermined or unpaid

(7) Proceeding for examination of a closing statement of a fiduciary are

a. Devisees of a testate estate

b. Trustee of a trust under the will and, if the trustee has not qualified, the beneficiaries

c. Heirs of an intestate estate

d. Persons whose claims have been duly filed and remain undetermined or unpaid

(8)-(23) (Formerly [6]-[21], renumbered but otherwise unchanged.)

(24) Petition for appointment of a guardian of a legally incapacitated person are

(a) Legally incapacitated person

(b) Legally incapacitated person's spouse

(c) Legally incapacitated person's children or, if no child is living, parents

(d) If no spouse, child, or parent is living, the presumptive heirs of the person

(e) Person who has the care and custody of the legally incapacitated person

(25) Petition for the appointment of a conservator or for a protective order are

(a) Person to be protected if 14 years of age or older

(b) Spouse of the person to be protected

(c) Children of the person to be protected or, if no child is living, the person's parents

(d) If no spouse, child, or parent is living, the presumptive heirs of the person

(e) Persons who, pursuant to law, have filed a request for notice

(f) Agent or attorney in fact having a power of attorney (meeting the requirements of MCL 700.495; MSA 27.5495) of the person to be protected

(26)-(27) (Formerly [24]-[25], renumbered but otherwise unchanged.)

RULE 201. APPLICATION OF GENERAL COURT RULES.

Chapter 20 of the General Court Rules of 1963 governs proceedings in probate court where applicable.

RULE 202. GUARDIAN AD LITEM; VISITOR.

.1 Appointment. The court may, if it deems necessary, appoint a guardian ad litem to appear for and represent in the proceeding a minor, a protected person, or one who is or is alleged to be a legally incapacitated person or a developmentally disabled person. The court may appoint a visitor as provided by law. The court shall state the purpose of the appointment in the order of appointment. The order may be entered with or without notice, as the court may direct. On the application of the minor or the next of kin of the ward, or for any reason in its discretion, the court may revoke the appointment and appoint another guardian ad litem or visitor.

.2 Duties. Before the date set for hearing, the guardian ad litem or visitor shall conduct an investigation and shall make a report in open court or file a report of the investigation and recommendations. He or she need not appear personally at the hearing unless required by law, directed by the court, or requested to appear by an interested party.

.3 Appearance by Attorney General. If the attorney general appears in an estate proceeding on behalf of unknown or unascertained heirs or presumptive heirs, the court may not appoint a guardian ad litem for the interest, and, if a guardian ad litem was previously appointed for the interest, the appointment is terminated by the appearance of the attorney general.

RULE 707. SETTLEMENT OF ESTATES; REPORTING REQUIREMENTS; CLOSING.

.1 (Unchanged.)

.2 Follow-up Procedures.

(a) Notice to Fiduciaries; Reporting.

(1)-(4) (Unchanged.)

(5) The judge of every probate court, or the chief judge of every probate court having more than one judge, shall, on the first day of January, the first day of May, and the first day of September of each year, file with the state court administrator a report, in a form established by the state court administrator, identifying all cases then pending in the court in which:

(A) except in independent probate proceedings, the fiduciary has not filed an inventory of the estate within 60 days after the order of appointment or issuance of the letters of authority and the inventory remains unfiled at the time of the report;

(B) except in independent probate proceedings, at the time of the report the fiduciary has not filed an accounting within the preceding 14 months;

(C) in independent probate proceedings, 15 months has expired since the original appointment of an independent personal representative without the filing of the closing statement provided by MCL 700.357(3); MSA 27.5357(3) or a detailed statement of the estate's continuing pendency and reasons for the delay in its closing and distribution provided by MCL 700.357(2); MSA 27.5357(2);

(D) there has been any other instance of noncompliance with the requirements of these rules.

The report shall set forth, as to each case reported, a statement of the nature and facts of the fiduciary's noncompliance and a full statement of the follow-up procedures instituted by the court as required by this rule, including any extensions of time for performance of required duties granted pursuant to subrule .2(a)(3) and the cause shown for the extensions. If no such procedures have been instituted or action taken, the report shall include a full statement of the reasons.

(6) (Unchanged.)

(b) (Unchanged.)

RULE 709. INDEPENDENT PROBATE.

.1—.2 (Unchanged.)

.3 Notices.

(a) (Unchanged.)

(b) Notice of Appointment; Service.

(1) The notice of appointment required to be served on interested parties must be in substantially the language of the form approved by the state court administrator. It must be served in the manner and by the method provided in chapter 10 of these rules within 10 days after the appointment of the independent personal representative.

(2) The notice of appointment need not be served on an interested party whose name or address is unknown and cannot be ascertained after diligent inquiry if

(A) a notice of the last day for the presentment of claims is published, and

(B) in addition to the information required in PCR 709.3(c), the published notice regarding claims includes the statements that the estate is not being supervised by the probate court and that any interested party may file a written petition with the court and with the independent personal representative objecting to the appointment and, if applicable, to the admission of the will to probate.

(3) If there are foreign heirs or foreign devisees, the notice of appointment must also be served on the foreign consul within the 10-day period. This service constitutes the service in independent probate on the foreign consul required by MCL 700.180; MSA 27.5180.

(c) Claims Notice; Publication. An independent personal representative must publish one time in a newspaper as defined by GCR 1963, 106.4, in the county in which a resident decedent was domiciled or in which the proceeding as to a nonresident is pending, a notice that claims must be presented to the independent personal representative, who must be identified as such. The notice must state

(1) the last known address, the date of death, and the social security number, if known, of the decedent;

(2) that the estate will be assigned and distributed to the persons entitled to it; and

(3) in a testate estate, that an instrument has been admitted to probate, including the date of execution.

Such notice is not required if the estate qualifies as a small estate under MCL 700.325; MSA 27.5325.

(d) (Unchanged.)

.4—.5 (Unchanged.)

.6 Follow-up Procedures. The court's authority under MCL 700.357(2); MSA 27.5357(2) includes the authority to take the actions provided in PCR 707.2(a)(4) and (5) and 707.2(b) 15 months after the appointment of an independent personal representative.

RULE 722. TESTAMENTARY TRUSTEE ACCOUNTING; FOLLOW-UP PROCEDURES.

.1 Time for Filing. Within 60 days after the end of the accounting period the trustee of a testamentary trust shall file an authenticated annual account, together with a proof that a copy has been served on each presently vested beneficiary. The accounting period may be a calendar year or a fiscal year ending on the last day of a month. The trustee may use the same accounting period as that used for income tax reporting, and the first accounting period may be less than a year.

.2 (Unchanged.)

.3 Notice of Hearing. If a hearing to approve a trustee's account is required by law, or if the jurisdiction of the court is invoked by an interested party for a hearing to settle a trustee's account, notice must be given to interested parties as provided in chapter 10 of these rules.

.4 (Formerly .5, renumbered but otherwise unchanged.)

.5 Election Not to Have Hearings on Accounts; Notice. If a trustee of a testamentary trust, whether in existence on June 30, 1979, or established thereafter, elects not to request periodic hearings on the allowance or settlement of the trustee's accounts, further hearings may not be required by the court unless a hearing is otherwise required by law or requested in writing by an interested party. The trustee shall send a written notice of this election to each presently vested beneficiary and shall file with the court a copy of the notice and a proof of service of the notice on the interested parties. The notice must include a statement that the court will not review the trustee's accounts unless requested in writing to do so by an interested party.

RULE 801. APPEALS TO OTHER COURTS.

.1 Right to Appeal. A party aggrieved by an order of the probate court may appeal as provided by this rule.

.2 Final Orders Appealable to the Court of Appeals. Final orders appealable of right to the court of appeals are defined as and limited to the following:

(a) a final order in an adoption proceeding;

(b) a final order in a condemnation proceeding under MCL 280.1-280.630; MSA 11.1001-11.1630;

(c) a final order affecting the rights or interests of an interested person in a decedent's estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of a developmentally disabled person, or an inter vivos or testamentary trust. These are defined as and limited to orders resolving the following matters:

(1) appointing or removing a personal representative, conservator, or trustee;

(2) admitting or denying to probate of a will, codicil, or other testamentary instrument;

(3) interpreting or construing a testamentary instrument or inter vivos trust;

(4) approving a settlement of a contest relating to an inter vivos trust or a testamentary instrument;

(5) discharging a surety on a bond from further liability;

(6) allowing or rejecting claims;

(7) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;

(8) authorizing or denying the continuation of a business;

(9) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, a family allowance, or right to remain in dwelling;

(10) authorizing or denying rights of election;

(11) determining heirs or devisees;

(12) determining title or claims to property;

(13) authorizing or denying partition of property;

(14) authorizing or denying specific performance;

(15) ascertaining survivorship of parties;

(16) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;

(17) granting or denying a petition to determine cy-pres;

(18) directing or denying repayment of distributions;

(19) determining or denying a constructive trust;

(20) determining or denying oral contract relating to will;

(21) allowing or disallowing an account, fees, or administration expenses;

(22) authorizing disclaimers;

(23) authorizing federal estate tax apportionment;

(24) distributing proceeds recovered for wrongful death under MCL 600.2922; MSA 27A.2922;

(25) determining or directing payment of inheritance taxes;

(26) assigning residue;

(27) granting or denying petition for instructions;

(d) other appeals as may be hereafter provided by statute.

.3 Final Orders Appealable to the Circuit Court. All final orders not enumerated in subrule 801.2 are appealable of right to the circuit court. The final orders include, but are not limited to:

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

(b) except for a final order affecting the rights or interests of a person in the estate of a developmentally disabled person, a final order affecting the rights or interests of a person under the mental health code; and

(c) a final order affecting the rights or interests of a person under the juvenile code.

.4 Interlocutory Orders. All interlocutory orders provided by law, such as an order regarding discovery, ruling on evidence, appointing a guardian ad litem, or removing a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the circuit court and only by leave of that court. The circuit court shall pay particular attention to a motion for leave to appeal an interlocutory order if the probate judge has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.

.5 Transfer of Appeals from the Court of Appeals to the Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the court of appeals, the court of appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court. If a docketing fee was paid to the court of appeals, on transfer of the appeal that court shall pay to the circuit court the amount of the fee for appeal to circuit court from probate court, provided by law.

.6 Appeals to the Court of Appeals on Certification by the Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the court of appeals if the probate judge certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the court of appeals may materially advance the ultimate termination of the litigation. An appeal to the court of appeals under this subrule is by leave only under the provisions of GCR 1963, 806.3. In lieu of granting leave to appeal, the court of appeals may remand the appeal to the circuit court for consideration as on leave granted.

RULE 802. APPELLATE PROCEDURE; STAYS PENDING APPEAL.

.1 Record. Appeals from the probate court shall be on a written transcript of the record made in the probate court or on a record settled and agreed to by the parties and approved by the court. The appeals shall not be tried de novo.

.2. Procedure. Appeals from the probate court are governed by applicable General Court Rules of 1963.

.3 Stays Pending Appeals. An order removing a fiduciary for failure to give a bond or to render an accounting; appointing a temporary personal representative, a temporary guardian, or a temporary conservator; granting a new trial or rehearing; granting an allowance to the spouse or children of a decedent; granting permission to sue on a fiduciary's bond; or suspending a fiduciary and appointing a special fiduciary may not be stayed pending appeal unless ordered by the court on motion for good cause shown.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

MAY 5, 1981

IN THE MATTER OF HELM. (Docket No. 66229.) Leave to appeal denied. *Boltz, Roth, Silver & Friedman, P.C.,* for appellant Robert E. Helm. *Michael Alan Schwartz,* Grievance Administrator, and *Eugene N. LaBelle,* Deputy Grievance Administrator, for appellee Attorney Grievance Commission.

MAY 13, 1981

IN THE MATTER OF HOTCHKISS. (Docket No. 67046.) The request by the Judicial Tenure Commission for the appointment of a Master pursuant to GCR 1963, 932.10(b) is considered and the Honorable DONALD E. HOLBROOK is hereby designated as Master to consider Formal Complaint No. 25. The petition for interim suspension is denied. *Michael J. Kelly,* Chairman, *Joseph F. Regnier,* Executive

Director & General Chairman, and *Thomas L. Prowse,* Staff Attorney, for the Judicial Tenure Commission. *Hubbard, Fox, Thomas, White & Bengtson, P.C.,* for respondent.

MAY 19, 1981

PROPOSED AMENDMENT OF GCR 1963, 912. On order of the Court, this is to advise that the Court is considering whether to amend GCR 1963, 912. Before determining whether the amendment should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposed amendment, the text of which is as follows:

(The present language is to be repealed and replaced by the following language unless otherwise indicated below:)

RULE 912. DISQUALIFICATION OF A JUDGE.

.1 (Unchanged.)

.2 Grounds. A judge is disqualified when he cannot impartially hear a case, including a proceeding where the judge

(a)-(d) (Formerly [1]-[4], redesignated but otherwise unchanged.)

(e) within the preceding two years employed as a law clerk or otherwise a person who is acting as attorney for a party. The judge is not disqualified merely because the former employee is associated with a law firm representing a party;

(f) (Formerly [5], redesignated but otherwise unchanged.)

(g) (Formerly [6], redesignated but otherwise unchanged.)

(1)-(3) (Formerly [A]-[C], redesignated but otherwise unchanged.)

(h) (Formerly [7], redesignated but otherwise unchanged.)

.3 Procedure.

(a)-(b) (Unchanged.)

(c) Ruling. The challenged judge must decide the motion. If the challenged judge denies the motion,

(1) in a court having two or more judges, the challenging party may ask that the motion be referred to the chief judge, who shall decide the motion;

(2) in a single-judge court, or if the challenged judge is the chief judge, the challenging party may ask that the motion be referred to another judge assigned by the state court administrator.

(d) (Unchanged.)

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: The proposed amendment would (1) add a reason for disqualification and (2) alter the present procedure for obtaining a second ruling after a judge refuses to disqualify himself or herself.

Proposed rule 912.2(e) would add as grounds for disqualification a situation in which the judge's former law clerk or an individual who was employed by the judge in some other capacity acts as attorney for a party. The period of disqualification is two years. The proposed amendment further provides that there is no disqualification simply because the judge's former employee is associated with a law firm representing a party.

Proposed subrule 912.3(c) requires the challenged judge to decide the motion for disqualification. In a court having two or more judges, after a denial of the motion, the challenging party may ask the chief judge to decide it and, when so requested, the chief judge must decide the motion unless the chief judge is the challenged judge. In such a circumstance, as well as in single-judge courts after the initial denial of the motion, the challenging party may ask that the motion be referred to another judge assigned by the state court administrator.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

JUNE 18, 1981

IN THE MATTER OF O'CONNELL. (Docket No. 60916.) The cause is remanded to the Judicial Tenure Commission for such further proceedings as it deems appropriate if the respondent is convicted of criminal charges on retrial. The Supreme Court does not retain jurisdiction. *Joseph F. Regnier,* Executive Director and General Counsel, for the Judicial Tenure Commission. *John D. O'Connell* for respondent.

In re EXECUTIVE MESSAGE OF THE GOVERNOR. (Docket No. 67053.) The Governor's executive message, filed under GCR 1963, 797.1, is considered and his request to certify the question is respectfully denied. The request is moot in light of this Court's grant of leave to appeal and decision in *Oakland County Prosecuting Attorney v Dep't of Corrections,* 411 Mich 183 (1981), in which the same issues were addressed.

JUNE 24, 1981

PROPOSED GCR 1963, 929. On order of the Court, this is to advise that the Court is considering whether to adopt new GCR 1963, 929. Before determining whether the rule should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

RULE 929. SIZE OF PAPER.

A pleading or other paper filed with a Michigan court must be on opaque paper 8-1/2 by 11 inches in size. Before December 1, 1983, however, either 8-1/2-by-11- or 8-1/2-by-14-inch pleadings or papers may be filed.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

PROPOSED AMENDMENT OF GCR 1963, 701, 803, 853 AND 864, AND PCR 801; AND PROPOSED JCR 1969, 14. On order of the Court, this is to advise that the Court is considering whether to amend GCR 1963, 701, 803, 853, and 864, and Probate Court Rule 801; and to adopt new Juvenile Court Rule 14. Before determining whether the amendments and the new rule should be adopted, changed before adoption, or

rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposals, the text of which is as follows:

(The present language is to be repealed and replaced by the following language unless otherwise indicated below:)

RULE 701. APPEALS TO CIRCUIT COURT.

.1 (Unchanged.)

.2 Time for Taking an Appeal.

(a) Appeal of Right.

(1) An appeal of right must be taken within

(A) 20 days after the entry of the order or judgment appealed from; or

(B) 20 days after the entry of an order denying a motion for new trial or judgment notwithstanding the verdict, if the motion was filed within the original 20-day period.

(2) In an appeal from an order terminating parental rights under MCL 712A.19a-712A.20; MSA 27.3178(598.19a)-27.3178(598.20), the time for taking all steps on appeal is halved. This includes the time for:

(A) filing a claim of appeal,

(B) ordering and filing the transcript,

(C) filing the briefs, and

(D) noticing for hearing.

An extension of time is available only on order of the circuit court. The appeal has precedence over other cases in scheduling for argument, and the court shall decide the appeal as expeditiously as possible after submission.

(b)-(c) (Unchanged.)

.3—.13 (Unchanged.)

RULE 803. TIME FOR TAKING APPEAL.

.1—.5 (Unchanged.)

.6 Time Requirements in Appeals from Interlocutory Orders in Criminal Cases, Contested Custody Cases, and Termination of Parental Rights Cases. In an appeal from an interlocutory order in a criminal case, an appeal involving a contest as to the custody of a minor child, and an appeal from an order terminating parental rights under MCL 712A.19a-712A.20; MSA 27.3178(598.19a)-27.3178(598.20),

the time for taking all steps on appeal is halved. This includes the time for:

(1) filing a claim of appeal,

(2) ordering and filing the transcript,

(3) filing the record and briefs, and

(4) noticing for hearing.

An extension of time is available only on order of the court. The appeal has precedence over other cases in being placed on a session calendar. Notice that the case involves a contest as to the custody of a minor child or termination of parental rights should be stated in the claim of appeal, but the requirement is not jurisdictional.

RULE 853. APPEALS FROM DECISIONS OF COURT OF APPEALS.

.1—.3 (Unchanged.)

.4 Time Requirements in Appeals from Interlocutory Orders in Criminal Cases, Contested Custody Cases, and Termination of Parental Rights Cases. In an appeal from an interlocutory order in a criminal case, an appeal involving a contest as to the custody of a minor child, and an appeal from an order terminating parental rights under MCL 712A.19a-712A.20; MSA 27.3178(598.19a)-27.3178(598.20), the time for taking all the steps on appeal is halved. This includes the time for:

(1) filing the application for leave to appeal,

(2) noticing for hearing, and

(3) filing briefs and appendixes.

An extension of time is available only on order of the supreme court. Such appeals shall have precedence over other cases in the hearing of cases on any session calendar.

RULE 864. CALL AND ARGUMENT OF CASES IN THE SUPREME COURT.

.1—.5 (Unchanged.)

.6 (Rescinded.)

PC RULE 801. APPEALS TO OTHER COURTS; RECORD; PROCEDURE.

.1—.4 (Unchanged.)

.5 Appeals to the Court of Appeals on Certification by the Probate Court.

(a) Instead of appealing to the circuit court, a party may appeal directly to the court of appeals if the probate judge certifies that the order involves a controlling question of law as to which there is

substantial ground for difference of opinion and that an appeal directly to the court of appeals may materially advance the ultimate termination of the litigation.

(b) A person appealing from an order involving the termination of parental rights under MCL 712A.19a-712A.20; MSA 27.3178(598.19a)-27.3178(598.20) is presumed to be entitled to such a certificate unless the probate judge specifically finds to the contrary in a written order stating the reasons for the denial.

(c) An appeal to the court of appeals under this subrule is by leave only under the provisions of GCR 1963, 806.3. In lieu of granting leave to appeal, the court of appeals may remand the appeal to the circuit court for consideration as on leave granted.

JC RULE 14. ORDERS TERMINATING PARENTAL RIGHTS.

An order placing a child in the permanent custody of the court and terminating parental rights under MCL 712A.19a-712A.20; MSA 27.3178(598.19a)-27.3178(598.20) must be accompanied by written findings of fact and conclusions of law including a statement of the statutory basis for the order.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: Each of the proposed rule changes is intended to accelerate the appeal process in cases of termination of parental rights under MCL 712A.19a-712A.20; MSA 27.3178(598.19a)-27.3178(598.20) (abuse and neglect cases). Although published as a group, except for the proposed amendments of GCR 1963, 853 and 864 the proposals are independent and might be adopted in any combination.

The proposed amendments to GCR 1963, 803 and 853 are to clarify that the half-time requirements apply to termination of parental rights matters as well as to appeals from orders under the child custody act. The proposed amendment to rule 864 is the deletion of the half-time provision to allow its more logical placement in rule 853.

The proposed amendment to GCR 1963, 701 would create a comparable half-time requirement in appeals of parental rights cases from the probate court to the circuit court.

The proposal regarding PCR 801 is related to MCL 600.863(3); MSA 27A.863(3), which permits a party aggrieved by a probate court order to apply for leave to appeal directly to the Court of Appeals "upon certification of the issue or issues by the probate judge." The proposed amendment would prescribe the content of the certification by the probate judge (in language similar to GCR 1963, 806.3[1][a][ii], which relates to interlocutory appeals to the Court of Appeals), and would create a presumption that a party appealing from an order involving termination of parental rights is entitled to such a certificate.

Proposed new JCR 14 is intended to avoid the necessity for an appellate court to remand to the probate court for more detailed findings, a process that frequently leads to additional delays in the appeals of these matters.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

JULY 8, 1981

IN THE MATTER OF HOTCHKISS. (Docket No. 67046.) The decision and recommendation for order of discipline by the Michigan Judicial Tenure Commission, together with the stipulation and consent thereto by the respondent, are considered. The recommendation of the Michigan Judicial Tenure Commission is accepted. It is ordered that the respondent be suspended from office for a period of 60 days without pay and without accrual of benefits, commencing on the date of certification of this order. It is further ordered that the respondent present himself in the courtroom of this Court at 10:00 a.m., on August 18, 1981 for imposition of public reprimand. The Honorable DONALD E. HOLBROOK is discharged from further duty, with the gratitude of this Court. *Joseph F. Regnier,* Executive Director and General Counsel, for the Judicial Tenure Commission. *Hubbard, Fox, Thomas, White & Bengtson, P.C.,* for respondent.

JULY 20, 1981

PROPOSED ADOPTION OF DCR 791. On order of the Court, this is to advise that the Court is considering whether to adopt new DCR 791. Before determining whether it should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

DC RULE 791. PROBATION REVOCATION.

Probation revocation procedure is governed by GCR 1963, 791.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: See the staff comment to GCR 1963, 791. See Advance Sheets for 411 Mich, Part 3, pp xxii-xxiii.

AUGUST 24, 1981

PROPOSED AMENDMENT OF GCR 1963, 785. On order of the Court, this is to advise that the Court is considering whether to amend GCR 1963, 785. Before determining whether the amendment should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

(The present language is to be repealed and replaced by the following language unless otherwise indicated below:)

RULE 785. CRIMINAL PROCEDURE.

.1—.7 (Unchanged.)

.8 Sentencing.

(1) Sentence Conferences. A defendant has the right to be present at any conference between the court and the defendant's lawyer regarding the sentence to be imposed. This right shall be afforded unless the defendant affirmatively waives the right either on the record or in writing.

(2) Sentence Proceedings. Before sentence is imposed, the court shall

(a) give defendant and his lawyer a reasonable opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence; and

(b) state the minimum and maximum sentence imposed by the court, together with any credit for time served to which the defendant may be entitled.

(3) Absence of Defendant's Lawyer. Sentence may not be imposed in the absence of the defendant's lawyer unless the defendant affirmatively waives the lawyer's presence.

(4) Failure to Comply With Rule. The provisions of subrule 785.8 are mandatory and failure to comply shall require resentencing.

.9—.13 (Unchanged.)

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: GCR 785.8(1) would require that a defendant who desires to be present at a conference regarding the sentence to be imposed be afforded the opportunity unless he or she waives that right. See *People v Pulley,* 411 Mich 523 (1981).

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

PROPOSED AMENDMENT OF GCR 1963, 964. On order of the Court, this is to advise that the Court is considering whether to amend GCR 1963, 964. Before determining whether the amendment should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

(The present language is to be repealed and replaced by the following language unless otherwise indicated below:)

RULE 964. HEARING PANEL PROCEDURE.

.1—.10 (Unchanged.)

.11 Stay of Discipline. If the respondent petitions the board for review and a stay of the discipline order before the panel's order is effective, the discipline order shall not take effect until ordered by the board.

.12—.13 (Unchanged.)

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

Staff Comment: The proposed amendment to GCR 1963, 964.11 would provide an automatic stay of discipline orders on the timely filing of a petition for review and for a stay. This would be consistent with the practice before the 1978 amendment of the disciplinary procedures (see former State Bar Rule 16.13) and similar to the stay provision applicable on appeals to the Supreme Court, GCR 1963, 971.3. The discipline board would have the authority to remove the stay before the final decision on the petition for review.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

AUGUST 26, 1981

IN THE MATTER OF SELBURN. (Docket No. 66707.) Leave to appeal denied August 26, 1981. *Michael Alan Schwartz,* Grievance Administrator, and *Eugene N. LaBelle,* Deputy Grievance Administrator, for the Attorney Grievance Commission. *Colista, Green & Adams* for respondent.

AUGUST 27, 1981

PROPOSED AMENDMENT OF GCR 1963, 208. On order of the Court,

this is to advise that the Court is considering the report of the committee to review GCR 1963, 208 (Class Actions), which proposes amendment of GCR 1963, 208. Before determining whether the proposed amendment should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal. The text of the report of the committee is as follows:

Introduction: Following the decision in *Grigg v Michigan National Bank,* 405 Mich 148; 274 NW2d 752 (1979), the Supreme Court appointed a committee to review GCR 1963, 208 concerning class actions. See 59 Michigan Bar Journal 476 (July, 1980). The committee consisted of Irwin M. Alterman, Michael E. Cavanaugh, Edward H. Cooper, Wilbur S. Davidson, Eugene Driker, Arthur J. Lombard, Theodore Sachs, and Theodore Souris. Arthur Lombard was elected chairman. Supreme Court Commissioner Frank J. Greco served as reporter.

The committee was directed to submit appropriate recommendations to the Court and, if revisions in the rule were recommended, to propose specific language. The committee solicited and considered comments from the bar (see 59 Michigan Bar Journal 562 [August, 1980]), studied the class action rules of each of the other states and recent proposals to modify class action procedure, and reviewed the practice under the federal class action rule, FR Civ P 23.

The committee's conclusion is that revision of the class action provisions of GCR 1963, 208 is desirable. (GCR 208.2, .3, .4 [insofar as it relates to rule 208.2], and .6 were not within the committee's charge and should presumably be retained in separate rules.) However, there is difference of opinion on the committee as to the form that the revision should take. Accordingly, two proposals have been submitted to the Supreme Court. The committee believes that submission of both versions will facilitate analysis of the proposals by the bench and bar and generate the most helpful comments for the Court to use in its consideration of the possible revision of the rule.

The critical distinction between the two versions of the rule relates to the fundamental question of who shall be included in a class. One version of the rule includes as members of a class all those potential members who do not exercise an option to exclude themselves. This "opt-out" principle is drawn from the federal rule as to class actions based on the existence of common questions of law or fact, see FR Civ P 23(c)(2), and the many state rules modeled after it. The theory of such a rule is that certain wrongs cannot be effectively redressed with a system that requires class members to affirmatively include themselves in the action. Five committee members, Irwin Alterman, Ed-

ward Cooper, Eugene Driker, Arthur Lombard, and Theodore Sachs, support this opt-out version.

The other version of the rule limits membership in the class to those potential members who affirmatively elect to be included. This "opt-in" principle is consistent with the present Michigan rule as interpreted in *Grigg v Michigan National Bank, supra,* 405 Mich 174. The theory of such a rule is that class membership should be limited to those who have sufficient interest in the assertion of their claims to take some affirmative step to indicate their desire to be represented in the action. Three committee members, Michael E. Cavanaugh, Wilbur Davidson, and Theodore Souris, support the opt-in version.

Despite this fundamental difference between the two versions of the rule, they follow the same structure. In fact, their language is identical except for the following sections:

208.1(C)	208.3(E)(2)	208.4(E)	208.8(C)
208.3(D)	208.3(E)(5)	208.6(B)(4)	

To facilitate comparison of the two versions, the proposals are printed as a single rule but with alternative language for the sections listed above. In each case the language of the opt-out alternative is set out first, followed by the opt-in alternative.

It should be noted that the entire committee fully participated in the drafting of both alternatives and that each of the two versions represents the collective view of the best rule under each of the assumptions. While some of the committee members disagree with other provisions of the proposed rule, they decided not to reflect these disagreements in alternative language or in the comments.

In addition to the comments on the specific sections set out below, the committee notes that a number of other topics that might be covered in a class action rule were considered by the committee, but are not included. For example the proposals do not include provisions covering attorney fees, appealability of orders, jurisdiction, or the availability of special types of relief. The committee's view was that such topics should be governed by other principles of statutory and decisional law, and the proposal is not meant to expand or restrict otherwise applicable principles.

RULE 208. CLASS ACTIONS.

RULE 208.1. NATURE OF CLASS ACTION.

(A) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class; and

(5) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

(B) In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:

(1) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(b) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) whether final equitable or declaratory relief might be appropriate with respect to the class;

(3) whether the action will be manageable as a class action;

(4) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(5) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(6) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

(C) [Opt-out alternative] Class members shall have the right to be excluded from the action in the manner provided in this rule, subject to the authority of the court to order them made parties to the action pursuant to other applicable court rules.

(C) [Opt-in alternative] The class will be limited to those potential members who file a written election to be included in the class.

(D) Class members have the right to intervene in the action, subject to the authority of the court to regulate the orderly course of the action.

(E) An action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action.

RULE 208.2. PROCEDURE FOR CERTIFICATION OF CLASS ACTION.

(A) Motion.

(1) Within 90 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the case may be maintained as a class action.

(2) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown.

(B) Effect of Failure to File Motion. If the plaintiff fails to file a certification motion within the time allowed by section (A), the defendant may file a notice of the failure. On the filing of such a notice, the class action allegations are deemed stricken and the action continues by or against the named parties alone. The class action allegations may be reinstated only if the plaintiff shows that the failure was due to excusable neglect.

(C) Action by the Court.

(1) Except on motion for cause shown the court shall not proceed with consideration of the motion to certify until service of the summons and complaint on all named defendants or until the expiration of any unserved summons under GCR 1963, 102.4.

(2) The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures.

(3) In an order certifying a class action, the court shall set forth a description of the class.

(4) When appropriate the court may order that

(a) the action be maintained as a class action limited to particular issues or forms of relief, or

(b) a proposed class be divided into separate classes with each treated as a class for purposes of certifying, denying certification, or revoking a certification.

(5) If certification is denied or revoked, the action shall continue by or against the named parties alone.

RULE 208.3. NOTICE TO CLASS MEMBERS.

(A) Notice Requirement. Notice shall be given as provided in this subrule to persons who are included in a class action by certification or amendment of a prior certification, and to persons who were included in a class action by a prior certification but who are to be excluded from the class by amendment or revocation of the certification.

(B) Proposals Regarding Notice. The plaintiff shall include in the motion for certification a proposal regarding notice covering the matters that must be determined by the court under section (C). In lieu of such a proposal the plaintiff may state reasons why a determination of these matters cannot then be made and offer a proposal as to when such a determination should be made. Such a proposal must also be included in a motion to revoke or amend certification.

(C) Action by the Court. As soon as practicable, the court shall determine how, when, by whom, and to whom the notice shall be given; the content of the notice; and by whom the response to the notice is to be received. The court may postpone the notice determination until after the parties have had an opportunity for discovery, which the court may limit to matters relevant to the notice determination.

(D) [Opt-out alternative] Manner of Giving Notice.

(1) Reasonable notice of the action shall be given to the class in such manner as the court directs.

(2) The court may require individual written notice to all members who can be identified with reasonable effort. In lieu of or in addition to individual notice, the court may require notice to be given through another method reasonably calculated to reach the members of the class. Such methods may include using publication in a newspaper or magazine; broadcasting on television or radio; posting; or distribution through a trade or professional association, union, or public interest group.

(3) In determining the manner of notice the court shall consider, among other factors,

(a) the extent and nature of the class,

(b) the relief requested,

(c) the cost of notifying the members,

(d) the resources of the plaintiff,

(e) the possible prejudice to be suffered by members of the class or by others if notice is not received.

(D) [Opt-in alternative] Manner of Giving Notice. The court shall allow notice to be given in the manner proposed by the plaintiff unless the court finds that the proposal is not reasonably calculated

to notify a significant portion of the class. Examples of methods of giving notice include mailing; publication in a newspaper or magazine; broadcasting on television or radio; posting; or distribution through a trade or professional association, union, or public interest group.

(E) Content of Notice. The notice shall include

(1) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

(2) [Opt-out alternative] a statement of the right of a member of the class to be excluded from the action by filing an election to be excluded, including the manner and time for exercising the election;

(2) [Opt-in alternative] a statement of the right of a member of the class to be included in the action by filing an election to be included, specifying the manner and time for exercising the election;

(3) a description of possible financial consequences for the class;

(4) a general description of any counterclaim or notice of intent to assert a counterclaim by or against members of the class, including the relief sought;

(5) [Opt-out alternative] a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(5) [Opt-in alternative] a statement that the judgment, whether favorable or not, will bind those members of the class who elect to include themselves in the action;

(6) a statement that any member of the class may intervene in the action;

(7) the address of counsel to whom inquiries may be directed; and

(8) other information the court deems appropriate.

(F) Cost of Notice.

(1) The plaintiff shall bear the expense of the notification required by section (A). The court may require the defendant to cooperate in the notice process, but any additional costs incurred by the defendant in doing so shall be paid by the plaintiff.

(2) Upon termination of the action, the court may allow as taxable costs the expenses of notification incurred by the prevailing party.

(G) In addition to the notice required by section (A), during the course of the action the court may require that notice of any other matter be given in such manner as the court directs to some or all of the members of the class.

RULE 208.4. JUDGMENT.

(A) The judgment shall describe the parties bound.

(B) A judgment entered before certification of a class binds only the named parties.

(C) A motion for accelerated or summary judgment (including partial summary judgment) may be filed and decided before the decision on the question of class certification. A judgment entered before certification in favor of a named party does not preclude that party from representing the class in the action if that is otherwise appropriate.

(D) A complaint that does not include class action allegations may not be amended to include such allegations after the granting of accelerated or summary judgment or partial summary judgment.

(E) [Opt-out alternative] A judgment entered in an action certified as a class action binds all members of the class who have not filed an election to be excluded, except as otherwise directed by the court.

(E) [Opt-in alternative] A judgment entered in an action certified as a class action is only binding on members of the class who have filed an election to be included.

RULE 208.5. DISMISSAL OR COMPROMISE.

An action certified as a class action may not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to the class in such manner as the court directs.

RULE 208.6. STATUTE OF LIMITATIONS.

(A) The statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action.

(B) The statute of limitations resumes running against class members other than representative parties and intervenors:

(1) on the filing of a notice of the plaintiff's failure to move for class certification under rule 208.2(B);

(2) 30 days after notice has been made under rule 208.3(A) of the entry, amendment, or revocation of an order of certification eliminating the person from the class;

(3) on entry of an order denying certification of the action as a class action;

(4) [Opt-out alternative] on filing an election to be excluded;

(4) [Opt-in alternative] on the expiration of the time for filing an election to be included in the class without the person having filed such an election;

(5) on final disposition of the action.

(C) If the circumstance that brought about the resumption of the running of the statute is superseded by a further order of the trial court, by reversal on appeal, or otherwise, the statute of limitations shall be deemed to have been tolled continuously from the commencement of the action.

RULE 208.7. DISCOVERY.

Representative parties and intervenors are subject to discovery in the same manner as parties in other civil actions. Other class members are subject to discovery in the same manner as persons who are not parties, and may be required to submit to discovery procedures applicable to parties to the extent ordered by the court.

RULE 208.8. COUNTERCLAIMS.

(A) Right to File Counterclaims. A party to a class action may file counterclaims as in any other action, including counterclaims by or against a class or individual class member.

(B) Notice of Intent to File Counterclaims. The defendant may file notice of intent to assert counterclaims against absent class members before notice of certification is given under rule 208.3(A), identifying or describing the persons against whom counterclaims may be filed and describing the nature of the counterclaims.

(C) [Opt-out alternative] Time to File. A counterclaim against a class member other than a representative party must be filed and served within 60 days after the class member intervenes or files a claim for distribution of a share of any award recovered in the action, whichever is earlier, or within such further time as the court allows.

(C) [Opt-in alternative] Time to File. A counterclaim against a class member other than a representative party must be filed and served within 60 days after the class member intervenes or files an election to be included in the action, whichever is earlier, or within such further time as the court allows.

(D) If the notice of certification given under rule 208.3(A) did not notify potential class members of the counterclaim, each class member against whom a counterclaim is asserted shall be permitted to elect to be excluded from the action. Notice of this right shall be served with the counterclaim.

(E) Control of Action. The court shall take such steps as are necessary to prevent the pendency of counterclaims from making the action unmanageable as a class action. Such steps include but are not limited to severing counterclaims for separate trial under GCR 1963, 505.2 or ordering that consideration of the counterclaims be deferred until after determination of the issue of the defendant's liability, at which time the court may hear the counterclaims, remove them to a

lower court, change venue, dismiss them without prejudice, or take other appropriate action.

RULE 208.9. DEFENDANT CLASSES.

(A) An action that seeks to recover money from individual members of a defendant class may not be maintained as a class action.

(B) A representative of a defendant class, other than a public body or a public officer, may decline to defend the action in a representative capacity unless the court finds that the convenient administration of justice otherwise requires.

COMMITTEE COMMENTS

208.1(A). The proposal includes the four prerequisites to a class action found in FR Civ P 23(a). It also includes two other requirements that in federal practice are applicable only to class actions brought under FR Civ P 23(b)(3): Subsection (A)(2) of the proposal includes a requirement that the common questions predominate over questions affecting only individual members, and subsection (A)(5) requires that the class action technique be superior to other available methods of adjudicating the controversy in promoting the convenient administration of justice. This form reflects the decision to eliminate in this proposal the distinctions between "types" of class actions. See rule 208.1(B). For comparable provisions, see Pa R Civ P 1702; NY CPLR § 901.

208.1(B). The proposal does not include the division of types of class actions, with distinctive procedures, found in both the present Michigan rule ("true", "hybrid", and "spurious" class actions) and the federal rule (FR Civ P 23[b]). Rather, the language describing the first two categories of actions in the federal rule is included in subsections (B)(1) & (2) along with other factors relevant to the appropriateness of a class action. The language of subsection 208.1(B)(2) has been changed from that of FR Civ P 23(b)(2) to make it clearly appropriate to defendant class actions. The requirements of predominance of common questions and superiority of the class action technique found in FR Civ P 23(b)(3) were included in rule 208.1(A).

Although no formal categories of class actions are recognized by the proposed rule, such factors as the nature of the class and the type of relief sought should be considered in deciding whether to certify a class and in regulating the procedures to be followed.

208.1(C). These alternative provisions express the basic difference between the opt-out and opt-in rules. Note that the opt-out proposal differs from the federal rule in that it expands the right to opt out to all class actions, rather than limiting that right to actions under FR Civ P 23(b)(3). Similarly, the opt-in proposal extends that option to all

class actions, rather than only to "spurious" class actions. See *Grigg v Michigan National Bank, supra,* 405 Mich 170-174.

208.1(D). Class members would have an absolute right to intervene in the action, although the degree of an intervenor's participation would be subject to the court's authority to control the course of proceedings. This authority is often expressed in the language of FR Civ P 23(d)(1) as, "measures to prevent undue repetition or complication in the presentation of evidence or argument." The rule does not include a separate provision of the sort found in FR Civ P 23(d) or GCR 1963, 208.4, regarding orders in the conduct of actions. In general the committee regarded such a provision as unnecessary; there are specific provisions, such as this one, stating particular authority. See also rule 208.3(G).

The committee also recommends that GCR 1963, 209.1(1) be amended to reflect this new rule-based right to intervene.

The proposed rule does not include language like that in FR Civ P 23(c)(2)(C) regarding the right of a class member to "enter an appearance". The meaning of that provision has never been clear.

208.1(E). This section is modeled on provisions such as NY CPLR § 901(b) and Or R Civ P 32(L). Minimum measures of recovery, unrelated to actual damages, found in some regulatory statutes (see, *e.g.,* MCL 445.360[2]; MSA 19.853[20][2], MCL 445.243[2]; MSA 19.655[53][2]) are designed to reduce the disincentive to bring actions challenging violations that results from the relatively small damages suffered by any individual. The class action device for bringing together many such claims achieves the same purpose, making the minimum damages provisions unnecessary. In addition, allowing recovery of the minimum damage as to each of a large number of class members might often impose an unreasonable and unintended penalty on a defendant.

208.2(A). The rule requires the prompt filing of a motion to certify the case as a class action. It is designed to prevent cases from remaining pending for extended periods without the propriety of a class action being raised.

208.2(B). This section provides the enforcement mechanism to compel the prompt filing of a motion to certify the action. If the plaintiff has not filed the motion, the defendant may file a notice of that fact, and the class allegations of the complaint are deemed stricken. However, if the plaintiff files the certification motion before the defendant files a notice, the untimeliness of the motion does not prevent the court from certifying the case as a class action. If notice is filed by the defendant, the court may reinstate the class action allegations on an appropriate showing.

208.2(C). Although the plaintiff must file a motion for certification promptly, the judge is not ordinarily to rule on the certification issue until either all defendants have been served or the remaining unserved summonses have expired under GCR 1963, 102.4. The reason is the potential unfairness of deciding a certification motion before one of the defendants has even been given notice of the action.

The language in FR Civ P 23(c)(1) authorizing conditional orders regarding certification and amendment of such orders is not included. Such language was thought unnecessary; in addition, the rule contains a number of specific provisions regarding amendment and revocation of orders.

If decision on the certification question is delayed pending discovery, it may be appropriate for the court to limit discovery to questions relevant to the certification issues.

208.3(A). This is the basic provision covering notification of the pendency of the action. Notice is required in all class actions, unlike the federal practice in which there is an explicit notice requirement only in actions based on FR Civ P 23(b)(3). See FR Civ P 23(c)(2). In the case of an amendment of a prior certification that changes the members of the class, the rule requires that notice be directed to those affected by the change. Notice to other class members would be within the discretion of the court.

After having received the initial notice of the action, class members may rely on its continued pendency and are entitled to notice of changes in the nature of the action. For this reason, a later notice of an order revoking certification or amending a description of a class to exclude persons previously included ordinarily should be made in the same manner as the first.

208.3(B). Requiring that a notice proposal be included in the motion to certify encourages the early consideration of the important notice question. In some cases it may not be feasible to propose a specific notice procedure at this point because the appropriate kind of notice may depend on the facts regarding the size and nature of the class that will become known only after certification and perhaps after discovery on the certifications issues. Thus, the plaintiff is given the option of explaining why the notice question should be deferred.

208.3(C). The court is to specify the details of the notice procedure to be followed.

208.3(D). The opt-out and opt-in provisions regarding the manner of giving notice differ.

Under the opt-out rule the court may, but need not, require individual notice to all class members as is required in certain federal class actions under FR Civ P 23(c)(2). Other nonexclusive methods of

possible notice are listed. The opt-out rule also lists the factors to be considered in selecting the manner of notice. Presumably a court would be more inclined to require individual notice in a damages case analogous to actions under FR Civ P 23(b)(3) than it would in a case seeking injunctive or declaratory relief, as to which the federal rule does not expressly require notice.

The opt-in rule contains less detail. Only those who affirmatively elect to join in the action are included in the class (and are therefore bound by the judgment). As a result, a potential class member who does not actually receive notice, and therefore fails to join in the action, is not prejudiced by the failure of notice. This avoids the argument that due process requires that the notice used meet a particular standard. Thus, while the court retains the authority to specify the manner of notice, greater weight is given to the plaintiff's preference as to the manner of notice. This is consistent with the result in *Grigg v Michigan National Bank,* which considered the notice requirements in the context of the opt-in nature of the present Michigan rule. 405 Mich 176-180.

208.3(E). The proposal includes considerably more detail regarding the content of notice than does the federal rule. FR Civ P 23(c)(2). The provision is modeled on § 7 of the Uniform Class Actions Act.

Although there are differences between the opt-out and opt-in rules in subsections (2) and (5), these are relatively minor variations that take account of the difference in the composition of the class under the two systems.

The language of subsection (7) is worded generally to leave open the possibility that the notice may include the address of counsel for the party opposing the class as well as that of counsel for the class representative.

208.3(F). The committee rejected the notion found in the rules of several jurisdictions (DC Super Ct R Civ P 23-I[c][3]; NJ R Civ P 4:32-2[b]) that the cost of the basic notification of the action may be placed on the defendant. The court can, however, require the defendant to cooperate in the notice process, for example, by providing information from its records regarding the names and addresses of potential class members or by including notice in regular mailings made to potential class members. However, the plaintiff would be required to pay the additional costs incurred by the defendant in connection with such cooperation.

208.3(G). This provision is similar to FR Civ P 23(d)(2), allowing the court to direct notice to the class of various steps in the action in addition to orders regarding certification. For example, the court might require notice of a motion to revoke or amend certification if it concludes that the interests of the class members who would be

excluded by revocation or amendment may not be adequately represented.

The considerations regarding who is to bear the cost of such additional notices may be different than those regarding the basic notice required by section (A). For example, if the defendant wishes to give the class notice of a settlement offer that was rejected by the class representative, it might be appropriate to place the cost of the notice on the defendant.

208.4. Sections (B) and (E) are the basic provisions regarding the binding effect of a judgment before and after certification.

Section (C) deals with the consideration of a motion for accelerated or summary judgment before certification. Most often, such a motion would be filed by a defendant, and, if the defendant obtains a judgment, section (B) would control. However, sometimes a plaintiff may wish to bring such a motion before certification to obtain an early ruling on controlling legal questions before incurring the expense of notice. The rule would also apply when a judgment is entered in favor of the plaintiff after consideration of a motion by the defendant (see GCR 1963, 117.3). In such cases, the fact that a judgment has been entered in favor of the named representative does not preclude that party from representing the class if the other requirements of the rule are met. Thus, a person could elect to join, or not to be excluded from, the class after the representative has achieved at least partial success. While such one-way intervention is generally prohibited under the federal practice, the committee determined that one-way intervention is appropriate where the representative has established a right to recover as a matter of law. In all other situations, the committee was persuaded that the membership of the class should be established, and thus the extent of the defendant's possible liability known, before the merits are reached.

Section (D) provides that a plaintiff who has obtained summary judgment in an action that was not brought as a class action may not convert it into a class action through an amendment of the complaint after judgment. The objective is to assure that the defendant has notice of the potential class action status of the case when responding to a plaintiff's motion for summary judgment.

208.5. The rule differs from FR Civ P 23(e) in that it requires court approval and notice of dismissal or compromise only in actions that have been certified as class actions. This makes it clear that notice is not required merely because the complaint includes class action allegations. The court may often find it appropriate to provide notice by the same means as was used in effecting notice originally.

208.6. Unlike the federal rule, the proposal includes an explicit provision on the statute of limitations. The principle that the filing of

the action tolls the statute for all class members is taken from *American Pipe & Construction Co v Utah,* 415 US 538; 94 S Ct 756; 38 L Ed 2d 713 (1974).

The rule also sets out specific provisions to start the statute running again as to class members other than representative parties and intervenors.

208.7. In the absence of a rule on the subject, the federal cases have exhibited some uncertainty as to the availability of discovery procedures against absent class members. See, *e.g., Clark v Universal Builders, Inc,* 501 F2d 324 (CA 7, 1974); *Brennan v Midwestern United Life Ins Co,* 450 F2d 999 (CA 7, 1971). The basic rule set out in the proposal is that representative parties and intervenors are treated as are parties in other actions for discovery purposes, and absent class members are treated as nonparties so that interrogatories, requests for admissions, and other "party" discovery techniques are not available. However, on a showing by the party opposing the class, the court has the discretion to allow the use of "party" techniques against absent class members. Some of the factors that might be considered in deciding whether to allow such expanded discovery as to absent class members are the timing of the request, whether the representatives of the class are seeking discovery on the subject matter to be covered, and whether the discovery sought would result in annoyance or undue burden or expense for the members of the class.

Of course the usual provisions allowing protective orders would be available as in other actions. See GCR 1963, 306.2, 309.5.

208.8. The treatment of counterclaims has caused problems in federal practice. The pendency of counterclaims or potential counterclaims has been said to make individual questions predominate over common ones, *e.g., Cotchett v Avis Rent-A-Car System, Inc,* 56 FRD 549 (SD NY, 1972), or to make the action unmanageable as a class action, *e.g., Alpert v US Industries, Inc,* 59 FRD 491 (CD Cal, 1973). The potential for such difficulties was noted in the Supreme Court's decision in *Grigg v Michigan National Bank, supra,* 405 Mich 184.

The committee's proposal is to allow unrestricted filing of counterclaims by defendants in class actions, but to follow the approach of a number of more recent federal decisions which emphasize that the management tools available to the trial judge will almost always make it possible both to permit the action to proceed as a class action and also to allow the defendant to raise counterclaims that may reduce or eliminate its liability to at least some class members. *E.g., National Super Spuds, Inc v New York Mercantile Exchange,* 75 FRD 40 (SD NY, 1977). In addition to the availability of severance of counterclaims for separate trial under GCR 1963, 505.2, the court may defer consideration of counterclaims until after decision on the

question of the liability of the defendant to the class, thereafter taking whatever steps are appropriate to deal efficiently with the counterclaims. Especially in cases in which the defendant is found not liable to the class, it may be appropriate to transfer or dismiss without prejudice counterclaims that would not otherwise be appropriately litigated in the court in which the class action was brought.

Section (A) would permit the filing of a counterclaim against a class or subclass, although the committee anticipates that it would be rare for such a counterclaim to itself meet the requirements for class certification. If a class action claim is asserted by counterclaim, the defendant asserting it will be treated as the "plaintiff" in applying the procedural provisions of the rule.

Under section (B) the defendant may file notice of its intention to assert counterclaims before notice is given to the class. Information about this notice would be included in the notice to members under rule 208.3(E)(4), and if the court found that this was adequate notice, there would be no need to give class members an additional opportunity to exclude themselves from the action when the actual counterclaim was filed. See rule 208.8(D).

Section (C) of each version of the rule permits the defendant to wait until a particular class member has indicated an intent to participate in the action before filing a counterclaim.

Under section (D), if the previous notice given to class members did not notify the class members of counterclaims, a class member against whom a counterclaim is asserted must be given an opportunity to elect to be excluded from the class when notice of the counterclaim's actual filing is given.

208.9. While the committee believed that actions against a class of defendants can serve a useful purpose in cases seeking injunctive or declaratory relief, or in which there is some common fund or other property in which defendant class members have an interest, it concluded that the problems associated with actions attempting to recover money from individual members of a defendant class are insurmountable. The committee was convinced of the desirability of permitting class members to exclude themselves from the action under either the opt-in or opt-out version of the rule. However, defendant class members would rarely, if ever, opt in to a class action seeking damages from them. And under the opt-out version, most defendant class members would opt out unless they lacked notice of the action. If for some reason such a person wished to become a defendant, it would probably be possible to intervene in an action brought against other individuals.

Section (B) provides that except for public bodies or officers the named representative of a defendant class may decline to serve in

that capacity unless a showing is made that the convenient administration of justice requires otherwise. Federal courts have at times imposed the burden of representative status on an unwilling defendant, *e.g., Research Corp v Pfister Associated Growers, Inc,* 301 F Supp 497 (ND Ill, 1969). The committee proposal is intended to discourage this practice.

A named defendant who declines to serve as a representative would, of course, remain in the action in his or her individual capacity.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

MAY 21, 1981

MILLER v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY. (Docket Nos. 62962, 62963.) Rehearing denied. *Sloan, Benefiel & Farrer* for plaintiffs-appellants. *Willingham, Coté, Hanslovsky, Griffith & Foresman, P.C.,* and *James, Dark & Brill* for defendant-appellant. Reported at 410 Mich 538.

SMITH v ALLENDALE MUTUAL INSURANCE COMPANY, SABRAW v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, BULLOCK v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, CSUTORA v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, HANSEN v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, and WAUGH v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY. (Docket Nos. 60645, 62465-62470.) Rehearing denied. *Goodman, Eden, Millender & Bedrosian* for plaintiffs-appellants Smith. *Cicinelli, Mossner, Majoros & Alexander, P.C.,* for plaintiffs-appellees Sabraw, Bullock, Csutora and Hansen. *Martin & Martin* for plaintiff-appellee Waugh. *David, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendants-appellees Allendale Mutual

Insurance Company and Factory Mutual Engineering Association. *Howard S. Otto* and *George M. Tunison* for defendant-appellant Michigan Millers Mutual Insurance Company. Reported at 410 Mich 685.

BERGER v WEBER. (Docket No. 61348.) Rehearing denied. *Church, Wyble, Kritselis, Anderson & Robinson, P.C.,* for plaintiffs-appellees. *Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark* for defendants-appellants. Reported *ante,* 1.

PEOPLE v WALTER JOHNSON and PEOPLE v TAVOLACCI. (Docket Nos. 62147, 62854.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, for the people. *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people, appellant, in *Johnson. Frank R. Del Vero,* Prosecuting Attorney, and *Thomas C. Nelson,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people in *Tavolacci. J. David Reck* for defendant-appellant Tavolacci. Reported *ante,* 50.

AUGUST 31, 1981

PROPOSED AMENDMENT OF DCR 4002. On order of the Court, this is to advise that the Court is considering whether to amend DCR 4002. Before determining whether the amendment should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

(The present language is to be repealed and replaced by the following language:)

DC RULE 4002. RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

.1 Applicability. This rule applies to all civil actions except civil infractions and to all criminal actions that can be adjudicated only by a judge. Any court may adopt a computerized, microfilm, or word-processing records system that substantially complies with this rule.

.2 Indexes and Files. The clerk shall keep records of each case consisting of a numerical index, an alphabetical index, a register of actions, and a case file. These records shall be maintained in such

form and style as may be prescribed by the supreme court. The records shall include the following characteristics.

(a) Numerical Index. Each case commenced shall be assigned a case number on receipt of the complaint with a prefix identifying the last two digits of the year filed. A suffix code may be included to designate a case type. The date filed and a case caption shall be recorded on the list of consecutive case numbers designated for the entire court, a particular division of the court, or a particular type of case. The clerk shall maintain a central numerical index for the court or numerical indexes for different types of cases or divisions of the court as determined by the chief judge. The case number of each case shall be recorded on the corresponding register of actions, file folder, and alphabetical index.

(b) Alphabetical Index. The clerk shall maintain an alphabetical central card file index or separate alphabetical index card indexes for different types of cases or different divisions as determined by the chief judge.

In civil actions, one alphabetical index shall include the names of all parties and the case number.

In criminal actions, one alphabetical index shall include the defendant's name, the case number, and the offense charged.

(c) Register of Actions. The clerk shall keep a record of each case known as a register of actions. When a case is commenced, a register of actions form shall be prepared and placed in the file folder. The case identification information in the alphabetical index shall be entered on the register of actions. In addition, all fees paid, all papers filed, all process issued and returned, and all court actions, orders, judgments, and verdicts pertaining to the case shall be noted chronologically on the register of actions. Each notation shall be brief, but shall show the nature of each paper filed, each order or judgment of the court, and the returns showing execution. Each notation shall be dated and initialed by the person recording the action.

(d) Case File. The clerk shall maintain a file folder for each case commenced that shall contain all pleadings, orders, judgments, and other documents filed in the case.

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

.4 Abolished Records.

(a) Journals. Journals shall not be required in the district court.

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

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated 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 GCR 1963, 933. Comments on this proposal may be sent to the Supreme Court clerk within 60 days after it is published in the State Bar Journal.

SEPTEMBER 8, 1981

FALK v STATE BAR OF MICHIGAN. (Docket No. 60722.) Rehearing denied without prejudice to plaintiff's presenting the issues raised in further proceedings in this pending case. *Allan Falk, in propria persona,* plaintiff. Reported *ante,* 63.

PEOPLE v LYNN. (Docket No. 63503.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *A. George Best, II,* Assistant Prosecuting Attorney, for the people, appellant. State Appellate Defender, *Nora J. Pasman,* Assistant Defender, for defendant-appellee. Reported *ante,* 291.

PEOPLE v CLABIN. (Docket No. 65138.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,* Prosecuting Attorney, and *John L. Wildeboer,* Assistant Prosecuting Attorney, for the people. State Appellate Defender, *P. E. Bennett,* Assistant Defender, for defendant-appellant. Reported *ante,* 472.

PEOPLE v WILDER. (Docket No. 61305.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people. *Carl Ziemba* for defendant-appellant. Reported *ante,* 328.

PEOPLE v PATTON. (Docket No. 64439.) Rehearing denied. *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, *Randy H. Smith,* Prosecuting Attorney, and *Leonard J. Malinowski,* Assistant Attorney General (Prosecuting Attorneys Appellate Service), for the people. Reported *ante,* 490.

INDEX-DIGEST

ABUSE OF DISCRETION—*See*
COURTS 4

ACCIDENTS—*See*
AUTOMOBILES 10

ACTIONS.
See, also, AUTOMOBILES 1, 4, 6, 8-11; CONSTITUTIONAL LAW 5.
NEGLIGENCE.
1. *It is not enough for the Court to invoke analogies in balancing the interest of an injured person's child in monetary redress for injury to the parent-child relationship against the consequences of imposing yet another potential liability upon a negligent defendant; an independent re-examination of the policy considerations implicated by the creation of such a separate cause of action is called for. Berger v Weber,* 411 Mich 1.
2. *The soundness of extending the common law to permit recovery from a negligent tortfeasor for loss of spousal consortium has been questioned and the Court should not proceed further and permit a child to recover for loss of a parent's society and companionship caused by a negligent injury to the parent merely because to do so would appear to be logical; the common law is free neither of some anomalies nor of everything illogical, but that is no reason for extending them. Berger v Weber,* 411 Mich 1.
3. *The concept of allowing a person to recover for consequential loss resulting from physical injury to another person is an idiosyncracy in the law; reasonable limits on liability for the consequences of negligent acts must be imposed, a decision which is essentially political. Berger v Weber,* 411 Mich 1.
4. *The extension for tort recovery beyond the primary victim remains the exceptional case, despite the increased acceptance of the spouse's action for loss of consortium; to the extent that a second tort victim's loss is likely to be duplicated in the primary victim's recovery, courts should be wary of creating additional claims deriving from the same tortious act, particularly where all injuries are localized within the same family unit. Berger v Weber,* 411 Mich 1.
5. *There is a limit to the range of injuries and the dollar amount of recovery which can be spread across society through the interaction of the tort litigation and insurance systems; where recognition is sought for a new cause of action subjecting a*

ACTIONS—Cont'd
negligent defendant to liability to a child of the victim, the inadequacy of monetary damages to make whole the loss suffered, considered in light of the social cost of paying such awards, and of the uncertainty that paying them will produce any social benefit, constitutes a strong reason for refusing to recognize the asserted claim. Berger v Weber, 411 Mich 1.

PARENT AND CHILD.

6. A child may recover for loss of a parent's society and companionship caused by a negligent injury to the parent. *Berger v Weber,* 411 Mich 1.

7. The elements of love, companionship, affection, society, comfort, service and solace are similar in the relation of husband and wife, and that of parent and child; in each case they are deserving of protection, and compensating a child who has suffered emotionally because of the deprivation of a parent's love and affection may provide the child with the means of adjustment to the loss without emotional handicap. *Berger v Weber,* 411 Mich 1.

PERSONAL INJURY.

8. *An injured parent should be permitted, in his or her own action, to recover certain damages resulting from the effect of the parent's injury upon the child; injury which removes a parent from providing the degree of affection, society, and companionship previously provided to the child, may necessitate expenditures by the parent to obtain for the child services or companionship that the parent would normally have provided, and although the child should have no independent right of recovery, the cost of substitute services should be recoverable in the injured parent's action. Berger v Weber,* 411 Mich 1.

ADJUDICATIVE FACTS—*See*
PERJURY 4

ADMINISTRATION OF JUSTICE—*See*
ATTORNEY AND CLIENT 15, 17, 19
CONSTITUTIONAL LAW 1-3, 14, 27

ADMISSIBILITY—*See*
CRIMINAL LAW 4, 18
EVIDENCE 1-3
HOMICIDE 8-10
JUDGES 17
NEGLIGENCE 7, 8
WITNESSES 1

ADVICE OF RIGHTS—*See*
CRIMINAL LAW 28, 33, 34

AFFECTION—*See*
ACTIONS 7

AFFIDAVITS—*See*
HOMICIDE 8, 9

AGENCY—*See*
HOSPITALS 2

AIDING AND ABETTING—*See*
CRIMINAL LAW 1
WEAPONS 1, 2

AIR FORCE PERSONNEL—*See*
WITNESSES 1

AIRMEN—*See*
WITNESSES 1

ALLOCUTION—*See*
CRIMINAL LAW 39

AMENDMENT—*See*
AUTOMOBILES 7

AMENDMENT OF DISCIPLINE—*See*
ATTORNEY AND CLIENT 7, 9, 10

AMENDMENT OF STATUTES—*See*
STATUTES 1, 3, 5

ANEURYSM—*See*
EVIDENCE 2, 3

ANIMALS—*See*
AUTOMOBILES 11

"ANY ARTICLE"—*See*
ROBBERY 1, 2

APPEAL—*See*
ATTORNEY AND CLIENT 8, 10
CRIMINAL LAW 3
PARENT AND CHILD 1
TRIAL 1
VENUE 1

APPEARANCE OF FAIRNESS—*See*
CRIMINAL LAW 41

ARGUMENT OF COUNSEL—*See*
TRIAL 1
WITNESSES 2-5

ARISING FROM OWNERSHIP—*See*
AUTOMOBILES 11

ARISING OUT OF MAINTENANCE—*See*
INSURANCE 8-10, 12, 13

ARMED ROBBERY—*See*
HOMICIDE 3, 4, 6
ROBBERY 1, 2

ARMED SERVICES.

POSSE COMITATUS ACT.

1. The Posse Comitatus Act was intended to preclude the use of military personnel as a military force to assist in execution of the laws, and not to prevent a serviceman, acting as would any other citizen, from assisting civilian authority in enforcing the law (18 USC 1385). *People v Burden,* 411 Mich 56.
2. One must look in each case to the nature of assistance rendered civilian authority by military personnel to determine if the aid may be characterized as military and hence forbidden by the Posse Comitatus Act (18 USC 1385). *People v Burden,* 411 Mich 56.

ARREST—*See*
HABEAS CORPUS 1, 2

ASPORTATION—*See*
KIDNAPPING 1-5

ASSIGNMENT OF JUDGES—*See*
JUDGES 1

ASSISTANCE OF CIVILIAN AUTHORITY—*See*
ARMED SERVICES 1, 2
WITNESSES 1

ASSISTANCE OF COUNSEL—*See*
CRIMINAL LAW 2, 3

ATTEMPT—*See*
CRIMINAL LAW 19
FORGERY 1-3

ATTORNEY AND CLIENT.

See, also, CONSTITUTIONAL LAW 4, 7-17, 19, 27; LIMITATION OF ACTIONS 1, 3, 4.

DISCIPLINARY PROCEEDINGS.

1. The separation of the State Bar Grievance Board into two independent bodies, the Attorney Grievance Commission to serve the prosecutorial function and the Attorney Discipline Board to perform the adjudicative functions, does not require that a lawyer be accorded more substantive due-process rights in disciplinary proceedings before the Attorney Discipline Board (GCR 1963, 957, 959). *Matter of Daggs,* 411 Mich 304.
2. Only after a decision on the merits of the alleged misconduct

ATTORNEY AND CLIENT—Cont'd

in an attorney discipline case is evidence of prior misconduct relevant for the formulation of an order of discipline (GCR 1963, 964.2). *Matter of Daggs,* 411 Mich 304.

3. A lawyer charged with professional misconduct was not unfairly prejudiced by the inclusion in the complaint of allegations concerning his prior professional misconduct where the record shows that the hearing panel of the Attorney Discipline Board was fully cognizant of the potential for unfair prejudice stemming from the allegations and expressly noted and exercised its discretion by limiting the Grievance Administrator to his proofs in one of the prior matters and refusing to consider the others, many of the findings by the hearing panel refer to undisputed and unexplained delays during which the rights of the respondent's clients were prejudiced, the respondent's credibility was seriously undermined by his own testimony, and there is nothing in the record upon which to conclude that the preponderance of evidence standard was not met (GCR 1963, 964.2). *Matter of Daggs,* 411 Mich 304.
4. To obtain a new disciplinary hearing on the ground of newly discovered evidence a respondent lawyer must show that the evidence and not merely its materiality is newly discovered, the evidence is not merely cumulative, a different result is probable on remand, and reasonable diligence could not have discovered and produced the evidence. *Matter of Daggs,* 411 Mich 304.
5. A respondent lawyer is not entitled to a new disciplinary hearing on the ground of newly discovered evidence because of an affidavit by an expert on questioned documents who concluded that the respondent did not make the alteration of the amount of a receipt given to his client, which was admitted in evidence against the respondent, where the substance of the affidavit is merely cumulative and not newly discovered, the credibility of the witnesses and the materiality of the alteration were assessed by the hearing panel in reaching its decision in the first hearing, and the respondent took no steps during the ensuing 5-1/2 months of the proceedings after the hearing to request expert examination of the alteration, or a new hearing after the hearing panel made its report. *Matter of Daggs,* 411 Mich 304.
6. A respondent lawyer's allegation of fraud by the complaining client is insufficient as a basis for a new disciplinary hearing where the fraud alleged, the alteration of the amount of a receipt signed by the respondent, is distinctly collateral to the issue whether the respondent accepted money to protect the client's rights, the hearing panel concluded that an undetermined amount was paid to the respondent, and that the respondent failed to protect the client's rights. *Matter of Daggs,* 411 Mich 304.
7. The Attorney Discipline Board has the power to amend an order of discipline against a lawyer by a hearing panel; reduction of the length of a respondent's suspension from the practice of law is, perforce, an amendment of the hearing panel's order of discipline (GCR 1963, 967.4). *Matter of Daggs,* 411 Mich 304.

ATTORNEY AND CLIENT—Cont'd

8. The powers granted to the Attorney Discipline Board to review the order of a hearing panel in disciplinary proceedings against a lawyer are substantially identical to those granted to its predecessor, the State Bar Grievance Board; but the broad grant of power is not unlimited, and abuse of discretion may be found under the proper circumstances (GCR 1963, 967.4). *Matter of Daggs,* 411 Mich 304.

9. The Attorney Discipline Board must state reasons for the modification of an order by a hearing panel so that its explanation will provide guidance to future hearing panels, and to the Attorney Discipline Board, when confronting similar or analogous facts (GCR 1963, 967.4). *Matter of Daggs,* 411 Mich 304.

10. The Attorney Discipline Board did not abuse its discretion in reducing an order of a hearing panel suspending a lawyer from the practice of law for two years to suspension for one year where the board found the imposition of a two-year suspension too severe in the light of the misconduct proved, a review of the whole record shows that the action of the board was principled and reasoned, and the board sufficiently explained its reasons that the Supreme Court was able to exercise its function of review (GCR 1963, 967.4, 971). *Matter of Daggs,* 411 Mich 304.

MALPRACTICE.

11. The common-law definition of malpractice is not limited to the negligent performance of professional duties by a physician or surgeon; the Supreme Court long ago implicitly recognized a common-law action for legal malpractice. *Sam v Balardo,* 411 Mich 405.

STATE BAR.

12. An action for superintending control over the State Bar challenging activities supported by compulsory dues as infringing on an objecting member's First Amendment rights requires the development of an adequate record of the activities of the State Bar, and particularly those activities addressed to influencing legislation, for the Court to agree upon a decision in the matter (US Const, Ams I, XIV; Const 1963, art 6, § 4; MCL 600.215, 600.219, 600.904; MSA 27A.215, 27A.219, 27A.904; GCR 1963, 711, 851[6]). *Falk v State Bar,* 411 Mich 63.

13. *The Supreme Court rules concerning the integrated State Bar of Michigan have as their purposes aiding in the promotion of improvements in the administration of justice and the advancement of the science of jurisprudence, in the improvement of the relations between the profession and the public, and in the promotion of the interests of the legal profession in this state (Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

14. *The privilege of practicing law in Michigan is conditioned upon association with, and financial support of, the integrated State Bar of Michigan compelled by the state (Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rules 3, 4). Falk v State Bar,* 411 Mich 63.

15. *The broad injunction of Rule 1 of the State Bar to aid in*

ATTORNEY AND CLIENT—Cont'd

promoting improvements in the administration of justice is consonant with the legislative purpose that the Supreme Court provide for the "regulation" of the State Bar; there is no rule of statutory construction which would confine "regulation" of the State Bar exclusively to regulation and discipline of the profession, continuing legal education, and related licensing functions, and the associated administrative functions (MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar, 411 Mich 63.

16. *The Legislature must have intended that "regulation" of the State Bar, as used in the statute creating the integrated State Bar, be defined expansively to provide for the Supreme Court the flexibility to insure that the State Bar can achieve such worthy results as restoring public confidence in the Bar, enlarging professional consciousness, energizing the Bar's responsibility to the public, improving the administration of justice, and being the only means whereby every member of the State Bar can share in its public and professional responsibility (MCL 600.901, 600.904; MSA 27A.901, 27A.904). Falk v State Bar,* 411 Mich 63.

17. *The Supreme Court has the inherent power, independent of legislation, to include in its rules and regulations the provisions of State Bar Rule 1 that the State Bar shall aid in promoting improvements in the administration of justice and advancements in jurisprudence (State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

18. *An action for superintending control over the State Bar challenging activities supported by compulsory dues as infringing on an objecting member's First Amendment rights, a matter within the Supreme Court's original jurisdiction, is not like ordinary litigation, in which a party is normally limited to the relief to which he has proven himself entitled; the case calls for the discretionary exercise of the Court's extraordinary superintending control and considers not merely the relative rights of the parties but, rather, the proper organization and actions of the State Bar in the light of the rights of all of its members and the interests of the state (US Const, Ams I, XIV; Const 1963, art 6, § 4; MCL 600.215, 600.219, 600.904; MSA 27A.215, 27A.219, 27A.904; GCR 1963, 711, 851[6]). Falk v State Bar,* 411 Mich 63.

19. *Improving the administration of justice properly includes at least activities primarily designed to educate the public about the law and legal services, to provide legal services to the indigent, to help the public select legal counsel intelligently through the Lawyer Referral Service, and to provide forums for discussion of problems facing the courts and the legal profession (MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

20. *It may be better for the Supreme Court to limit activities of the State Bar supported by compulsory dues which arguably infringe upon an objecting member's First Amendment rights of association and belief by court rule, and thereby eliminate*

ATTORNEY AND CLIENT—Cont'd

the potential for constitutional conflict; such an approach may not only serve the important goal of avoiding unnecessary constitutional decisions, but may also provide a measure of flexibility in an area which will almost certainly change with time (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.904; MSA 27A.904; State Bar Rule 1). Falk v State Bar, 411 Mich 63.

ATTORNEY GRIEVANCE COMMISSION—*See* JUDGES 17, 18, 22

AUTOMOBILES.

See, also, INSURANCE 8-13.

NO-FAULT INSURANCE.

1. The no-fault insurance act retains the common-law action for loss of consortium; the statute does not abolish the action expressly and there is nothing in the language of the act or its legislative purposes which requires a construction that it abolishes the action (MCL 500.3135; MSA 24.13135). *Rusinek v Schultz Lumber Co,* 411 Mich 502.
2. It is probable that the Legislature, in using the language of the model Uniform Motor Vehicle Accident Reparations Act to abolish tort liability partially for motor vehicle accidents, intended the meaning ascribed to that language by the drafters of the model act, particularly where that meaning is the most natural sense of the language used (MCL 500.3135; MSA 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.
3. The policy apparently expressed by the no-fault insurance act in conditioning the abolition of tort liability upon the obtaining of no-fault coverage is that a person is to be relieved of tort liability only upon participating, through the payment of premiums, in a system for spreading the costs of compensating injuries caused by vehicles without regard to fault (MCL 500.3135; MSA 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.
4. The no-fault insurance act provides in one subsection for retention of tort liability for noneconomic loss above a certain threshold caused by ownership, maintenance or use of a motor vehicle, and the general abolition of tort liability in another subsection abolishes only tort liability of the motorist defendant; so construed, the two subsections work together to abolish the tort liability of a motorist generally but to limit that abolition with respect to noneconomic loss to below-threshold loss (MCL 500.3135; MSA 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.
5. Derogation of both statutory and common-law rights to recover noneconomic loss should not be inferred from ambiguous language of the no-fault insurance act where a reasonable construction would retain the rights, and the statute also expresses a policy to retain such rights where the injury is severe (MCL 500.3135; MSA 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.

AUTOMOBILES—Cont'd

6. It would be contrary to the clear intent of the no-fault insurance act to retain the tort liability of the uninsured motorist if the tort liability abolished by the statute were construed to include all tort liability for injuries or damage incurred in accidents involving vehicles with respect to which no-fault coverage is in effect (MCL 500.3135; MSA 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.
7. The amendment of the no-fault insurance act specifying the types of tort recovery for which the insurer is permitted subtraction or reimbursement was intended to clarify the limitations on the insurer's right of subtraction and reimbursement, and was enacted at a time when litigation involving that issue was pending in the Supreme Court; there is no indication of an intent to alter the scope of the abolition of tort liability, and none may be inferred (1978 PA 461). *Citizens Ins Co v Tuttle,* 411 Mich 536.

TORTS.

8. The tort liability abolished by the no-fault insurance act is only such liability as arises out of the defendant's ownership, maintenance or use of a motor vehicle, not liability which arises out of other conduct (MCL 500.3135; MSA 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.
9. The no-fault insurance act was not intended to work a comprehensive abolition of all tort liability incident to a motor vehicle accident (MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.). Citizens Ins Co v Tuttle,* 411 Mich 536.
10. Injuries to persons or property arising from a motor vehicle collision do not give rise to tort liability unless the injury is caused by a wrongful act of commission or omission; absent a wrongful act, the collision is simply an accident for the consequences of which no one is liable in tort. *Citizens Ins Co v Tuttle,* 411 Mich 536.
11. An action in tort for damages to a truck resulting from a collision with the defendant's cow is not one arising from the ownership, maintenance or use of an automobile within the meaning of the provision of the no-fault insurance act abolishing liability for such torts where the wrongful act asserted is the improper keeping of the cow in violation of the statute prohibiting allowing an animal to run at large (MCL 433.11 *et seq.,* 500.3135; MSA 18.789[1] *et seq.,* 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.
12. The no-fault insurance act is a system of compensating injuries and damages incurred in accidents caused by motor vehicles in which compensation is due without regard to fault, and it partially abolished the tort system for adjudicating fault; in that context, the abolition of tort liability carries the implicit sense of tort liability for injuries or damage *caused by* the ownership, maintenance or use of a motor vehicle (MCL 500.3135; MSA 24.13135). *Citizens Ins Co v Tuttle,* 411 Mich 536.

BAR DUES—*See*

ATTORNEY AND CLIENT 12, 18, 20

BAR DUES—Cont'd
CONSTITUTIONAL LAW 2, 7, 9-15, 17, 19, 21

BEST INTEREST—*See*
PARENT AND CHILD 2, 3, 8

BIAS—*See*
WITNESSES 7, 9-12

BIAS OF JUDGES—*See*
JUDGES 24

BREAKING AND ENTERING—*See*
BURGLARY 1, 2

BUILDING CONTRACTORS—*See*
TRUSTS 1

BURDEN OF PROOF—*See*
CONSTITUTIONAL LAW 20
CRIMINAL LAW 13
PARENT AND CHILD 3

BURGLARY.

BREAKING AND ENTERING.

1. Only a minimum amount of force is necessary to establish the element of a breaking in a breaking and entering with intent to commit a felony, but the force exerted must be unauthorized; thus, where a person is given a key with the permission of the owner of a building and with no qualifications on its use, any subsequent exercise of the privilege to use it should not be considered a breaking (MCL 750.110; MSA 28.305). *People v Rider,* 411 Mich 496.
2. A conviction of breaking and entering with intent to commit larceny where the defendant used a key given to him by his employer to enter his place of employment after working hours must be set aside where the prosecutor is unable to establish that the defendant's right to use the key was restricted by his employer and that his use of it violated the restriction; there is no burglary if the person entering has a right to do so (MCL 750.110; MSA 28.305). *People v Rider,* 411 Mich 496.

CENSURE—*See*
JUDGES 4, 5, 13-15

CHANGE OF CUSTODY—*See*
PARENT AND CHILD 2, 3

CHANGE OF VENUE—*See*
VENUE 1

CHARACTER—*See*
CRIMINAL LAW 15, 16

CHECKS—*See*
FORGERY 2, 3

CHILD CUSTODY ACT—*See*
PARENT AND CHILD 1-9

CHILDREN—*See*
ACTIONS 1, 5-8
CONSTITUTIONAL LAW 5

CHOICE OF FORUM—*See*
COURTS 1-6

CIVIL SERVICE—*See*
LABOR RELATIONS 1, 9, 11, 12

COINSUREDS—*See*
INSURANCE 5

COLLATERAL ESTOPPEL—*See*
PERJURY 1

COLLATERAL FACTS—*See*
CRIMINAL LAW 4
WITNESSES 17

COLLECTIVE BARGAINING—*See*
LABOR RELATIONS 2, 4, 6, 7, 9, 10, 12

COLLEGE EDUCATION—*See*
CRIMINAL LAW 50

COLLISIONS—*See*
AUTOMOBILES 10

COMFORT—*See*
ACTIONS 7

COMITY—*See*
PRISONS AND PRISONERS 2

COMMERCIAL INTERESTS—*See*
CONSTITUTIONAL LAW 13

COMMON LAW.
See, also, ACTIONS 1, 2; AUTOMOBILES 1; HOMICIDE 7; HUSBAND AND WIFE 1-4; LIMITATION OF ACTIONS 2, 4, 5; NEGLIGENCE 1, 2; STATUTES 7; WORDS AND PHRASES 1.

COURTS.
1. Lack of precedent cannot absolve a common-law court from responsibility for adjudicating each claim that comes before it on its own merits. *Berger v Weber,* 411 Mich 1.

COMMUNITY CONTACTS—*See*
PARENT AND CHILD 5, 6, 9

COMMUTATION—*See*
CONSTITUTIONAL LAW 24

COMMUTATION OF SENTENCES—*See*
CONSTITUTIONAL LAW 23, 25

COMPANIONSHIP—*See*
ACTIONS 6, 7
AUTOMOBILES 1

COMPLAINT—*See*
ATTORNEY AND CLIENT 3

COMPULSORY MEMBERSHIP—*See*
ATTORNEY AND CLIENT 12-14, 18, 20
CONSTITUTIONAL LAW 2, 7-12, 14, 15, 17-19, 21

CONDITIONAL SUSPENSION—*See*
JUDGES 5, 15

CONDITIONS OF EMPLOYMENT—*See*
LABOR RELATIONS 2, 4, 6, 7

CONSEQUENTIAL LOSS—*See*
ACTIONS 3, 4

CONSORTIUM—*See*
ACTIONS 1, 2, 4-8
AUTOMOBILES 1
CONSTITUTIONAL LAW 5
DEATH 1

CONSTITUTIONAL LAW.
See, also, ATTORNEY AND CLIENT 19, 20; HABEAS CORPUS 1; JUDGES 1, 2, 12, 14, 15, 25; LABOR RELATIONS 1, 3, 5, 9-12; PERJURY 2; STATUTES 1, 6; SUPERINTENDING CONTROL 1, 2.

ADMINISTRATION OF JUSTICE.

1. *That the state, through the Supreme Court, has a compelling interest in improving the administration of justice is sufficiently clear as not to need explication. Falk v State Bar,* 411 Mich 63.

2. *Limiting the compulsory element of membership in the State Bar to a reasonable level of dues, with no requirement of participation beyond the financial obligation, is the means available to aid in the state's compelling interest in improving the administration of justice which least intrudes on the First Amendment rights of objecting members (US Const, Ams I, XIV; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

CONSTITUTIONAL LAW—Cont'd

3. *Activities financially supported by the State Bar such as the preparation and distribution by the Young Lawyers of the Juror's Manual, the provision to students of the "You and the Law" booklet by the Lawyers Wives of Michigan, and funding of the Children's Charter of Michigan, fall comfortably within the permissible range of activities which clearly aid the state's compelling interest in improving the administration of justice where an objecting lawyer claims an infringement of First Amendment rights (MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

ATTORNEY AND CLIENT.

4. *The State Bar Lawyer Referral Service, Prepaid Legal Services programs, the Client Security Fund and the Lawyer Placement Service clearly constitute a permissible public purpose, rather than a local or private purpose, within the meaning of the constitutional provision concerning appropriation of public money (Const 1963, art 4, § 30). Falk v State Bar,* 411 Mich 63.

EQUAL PROTECTION.

5. *The Equal Protection Clauses of the United States and Michigan Constitutions do not require recognition of a child's cause of action for loss of parental consortium when the parent does not die simply because the spouse's action is judicially recognized or because the wrongful death act gives the child the right to recover when the parent dies (US Const, Am XIV; Const 1963, art 1, § 2; MCL 600.2922[2]; MSA 27A.2922[2]). Berger v Weber,* 411 Mich 1.

FIRST AMENDMENT.

6. *State action which infringes on First Amendment rights can only be tolerated where such infringement is unavoidably required in order to further a compelling, paramount, or vital state interest (US Const, Ams I, XIV). Falk v State Bar,* 411 Mich 63.

7. *The State of Michigan, through the combined actions of the Supreme Court, the Legislature, and the State Bar, may compulsorily exact State Bar dues, and require association in the State Bar, to support only those duties and functions of the State Bar which serve compelling state interests and which cannot be accomplished by means less intrusive upon the First Amendment rights of objecting attorneys (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

8. *The state has a compelling interest in the regulation of the practice of law, the maintenance of high standards in the legal profession, and the discharge of the profession's duty to protect and inform the public which justifies unavoidable intrusions on the First Amendment rights of objecting attorneys (US Const, Ams I, XIV). Falk v State Bar,* 411 Mich 63.

9. *The State Bar of Michigan has shown a compelling state interest which cannot be accomplished by means less intrusive on the First Amendment rights of an objecting attorney than*

CONSTITUTIONAL LAW—Cont'd

compulsory payment of State Bar dues in the following State Bar activities: all regulatory activities, including attorney disciplinary proceedings, to the extent that they are funded out of compulsory State Bar dues, and all activities related to licensing of attorneys; all continuing legal education activities presently engaged in by the State Bar which are directed to the maintenance of high professional standards; the publication of the Michigan Bar Journal insofar as it is primarily devoted to informing the members of the State Bar on current matters relating to regulation of the profession and the improvement of professional standards; the Client Security Fund insofar as it represents a discharge of a duty to protect the public from recreant members of the profession; those activities designed to educate the general public concerning the use of legal services and the relationship between individuals and the legal system generally; and activities designed to make legal services more accessible (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; GCR 1963, 950 et seq.; State Bar Rules 1, 15). Falk v State Bar, 411 Mich 63.

10. *The political and legislative activities of the State Bar, to the extent they are funded by mandatory State Bar dues, violate the First Amendment rights of an objecting attorney to freedom of association and expression; such activities include rendering technical advice to the Legislature, testifying before the State Officers Compensation Commission, adopting and publishing official State Bar positions on proposed legislation and retaining a professional lobbyist (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

11. *Compelling a dissenting attorney to finance the encouragement of legislation and associate with its advancement cannot be constitutionally justified in the absence of an overriding state need and then only by means narrowly drawn; for purposes of the First Amendment, a distinction cannot be drawn between legislation aimed at issues loosely termed procedural and those termed substantive because in either case the choice is necessarily based on a premise which is subject to contrary opinion or belief (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

12. *There is no compelling state interest to justify support by compulsory State Bar dues of legislative activities where the Legislature has alternative methods available to inform its decision-making,* i.e., *the power of subpoena, and access to the Legislative Service Bureau and legal counsel, and to voluntary and self-supporting sections within the State Bar (US Const, Ams I, XIV; Const 1963, art 6, § 5, MCL 4.101, 600.901, 600.904; MSA 2.181, 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

13. *Activities of the State Bar designed to further the commercial interests of its members, such as the Lawyer Placement Service, cannot constitute a compelling state interest that cannot*

CONSTITUTIONAL LAW—Cont'd

be accomplished by means less intrusive upon the First Amendment rights of objecting attorneys (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar, 411 Mich 63.

14. *The test of claims that certain uses of compulsory State Bar dues indirectly infringe upon First Amendment rights of an attorney is whether the state has a compelling interest involved, and if so, whether the activities complained of are germane to that interest; insofar as the activities aid in promoting improvements in the administration of justice and the advancement of jurisprudence they are essential for the state's continued existence and therefore survive attack under the First Amendment (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

15. *The State Bar's use of compulsory dues to influence legislation and to fund committee study projects which result in recommendations of policy for executive, legislative, or judicial action is germane to the state's legitimate and compelling interest in the administration of justice and the advancement of jurisprudence; such activity survives attack under the First Amendment where there is nothing in the record to indicate that the State Bar participates in partisan politics and the plaintiff challenging the use of the dues does not specify any of his views which conflict with those advanced by the State Bar (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

16. *The State Bar, when it takes a position on proposed legislation, court rules, or administrative actions must confine itself to those subjects directly affecting the administration of justice or the advancement of jurisprudence; endorsing a particular candidate for office or lobbying for legislation which is unrelated to the improvement of the administration of justice is outside of the scope of the State Bar Rules and also violates the First Amendment rights of free speech and association of State Bar members (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

17. *The expenditure of compulsory State Bar dues for the Young Lawyers Section, Prepaid Legal Services programs, the Lawyer Referral Service, the Lawyer Placement Service, the Client Security Fund, public education about the law, Lawyers Wives of Michigan, Children's Charter of Michigan, certain State Bar social functions, and appearances before the State Officers Compensation Commission to support higher judicial salaries is germane to the state's compelling interest in promoting improvements in the administration of justice; therefore, those activities have not been shown to violate the First Amendment rights of free speech and association of a member of the State Bar (US Const, Ams I, XIV; Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

CONSTITUTIONAL LAW—Cont'd

18. *The interests of the State Bar and of the state in collective legislative activity must yield at some point to the constitutional freedoms of the objecting individual lawyer (US Const, Ams I, XIV; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

19. *The support by compulsory dues of regulatory and licensing activities of the State Bar which are narrowly drawn to the end of maintaining high standards of competence and honesty in the legal profession can be justified as serving a compelling state interest even if they impinge on First Amendment rights of objecting members (US Const, Ams I, XIV; MCL 600.901, 600.904; MSA 27A.901, 27A.904; State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

20. *The burden is on an objecting member to show specific activities of the State Bar which infringe upon his First Amendment rights; the burden is on the State Bar to establish the requisite state interest, the appropriate connection between particular activities and the state interest (or, if a valid criterion for First Amendment purposes, the economic self-interest of the bar's members) and the unavailability or impracticability of alternative means of realizing the asserted state interest (US Const, Ams I, XIV). Falk v State Bar,* 411 Mich 63.

21. *A proper respect for the "breathing room" necessary for full enjoyment of First Amendment rights suggests that the Supreme Court should be reluctant to allow activities of the State Bar supported by compulsory dues to press upon the border of the constitutional prohibition against infringing the First Amendment rights of an objecting attorney, absent a clearly demonstrated need (US Const, Ams I, XIV). Falk v State Bar,* 411 Mich 63.

HABEAS CORPUS.

22. An informal procedure in Recorder's Court of Detroit, known as a reverse writ, which gives police officers judicial approval of the continued detention of a suspect where no arrest warrant has been issued is a nullity. *People v Casey,* 411 Mich 179.

PRISONS AND PRISONERS.

23. The constitutional amendment which gave the Legislature the power to provide for indeterminate sentences and for the detention and release of persons imprisoned under such sentences was intended to give to the Legislature a power which previously was vested exclusively in the judiciary and executive, and whatever infringement or sharing of the Governor's commutation power exists in a statute which falls within its authorization is constitutionally authorized (Const 1963, art 4, § 45; art 5, § 14). *Oakland Prosecutor v Corr Dep't,* 411 Mich 183.

24. The Prison Overcrowding Emergency Powers Act, which authorizes the reduction of established minimum terms of prisoners upon a declaration by the Governor of a state of emergency in excess prison population, is within the power granted in the constitution to the Legislature to provide for

CONSTITUTIONAL LAW—Cont'd
indeterminate sentences and for the detention and release of persons imprisoned under such sentences, and thus is constitutional regardless of whether the release of prisoners under the statute is characterized as a commutation (Const 1963, art 4, § 45; MCL 800.71 *et seq.*; MSA 28.1437[1] *et seq.*). *Oakland Prosecutor v Corr Dep't,* 411 Mich 183.

25. *The Prison Overcrowding Emergency Powers Act is constitutional and does not contravene the Governor's exclusive power of commutation with respect to sentences imposed after January 26, 1981, and with respect to sentences imposed before that date only insofar as the Governor's actions which trigger the reductions in sentence are discretionary rather than mandatory (Const 1963, art 4, § 45; art 5, § 14; MCL 800.71 et seq.; MSA 28.1437[1] et seq.). Oakland Prosecutor v Corr Dep't,* 411 Mich 183.

26. *The Legislature is not authorized by the constitution to mandate the reduction of minimum prison sentences already judicially imposed; the powers of detention and release must be read together, and the Legislature cannot provide for the release of a person imprisoned under an indeterminate sentence where it could not provide for detention (Const 1963, art 4, § 45). Oakland Prosecutor v Corr Dep't,* 411 Mich 183.

PRIVACY.

27. *The right to privacy, the right to be left alone, inherently includes some discretion in what enters one's home through the mail; an attorney has the right to demand that his name be excluded from the mailing list, the use of which the State Bar sells to commercial advertisers, because it cannot be said to be promoting the administration of justice or advancing the science of jurisprudence (State Bar Rule 1). Falk v State Bar,* 411 Mich 63.

STATE BAR.

28. *The Supreme Court has the inherent power to regulate the practice of law and to supervise those persons engaged in it to the extent necessary for the proper functioning of the courts, but because there has been legislative action on the subject, there is no necessity for the Court to now assert its inherent power to create an integrated state bar (Const 1963, art 6, § 5; MCL 600.901, 600.904; MSA 27A.901, 27A.904). Falk v State Bar,* 411 Mich 63.

CONSTRUCTION OF STATUTES—*See*
AUTOMOBILES 2, 4-7
CRIMINAL LAW 24, 26
HOMICIDE 6
INSURANCE 8
KIDNAPPING 5, 6
LABOR RELATIONS 5
LIMITATION OF ACTIONS 2-5
PRISONS AND PRISONERS 1
STATUTES 2-5, 7-9

CONTRACTORS—*See*
TRUSTS 1

CONTRACTS.
See, also, INSURANCE 1, 14.
SURETYSHIP AND GUARANTEE.
1. The general law of contracts is that if two or more persons promise the same performance there is necessarily a relation of suretyship between them. *Morgan v Cincinnati Ins Co,* 411 Mich 267.

CONTROLLED SUBSTANCES—*See*
CRIMINAL LAW 10, 11, 14
WITNESSES 1

CONVENIENCE OF WITNESSES—*See*
COURTS 4

CONVICTS—*See*
STATUTES 6

COURT RECORDS—*See*
CRIMINAL LAW 17

COURT RULES—*See*
ATTORNEY AND CLIENT 13
CRIMINAL LAW 27, 28, 47, 48
JUDGES 24

COURTS.
See, also, COMMON LAW 1; JUDGES 25; NEGLIGENCE 1; SUPERINTENDING CONTROL 1.
JURISDICTION.
1. A plaintiff seaman may choose to bring an action under the Jones Act for injuries suffered in the course of his employment in a state court, and there may be a federal policy of allowing plaintiffs a choice among many possible forums, but there are no clear federal concerns which would be disparaged by application of the doctrine of *forum non conveniens* to Jones Act cases (46 USC 688). *Anderson v Great Lakes Dredge,* 411 Mich 619.
2. The facts that seamen regularly move from job to job, and state to state, and that the situs of an accident in the course of a seaman's employment is usually on a ship are among the circumstances which should be considered in a case-by-case application of the doctrine of *forum non conveniens* to Jones Act cases, but there is no reason under the doctrine of *forum non conveniens* to adopt, as a matter of judicial policy, a rule to foreclose the possibility of dismissal of any case brought by a plaintiff seaman for injuries in the course of his employment (46 USC 688). *Anderson v Great Lakes Dredge,* 411 Mich 619.
3. If the plaintiff has chosen a forum where none of the parties or

COURTS—Cont'd
witnesses reside, where the law of the forum does not apply, and where none of the operative facts have occurred, that choice of forum is entitled to much less weight under the doctrine of *forum non conveniens* than where there exists a significant nexus between the litigation and the chosen forum. *Anderson v Great Lakes Dredge,* 411 Mich 619.
4. Under the doctrine of *forum non conveniens,* it was an abuse of discretion for a circuit court in Michigan to decline to dismiss an action by a plaintiff seaman for injuries in the course of his employment in Florida where the only apparent nexus between the litigation and Michigan was that plaintiff's counsel was located in Michigan and that there might have been testimony from an expert witness who resides there; the convenience of counsel and of expert witnesses is entitled to little weight when it alone is advanced as favoring the chosen forum (46 USC 688). *Anderson v Great Lakes Dredge,* 411 Mich 619.
5. There is no need, under the doctrine of *forum non conveniens,* for the defendant to prepare extensively for trial in order to show exactly how inconvenient a trial in the chosen forum might prove to be where no significant nexus between the litigation and the forum state has been demonstrated, and there is an appropriate forum available to the plaintiff in the state or federal courts of another state. *Anderson v Great Lakes Dredge,* 411 Mich 619.
6. The public interest favors a decision by a Michigan court to decline to assert jurisdiction, under the doctrine of *forum non conveniens,* in a case which is essentially "imported litigation" from another jurisdiction where the burden on the crowded civil dockets in Michigan and upon the defendant's ability to prepare a defense greatly outweighs the remote interest the plaintiff shows in conducting the trial in Michigan. *Anderson v Great Lakes Dredge,* 411 Mich 619.

COVERTURE—*See*
HUSBAND AND WIFE 2

CREDIBILITY—*See*
CRIMINAL LAW 4, 16, 49-55
PERJURY 7
WITNESSES 7-9, 11, 12

CRIMINAL LAW.
See, also, CONSTITUTIONAL LAW 22; FORGERY 1; HABEAS CORPUS 1, 2; HOMICIDE 7; HUSBAND AND WIFE 7; INDICTMENT AND INFORMATION 1; JUDGES 24; KIDNAPPING 1-4, 6, 7; PERJURY 1-7; STATUTES 6.

AIDING AND ABETTING.
1. To convict a defendant of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in possession during the commission of a felony, it must be established that the defendant procured, counselled, aided, or abetted and so assisted in obtaining the proscribed possession,

CRIMINAL LAW—Cont'd

or in retaining such possession otherwise obtained (MCL 767.39; MSA 28.979). *People v Johnson,* 411 Mich 50.

ASSISTANCE OF COUNSEL.

2. A defendant sufficiently establishes his right to a post-conviction evidentiary hearing on whether he was denied the effective assistance of counsel where he claims that his lawyer had him testify at the preliminary examination and told him the judge would dismiss the charge if presented with any evidence that the defendant did not commit the offense, that he provided the judge with such evidence on his lawyer's instruction to "deviate" from the truth, and that all lawyers who handle criminal cases know that a defendant should never testify at his own preliminary examination. *People v White,* 411 Mich 366.

3. A claim of ineffective assistance of counsel which depends on facts not of record may not be raised for the first time on appeal. *People v White,* 411 Mich 366.

DEFENDANT TESTIFYING.

4. Testimony of a police officer that a defendant charged with manslaughter in the death of her husband stated, more than ten years before the killing, that she had stabbed her husband, and that the police officer had found at that time that the husband had three stab wounds is collateral and not admissible for the purpose of impeaching the defendant's testimony that she had never harmed her husband; it is neither relevant to the substantive issues in the case, nor independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness. *People v Teague,* 411 Mich 562.

DOUBLE JEOPARDY.

5. The guarantee against double jeopardy applies as a restraint on imposing multiple punishment for a single criminal act (US Const, Am V; Const 1963, art 1, § 15). *People v Wilder,* 411 Mich 328.

6. Review, as a matter of state law, of a double jeopardy claim based upon multiple punishment imposed for a single criminal act focuses upon the proof necessary to conviction; where the proof adduced at trial indicates that one offense is an included offense of the other, conviction of both offenses is precluded (Const 1963, art 1, § 15). *People v Wilder,* 411 Mich 328.

7. A defendant may be charged and tried for each act that constitutes a separate crime; however, when trial is for an act which includes lesser offenses, if the jury finds guilt of the greater, the defendant may not also be convicted separately of the lesser included offense because the prohibition against multiple punishment for the same crime cannot be avoided by the form of the charge (Const 1963, art 1, § 15). *People v Wilder,* 411 Mich 328.

8. *The guarantee of the Double Jeopardy Clause operates differently in cases of multiple prosecution and multiple punishment because different interests are implicated; thus, the meaning of the "same offense" depends on the context in which the double jeopardy question arises (US Const, Am V; Const 1963, art 1, § 15). People v Wilder,* 411 Mich 328.

CRIMINAL LAW—Cont'd

ENTRAPMENT.

9. The defense of entrapment, in Michigan, is based on the belief that the method employed by the government to bring about conviction cannot be countenanced; the question is whether, regardless of the predisposition to crime of the particular defendant involved, the governmental agents have acted in a way that is likely to instigate or create a criminal offense. *People v White,* 411 Mich 366.

10. A trial judge did not properly apply the objective test of entrapment in accepting a plea of guilty of attempted delivery of heroin where, although the judge considered the conduct of the police officers in the case, he attached undue significance to the propensities of the defendant to commit the crime, finding that the defendant's "only hesitancy was in accumulating enough business to make it worthwhile" (MCL 333.7401; MSA 14.15[7401]). *People v White,* 411 Mich 366.

11. A defendant charged with delivery of heroin was entrapped as a matter of law where an undercover police officer sought out the defendant and asked to purchase narcotics, gave the defendant some money and agreed to meet him several days later, twice again sought out the defendant after he failed to meet the officer as agreed, offered and provided the defendant transportation by automobile from Oscoda to Detroit to make the transaction, gave him money to purchase more narcotics than previously requested, waited while the defendant purchased the heroin, and drove him back to Oscoda (MCL 333.7401; MSA 14.15[7401]). *People v White,* 411 Mich 366.

12. *The defense of entrapment, if successfully raised, provides a complete defense to a criminal prosecution by claiming the benefit of a judicial policy that, even if culpable, the defendant should be insulated from prosecution because of the impropriety of the government's conduct. People v White,* 411 Mich 366.

13. *The defendant bears the burden of proving a defense of entrapment. People v White,* 411 Mich 366.

14. *A defendant charged with delivery of heroin was not entrapped as a matter of law where an undercover police officer, who sought him out to buy narcotics several times and provided the transportation to make the sale, gave the defendant an opportunity to cancel the proposed drug transaction and return the money advanced, and the defendant refused, stating that he would still like to obtain the heroin for the officer (MCL 333.7401; MSA 14.15[7401]). People v White,* 411 Mich 366.

EVIDENCE.

15. Evidence of a defendant's reputation for good character may, as a general rule, only be rebutted by evidence that it is bad; specific acts of misconduct may not be shown for that purpose (MRE 405[a]). *People v Champion,* 411 Mich 468.

16. A prosecutor may cross-examine the defendant's character witness to test his knowledge and candor, and for that purpose he may be asked if he has heard of specific acts of misconduct

CRIMINAL LAW—Cont'd

by the defendant; however, the prosecutor's rebuttal witnesses may testify only as to the defendant's reputation generally and not as to specific acts of misconduct. *People v Champion,* 411 Mich 468.

17. The use by the defense in a trial for murder of a summons in divorce proceedings to establish the date of the proceedings does not justify a conclusion that whatever else was in the court's file in the matter could also be used as evidence against the defendant. *People v Patton,* 411 Mich 490.

18. Evidence of an assault ten years earlier under dissimilar circumstances on the same victim by a defendant charged with manslaughter in the death of the victim is too remote to be relevant to the defendant's motive or intent in the case. *People v Teague,* 411 Mich 562.

INSTRUCTIONS TO JURY.

19. An oral request by the defendant for an instruction on an attempt to commit the crime charged, which was made when the trial court asked if there were any objections to the instructions given to the jury, is timely where the trial lasted one-half day, the jury was instructed immediately following the argument of counsel, the trial court found that the request was made at the first available opportunity, and it was made before the commencement of deliberation by the jury (GCR 1963, 516.1). *People v Rogers,* 411 Mich 202.

20. The use of the American Bar Association instruction to the jury which the Supreme Court has approved for a jury which may be deadlocked is not limited to cases where there is a deadlock; the trial judge may deliver the instruction to the jury before it begins deliberations because it provides the jurors guidance concerning their duties, and while the instruction tells the jury that they are obligated to deliberate with reaching an agreement in mind, it also emphasizes that no juror need surrender his honest convictions concerning the evidence solely to obtain a unanimous agreement (ABA Standards for Criminal Justice [2d ed], Standard 15-4.4). *People v Goldsmith,* 411 Mich 555.

21. An instruction to the jury which is essentially a call for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that a failure to reach a verdict constitutes a failure of purpose is reversibly erroneous because it is a substantial departure from the American Bar Association instruction to the jury which the Supreme Court has approved for a jury which may be deadlocked (ABA Standards for Criminal Justice [2d ed], Standard 15-4.4). *People v Goldsmith,* 411 Mich 555.

MULTIPLE PUNISHMENT.

22. *A defendant has no recourse under the Double Jeopardy Clause for a claim of multiple punishment imposed for a single criminal act where the punishment imposed, however onerous, is a punishment which the Legislature clearly intended to be imposed (US Const, Am V; Const 1963, art 1, § 15). People v Wilder,* 411 Mich 328.

CRIMINAL LAW—Cont'd

23. *Where multiple sentences are imposed at a single criminal trial the role of the constitutional guarantee of the Due Process Clause is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense (US Const, Am V; Const 1963, art 1, § 15). People v Wilder,* 411 Mich 328.

24. *The rule that conviction of both the greater and lesser included offense on proof of a single criminal act is precluded is a rule of statutory construction to be applied only when it is probative of legislative intent; the implicit assumption of the rule is that the Legislature would not intend a person to be convicted of and punished for two or more offenses that lie on a single continuum of culpability because each continuum comprises those offenses that serve to vindicate the same social norm. People v Wilder,* 411 Mich 328.

25. *An inference of legislative intent against multiple punishment should not arise where the Legislature defines an offense by reference to another independently defined offense or class of offenses so that proof of the latter is a prerequisite for proof of the former. People v Wilder,* 411 Mich 328.

26. *A clear legislative intent to impose multiple punishment is required to overcome what is in effect the rebuttable presumption against multiple punishment contained in the Double Jeopardy Clause, a particularized version of the rule of lenity that the Court will not interpret a criminal statute so as to increase the penalty that it places on a defendant when such an interpretation can be based on no more than a guess as to what the Legislature intended (US Const, Am V; Const 1963, art 1, § 15). People v Wilder,* 411 Mich 328.

PLEA OF GUILTY.

27. A trial court is not required to explain the elements of the offense in accepting a plea of guilty of the offense; therefore, a plea of guilty of perjury is not unknowing and involuntary on the ground that the defendant was not informed by the trial court of the requisite element of intent (GCR 1963, 785.7). *People v White,* 411 Mich 366.

28. Failure of a judge conducting a plea-taking proceeding on a charge of perjury to advise the defendant that the witnesses who were present during alleged perjured testimony given by the defendant in another criminal matter included the judge, prosecuting attorney, and defense attorney is not erroneous where the plea-taking judge adequately complied with the requirement that he inform the defendant that he is giving up the rights he would have at trial to have witnesses against him appear and the right to question witnesses against him (GCR 1963, 785.7). *People v White,* 411 Mich 366.

29. A claim of entrapment does not involve an assessment of guilt or innocence, but rather expresses a policy that there should be no prosecution at all; in that respect, it is like a jurisdictional defect which is not waived by a plea of guilty. *People v White,* 411 Mich 366.

30. *The general rule is that a plea of guilty waives all non-*

CRIMINAL LAW—Cont'd

jurisdictional defects in the proceedings; however, those rights which might provide a complete defense to a criminal prosecution, and those which undercut the state's interest in punishing the defendant or the state's authority or ability to proceed with the trial, may never be waived by a plea of guilty. People v White, 411 Mich 366.

31. *Rights which are not subsumed by a plea of guilty include strictly jurisdictional defenses and those defenses which, if proven, would prevent the trial from taking place; only those rights and defenses which reach beyond the factual determination of the defendant's guilt and implicate the very authority of the state to bring a defendant to trial are preserved. People v White,* 411 Mich 366.

32. *A defendant does not waive his claim of the defense of entrapment by a plea of guilty of the substantive offense because that defense assumes that without improper involvement by the police the crime would not have taken place. People v White,* 411 Mich 366.

33. The responsibility for determining that the defendant's plea of guilty is understanding, voluntary and accurate is the trial judge's; the court rules require the trial judge to speak directly to the defendant and advise him of the consequences of his plea (GCR 1963, 785.7). *People v Ovalle,* 411 Mich 478.

34. The interpreter's function in a guilty plea proceeding where the defendant's lack of command of the English language requires the use of an interpreter is to translate the trial judge's statements to the defendant and the defendant's responses; to allow the interpreter to read the defendant's rights as paragraphs from a form and to inform the judge after each paragraph that the defendant understands it or says that he understands it is to delegate to the interpreter the trial judge's responsibility to advise the defendant of the consequences of his plea and to determine that the plea is an understanding one (GCR 1963, 785.7). *People v Ovalle,* 411 Mich 478.

PRESENCE OF DEFENDANT.

35. *The Due Process Clause provides defendants the fundamental right to be present personally at every stage of the trial where their substantial rights may be affected by the proceedings and where their presence relates to the fullness of their opportunity to defend against the charge (US Const, Am XIV; Const 1963, art 1, § 17). People v Pulley,* 411 Mich 523.

36. *A right as fundamental as the right of the defendant to be present personally is not subject to such formalistic confinement as to end with trial and thus to depend on the chronological stage of the proceeding rather than on the substantive nature of the inquiry; the right to be present should depend on the character of the proceeding and whether the reasons supporting a defendant's right to be present at trial are equally applicable to that proceeding (US Const, Am XIV; Const 1963, art 1, § 17). People v Pulley,* 411 Mich 523.

RIGHT TO SILENCE.

37. Cross-examination of a defendant about a prior statement

CRIMINAL LAW—Cont'd

inconsistent with his testimony at trial is permissible and does not indirectly restrict the exercise of the constitutional right to remain silent; such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving the requisite warnings about waiving the constitutional right to remain silent has not been induced to remain silent and as to the subject matter of his statements, the defendant has not remained silent at all (US Const, Am V; Const 1963, art 1, § 17). *People v Cole,* 411 Mich 483.

SENTENCING.

38. *The sentencing proceeding, which requires the judge to tailor the sentence to the particular circumstances of the case and the offender, is akin to the determination of guilt or innocence at trial, and there is a consequent need for the presence and participation of the defendant. People v Pulley,* 411 Mich 523.

39. *Absence of the defendant from a conference where the trial court discusses with counsel the report of the presentence investigation denigrates the defendant's personal right of allocution, because he must challenge any preconceived determination without knowledge of what went on in the conference (GCR 1963, 785.8[2]). People v Pulley,* 411 Mich 523.

40. *Sentencing proceedings secret to the defendant, whether or not fair in fact, are antithetic to the defendant's perception that he is being treated fairly. People v Pulley,* 411 Mich 523.

41. *The appearance of fairness and reliability of courts is essential to maintaining confidence in them as instruments of justice; liberty ought not to be taken away from a person unless the process is fair, just and reliable, and recognition of the right of the defendant to participate actively in the sentencing proceeding signifies a way of dealing with persons which is fundamental to a free society. People v Pulley,* 411 Mich 523.

42. The Supreme Court declined to require, as a matter of policy, that an accused be present upon request at a presentence conference between the trial court and counsel where the Court concluded that the defendant was not prejudiced by his absence from the sentence conference and there was no showing that what transpired at the conference was objectionable in any fashion. *People v Pulley,* 411 Mich 523.

43. *A defendant is deprived of constitutional due process of law by his absence from a conference where the trial court discusses with counsel the report of the presentence investigation (US Const, Am XIV; Const 1963, art 1, § 17). People v Pulley,* 411 Mich 523.

44. A trial court cannot set aside a valid sentence and impose a new and different one after a defendant has been remanded to jail to await the execution of the sentence. *People v Barfield,* 411 Mich 700

45. Efforts by a Recorder's Court judge to release a defendant on probation after a valid sentence of one year in the Detroit House of Correction with no further provision for probation had been imposed and to resentence him at a later date were a nullity. *People v Barfield,* 411 Mich 700

CRIMINAL LAW—Cont'd

STRUCK JURY.

46. The "struck jury" method of jury selection or any system patterned after it is disapproved and may not be used. *People v Miller,* 411 Mich 321.

TRIAL.

47. A defendant is entitled to have the jury selected as provided by the court rule, and where a selection procedure is challenged before selection begins, failure to follow the procedure prescribed in the rule requires reversal (GCR 1963, 511). *People v Miller,* 411 Mich 321.

48. *Reversal of the convictions of three defendants who were jointly tried is not mandated for failure to follow the jury selection procedure set out in the court rules where more than five weeks before trial the court gave notice to the attorneys of the method to be used to expedite selection of the jury because of the large number of peremptory challenges available, which included examining a large number of jurors at once, and after excuse for cause, the exercising of peremptory challenges in rotation until 11 jurors remained, and empanelling and questioning additional jurors; no objection was made until the start of jury selection; and the parties were always faced with a panel of at least 12 so that their right to exercise peremptory challenges was not diluted. People v Miller,* 411 Mich 321.

WITNESSES.

49. A trial court has discretion to exclude evidence of a defendant's prior conviction or to admit it for the limited purpose of attacking the defendant's credibility where he chooses to testify on his own behalf (MRE 609[a]). *People v Hughes,* 411 Mich 517.

50. Evidence of a defendant's college education and subsequent achievements is not probative of his disposition to truthfulness and therefore is not pertinent to his credibility. *People v Hughes,* 411 Mich 517.

51. The probative value of a defendant's prior felony conviction on the issue of credibility as a witness is to be weighed against its potential prejudicial effect on the fairness of the defendant's trial, not against the probative value of some other evidence (MRE 609[a]). *People v Hughes,* 411 Mich 517.

52. Balancing the prejudicial effect of evidence of prior convictions against their probative value on the issue of credibility in deciding whether to allow a defendant to be impeached by evidence of prior convictions should include as factors the nature of the prior offense, whether the conviction was for substantially the same conduct as that for which the accused is on trial, and the effect on the decisional process if the accused does not testify for fear of impeachment by prior convictions (MRE 609[a]). *People v Hughes,* 411 Mich 517.

53. Only those prior convictions indicative of the defendant's disposition toward truthfulness and veracity may be put before the jury for purposes of impeaching the defendant's testimony, and the trial court must keep from the jury evidence of such

CRIMINAL LAW—Cont'd
prior convictions which may interfere with the jury's ability to determine the defendant's guilt or innocence on the basis of the evidence (MRE 609[a]). *People v Hughes,* 411 Mich 517.
54. Evidence of a 14-year-old conviction of essentially the same crime as that with which the defendant was charged may not be put before the jury for purposes of impeaching the defendant's testimony when its prejudicial effect outweighs its probative value (MRE 609[a]). *People v Hughes,* 411 Mich 517.
55. *The prejudicial nature of a defendant's prior conviction of second-degree murder outweighed its probative value for purposes of testing the defendant's credibility in a trial for first-degree murder where 14 years separated the two offenses, the crimes were substantially similar, the nature of the prior conviction, although probative, offered modest insight as to credibility, and the defendant elected not to testify after the trial court denied the request of defense counsel to exclude references to the prior conviction (MRE 609[a]). People v Hughes,* 411 Mich 517.

CRIMINAL SEXUAL CONDUCT—*See*
KIDNAPPING 3, 4, 7

CROSS-EXAMINATION—*See*
DEATH 1, 2
PERJURY 7
WITNESSES 6-9, 11-16

CUSTODIAL ENVIRONMENT—*See*
PARENT AND CHILD 4-6, 9

CUSTODY OF CHILDREN—*See*
PARENT AND CHILD 1-4, 6-9

DAMAGES.
See, also, ACTIONS 8; DEATH 1, 2; WITNESSES 16.
EXEMPLARY DAMAGES.
1. An award of exemplary damages is justifiable only where it is first shown that the defendant's conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights. *Bailey v Graves,* 411 Mich 510.
2. Failure to grant a request to instruct the jury in an action for assault and battery that exemplary damages may only be awarded on a finding of malicious or willful and wanton misconduct demonstrating a reckless disregard of the plaintiff's rights by the defendants seriously prejudiced the defendants and is reversible error where consideration of that issue might well have altered the resulting verdict for the plaintiff with unapportioned damages. *Bailey v Graves,* 411 Mich 510.

DEADLOCKED JURY—*See*
CRIMINAL LAW 20, 21

DEATH.

WRONGFUL DEATH.

1. An expert witness who offers his opinion as to the amount of economic damages suffered by a plaintiff surviving spouse may properly be cross-examined on whether, in making his calculations of the plaintiff's economic loss, he assumed that the plaintiff would not remarry, although such evidence would not be admissible to prove that there has been no loss of consortium (MCL 600.2922; MSA 27A.2922). *Schaible v Myers,* 411 Mich 704
2. *Permitting defendants in a wrongful death case to cross-examine the plaintiff's expert on damages about whether his estimate assumed that the plaintiff would not remarry had the effect of bringing an irrelevant and improper consideration, the possibility of the plaintiff's remarriage, to the attention of the jury. Schaible v Myers,* 411 Mich 704

DEFECTIVE PRODUCT—*See*
PRODUCTS LIABILITY 1, 2

DEFENDANTS' WITNESS—*See*
WITNESSES 10

DEFENDANT TESTIFYING—*See*
CRIMINAL LAW 4, 37, 49-55
PERJURY 1-4

DEFENSES—*See*
CRIMINAL LAW 9, 12, 13, 29-32

DEGREES OF MURDER—*See*
HOMICIDE 7

DELIBERATION—*See*
HOMICIDE 2

DELIVERY OF HEROIN—*See*
CRIMINAL LAW 10, 11, 14
PERJURY 4

DETAINERS—*See*
PRISONS AND PRISONERS 1-4

DETENTION WITHOUT WARRANT—*See*
CONSTITUTIONAL LAW 22
HABEAS CORPUS 1, 2

DIES—*See*
NEGLIGENCE 6-8, 10, 11
PRODUCTS LIABILITY 2

DISCIPLINARY PROCEEDINGS—*See*
ATTORNEY AND CLIENT 1-10

DISCIPLINE OF JUDGES—*See*
JUDGES 3-23, 25, 26
SUPERINTENDING CONTROL 2

DISCRETION—*See*
ATTORNEY AND CLIENT 8, 10
COURTS 1-4
JUDGES 1
SUPERINTENDING CONTROL 3, 4
VENUE 1
WITNESSES 6, 7, 9, 10

DISQUALIFICATION—*See*
UNEMPLOYMENT COMPENSATION 1-9

DISQUALIFICATION OF JUDGES—*See*
JUDGES 24

DIVORCE—*See*
HUSBAND AND WIFE 5
PARENT AND CHILD 1-8

DOUBLE JEOPARDY—*See*
CRIMINAL LAW 5-8, 22, 23, 26
HOMICIDE 4, 6
PERJURY 2

DUE PROCESS—*See*
ATTORNEY AND CLIENT 1
CONSTITUTIONAL LAW 6
CRIMINAL LAW 23, 35, 36, 43

DUES—*See*
ATTORNEY AND CLIENT 12, 18, 20
CONSTITUTIONAL LAW 2, 7, 9-15, 17, 19, 21

DUTY—*See*
NEGLIGENCE 3

DYNAMITE CHARGE—*See*
CRIMINAL LAW 21

ECONOMIC LOSS—*See*
DEATH 1
WITNESSES 16

EDUCATION—*See*
ATTORNEY AND CLIENT 19
CONSTITUTIONAL LAW 3

EFFECTIVE ASSISTANCE OF COUNSEL—*See*
CRIMINAL LAW 2, 3

ELECTIVE OFFICE—*See*
JUDGES 2, 26

ELEMENTS OF CRIME—*See*
BURGLARY 1, 2
CRIMINAL LAW 1, 27
HOMICIDE 5
KIDNAPPING 1-7
WEAPONS 2

ENTRAPMENT—*See*
CRIMINAL LAW 9-14, 29-32

EQUAL PROTECTION—*See*
CONSTITUTIONAL LAW 5

ESTABLISHED CUSTODIAL ENVIRONMENT—*See*
PARENT AND CHILD 4, 5, 9

ESTOPPEL—*See*
HOSPITALS 2

EVIDENCE.
See, also, ATTORNEY AND CLIENT 5; CRIMINAL LAW 15-18, 50, 51; FORGERY 3; HOMICIDE 8-10; NEGLIGENCE 5-8, 11; ROBBERY 1, 2; SUPERINTENDING CONTROL 4.

HEARSAY.
1. The objection to the admission into evidence of treatises and other professional literature to prove the truth of the matters asserted in them is that the material is hearsay; however, the hearsay objection applies only if the evidence is offered to prove the truth of the matters asserted and it may be admissible for other purposes (MRE 707, 801). *Stachowiak v Subczynski,* 411 Mich 459.

LEARNED TREATISES.
2. Charts of statistics taken from medical textbooks concerning the probable outcomes of different treatments for aneurysm were relevant and not subject to a hearsay objection in a trial for medical malpractice where the charts were not admitted into evidence to prove the truth of the matter asserted, but rather were admitted to explain why the defendant physician proceeded as he did to treat a plaintiff suffering from an aneurysm (MRE 707, 801). *Stachowiak v Subczynski,* 411 Mich 459.
3. A trial judge did not abuse his discretion in ruling that charts of statistics taken from medical textbooks could be used by the defendant physician during his testimony in a trial for medical malpractice where the defendant based his judgment as to how to proceed with the treatment of the plaintiff on his understanding of the consequences of various treatments for aneurysm, which was represented in the charts, the potential for misuse of the charts by the jury was reduced by the fact that

EVIDENCE—Cont'd
similar statistics were presented during the testimony of other expert witnesses, and the trial judge required the removal of identifying information from the charts before they could be displayed and gave careful and repeated instructions to the jury as to the limited purpose for which the evidence was offered (MRE 403). *Stachowiak v Subczynski,* 411 Mich 459.

EVIDENTIARY HEARING—*See*
CRIMINAL LAW 2

EXECUTION OF SENTENCE—*See*
CRIMINAL LAW 44

EXEMPLARY DAMAGES—*See*
DAMAGES 1, 2

EXPERT WITNESSES—*See*
COURTS 4
DEATH 1, 2
EVIDENCE 3
HOSPITALS 3
WITNESSES 2-5, 8-16

EXPLANATION ON THE RECORD—*See*
ATTORNEY AND CLIENT 9, 10

EXTRINSIC EVIDENCE—*See*
CRIMINAL LAW 4
WITNESSES 17

FACTUAL BASIS OF PLEA—*See*
PERJURY 5, 6

FAIRNESS—*See*
CRIMINAL LAW 40, 41

FAIR TRIAL—*See*
WITNESSES 3, 4

FELONY-FIREARM—*See*
CRIMINAL LAW 1
WEAPONS 1, 2

FELONY MURDER—*See*
HOMICIDE 1-6

FINDINGS OF FACT—*See*
PARENT AND CHILD 6, 7

FIREARMS—*See*
WEAPONS 1, 2

FIRE INSURANCE—*See*
HUSBAND AND WIFE 6
INSURANCE 1-3, 6, 7

FIRST AMENDMENT—*See*
ATTORNEY AND CLIENT 12, 18-20
CONSTITUTIONAL LAW 2, 3, 6-21

FIRST-DEGREE MURDER—*See*
HOMICIDE 1-10

FORESEEABILITY—*See*
NEGLIGENCE 3

FORGERY.
UTTERING AND PUBLISHING.
1. Attempted uttering and publishing of a forged instrument is a necessarily included offense of uttering and publishing a forged instrument; accordingly, a defendant charged with uttering and publishing is entitled to a requested instruction on the attempted offense, and refusal so to instruct the jury is reversible error, if evidence has been presented which will support a conviction of the lesser included offense (MCL 750.92, 750.249; MSA 28.287, 28.446). *People v Rogers,* 411 Mich 202.
2. Testimony by a defendant that she had "asked" a bank teller about a forged check, if it is given credence by the jury, falls short of the actual representation that the check is genuine, which is the presentment necessary for the completed crime of uttering and publishing (MCL 750.92, 750.249; MSA 28.287, 28.446). *People v Rogers,* 411 Mich 202.
3. Sufficient evidence was adduced at trial to support a conviction of attempted uttering and publishing of a forged instrument where the issue was whether the defendant presented a forged check, which had been reported as stolen by the business on which it was drawn and which was made payable to the defendant, to a teller and the defendant testified that she had "asked" the teller about the check before she was arrested (MCL 750.92, 750.249; MSA 28.287, 28.446). *People v Rogers,* 411 Mich 202.

FORMER EMPLOYMENT—*See*
UNEMPLOYMENT COMPENSATION 2, 6, 9

FORMER JUDGES—*See*
JUDGES 1, 4-9, 12, 16, 22, 23

FORUM NON CONVENIENS—See
COURTS 1-6

FRAUD—*See*
ATTORNEY AND CLIENT 6
HUSBAND AND WIFE 6

FRAUD—Cont'd
INSURANCE 1-7

GOOD CAUSE—*See*
UNEMPLOYMENT COMPENSATION 5, 6, 8, 9

HABEAS CORPUS.

See, also, CONSTITUTIONAL LAW 22.

CONSTITUTIONAL LAW.

1. The writ of habeas corpus cannot be used as an instrument for the detention of a citizen rather than his release (US Const, art I, § 9; Const 1963, art 1, § 12). *People v Casey,* 411 Mich 179.

REVERSE WRIT.

2. Whether a citizen is being legally or illegally held must be determined by reference to principles in constitutional, statutory, and judicial sources; a detention which is otherwise illegal is not cleansed of its illegality by the informal procedure in Recorder's Court of Detroit, known as a reverse writ, which gives police officers judicial approval of the continued detention of a suspect where, for want of probable cause, no arrest warrant has been issued, or by the pendency of such proceedings (US Const, art I, § 9; Const 1963, art 1, § 12). *People v Casey,* 411 Mich 179.

HABEAS CORPUS *AD PROSEQUENDUM*—*See*
PRISONS AND PRISONERS 2, 3

HEARSAY—*See*
EVIDENCE 1
HOMICIDE 8, 10

HEROIN—*See*
CRIMINAL LAW 10, 11, 14
PERJURY 4

HOME-RULE CITIES—*See*
LABOR RELATIONS 11

HOMICIDE.

See, also, CRIMINAL LAW 4, 18, 55.

FELONY MURDER.

1. The instructions to the jury in a trial for murder in the perpetration or attempted perpetration of one of the felonies enumerated in the first-degree murder statute must include the element of malice necessary to prove murder because the common-law felony murder doctrine, which supplies the element of malice from the intent to commit the underlying felony, has been abolished in Michigan to the extent that it was in force; the conclusion must be left to the jury to infer from all of the evidence, including the facts and circumstances of the perpetration of the felony (MCL 750.316; MSA 28.548). *People v Wilder,* 411 Mich 328.

HOMICIDE—Cont'd

2. A conviction of first-degree murder must be reversed where the trial court instructed the jury only that the fact that the killing was in the perpetration of a robbery supplied the elements of premeditation and deliberation, because the instruction assumed that a killing during the commission of an armed robbery constitutes first-degree felony murder and failed to instruct on the element of malice (MCL 750.316; MSA 28.548). *People v Wilder,* 411 Mich 328.
3. The first-degree murder statute and the armed robbery statute are devoid of any express or reasonably ascertainable legislative intent to create more than a single crime or punishment for a murder which is committed in the perpetration or attempted perpetration of armed robbery; to the extent that legislative intent is not entirely free of doubt, the doubt must be resolved in favor of lenity (MCL 750.316, 750.529; MSA 28.548, 28.797). *People v Wilder,* 411 Mich 328.
4. Conviction of first-degree murder in the perpetration of armed robbery and of the same armed robbery violates the defendant's state constitutional right against double jeopardy because the underlying felony is a necessary element of murder in the perpetration or attempt to perpetrate the felonies listed in the first-degree murder statute, and, on the facts of such a case, the greater offense of first-degree murder could not have been committed without the armed robbery (Const 1963, art 1, § 15; MCL 750.316, 750.529; MSA 28.548, 28.797). *People v Wilder,* 411 Mich 328.
5. Proof of the underlying felony is a necessary element to establish first-degree murder in the perpetration or attempted perpetration of a felony, although malice may no longer be supplied by the intent to commit the underlying felony (MCL 750.316; MSA 28.548). *People v Wilder,* 411 Mich 328.
6. *A defendant cannot be subjected to multiple punishment for first-degree murder in the perpetration of armed robbery and for the same armed robbery because the language of the first-degree murder statute does not show the clear legislative intent to impose multiple punishment which is required to overcome the presumption against multiple punishment contained in the Double Jeopardy Clause (US Const, Am V; Const 1963, art 1, § 15; MCL 750.316, 750.529; MSA 28.548, 28.797). People v Wilder,* 411 Mich 328.

FIRST-DEGREE MURDER.

7. The use of the common-law term "murder" in the first-degree murder statute requires that a murder, as defined at the common law, must first be established before the statute is applied to elevate the degree (MCL 750.316; MSA 28.548). *People v Wilder,* 411 Mich 328.
8. An affidavit which the victim of a shooting had given in a divorce proceeding to obtain a preliminary injunction against her husband who later was accused of her murder, and which stated that the defendant had been abusive and violent against her and that she feared for her safety, was hearsay and should not have been received in evidence against the defendant for

HOMICIDE—Cont'd

the purpose of showing premeditation (MCL 750.316; MSA 28.548; MRE 801, 804). *People v Patton,* 411 Mich 490.

9. Use of an affidavit by the defendant's wife against the defendant in a divorce proceeding to show premeditation by the defendant in the killing of his wife denied the defendant his constitutional right of confrontation (US Const, Am VI; Const 1963, art 1, § 20; MCL 750.316; MSA 28.548). *People v Patton,* 411 Mich 490.
10. The error in admitting into evidence an affidavit which was hearsay against a defendant charged with first-degree murder was not harmless where the affidavit was introduced to demonstrate prior assaultive behavior by the defendant against the victim for the purpose of showing premeditation, the prosecutor emphasized to the jury the importance of the statements in the affidavit in attempting to establish that the defendant was guilty of first-degree murder, and the evidence at trial could have supported a verdict of either second-degree murder or manslaughter and the jury might have so found had the affidavit not been admitted in evidence (MCL 750.316; MSA 28.548). *People v Patton,* 411 Mich 490.

HOSPITALS.

MALPRACTICE.

1. The mere occurrence of a post-operative infection and a showing that a defendant hospital had a rate of post-operative infection well below the national average are not sufficient, under the doctrine of *res ipsa loquitur,* to establish an issue for the jury of the hospital's negligence in an action for medical malpractice. *Wilson v Stilwill,* 411 Mich 587.
2. A claim against a defendant hospital of medical malpractice based on the doctrine of agency by estoppel was without merit where there was an independent relation between the defendant physician and the plaintiff patient before the treatment by the physician in the hospital and its operating room which allegedly resulted in plaintiff's post-operative injury, there was a verdict of no cause of action for the defendant physician, there was no testimony that the hospital's operating room or its surgical materials were unclean, the only possible liability of the hospital would be if its ostensible agents or employees failed to prevent a post-operative infection, and the question of negligence in failing to prevent a post-operative infection was properly withdrawn from consideration by the jury. *Wilson v Stilwill,* 411 Mich 587.
3. A directed verdict of no cause of action for a defendant hospital was proper in an action for medical malpractice on a theory that the hospital negligently failed to establish standards for the care of patients after surgery where the plaintiffs failed to introduce any expert testimony to establish the standard of conduct; the issue presented is not within the common knowledge and experience of a jury, but raises a question of medical judgment which, as a general rule, requires expert testimony. *Wilson v Stilwill,* 411 Mich 587.

HUSBAND AND WIFE.

See, also, ACTIONS 7; AUTOMOBILES 1; DEATH 1, 2; INSURANCE 3, 4, 6, 7.

PROPERTY.

1. *A tenancy by the entireties is created when a conveyance of land is made to a husband and wife, absent explicit language to the contrary; it is an estate of the common law created by operation of law rather than by the act of the parties through deed or will, based upon the common-law concepts of the unity of husband and wife, and the disabilities of coverture of married women. Morgan v Cincinnati Ins Co,* 411 Mich 267.
2. *Married women's property acts were passed to remove the common-law disabilities of coverture; married women were given the power to contract, convey and acquire real property, sue and be sued as separate legal entities, free from any spousal interference (Const 1963, art 10, § 1; MCL 557.1; MSA 26.161). Morgan v Cincinnati Ins Co,* 411 Mich 267.
3. *The salient feature of the tenancy by the entireties was the concentration of power in the husband; he was able to exercise all the incidents of ownership except determining succession at his death should he predecease his wife. Morgan v Cincinnati Ins Co,* 411 Mich 267.
4. *Because the married women's property act did not specifically mention the tenancy by the entireties, it continued to exist as it did at common law (MCL 557.1; MSA 26.161). Morgan v Cincinnati Ins Co,* 411 Mich 267.
5. *The husband alone is entitled to possess, use, and manage entireties property, but he may do nothing without the express consent of his wife to defeat her right of survivorship; the law is not frequently called upon to adjust controversies between husband and wife as tenants by the entireties because if relations become strained and a divorce is obtained, the tenancy by the entireties ends. Morgan v Cincinnati Ins Co,* 411 Mich 267.
6. *One spouse has no greater interest in property owned in tenancy by the entireties than the other; the quantity of interest being equal, where the liability of the spouses is several the innocent spouse may recover one-half of the interest insured under a fire policy when the fire is set by the other spouse. Morgan v Cincinnati Ins Co,* 411 Mich 267.

VICARIOUS LIABILITY.

7. *Vicarious liability is not an attribute of marriage; one spouse may not be held responsible for the crime of the other because married people are still individuals and responsible for their own acts. Morgan v Cincinnati Ins Co,* 411 Mich 267.

ILLEGAL WORKING CONDITIONS—*See*
UNEMPLOYMENT COMPENSATION 4

IMPEACHMENT—*See*
CRIMINAL LAW 4, 37, 49, 51-55
PERJURY 7

IMPEACHMENT—Cont'd
WITNESSES 10, 16, 17

IMPLICATION—*See*
CONTRACTS 1
INSURANCE 14

IMPROPER COMMENT—*See*
WITNESSES 2-5

IMPROPER KEEPING OF ANIMALS—*See*
AUTOMOBILES 11

IMPUTED FRAUD—*See*
INSURANCE 6

INCIDENTS OF OWNERSHIP—*See*
HUSBAND AND WIFE 3

INCLUDED OFFENSES—*See*
CRIMINAL LAW 6, 7, 24, 25
HOMICIDE 4

INCONSISTENT STATEMENTS—*See*
WITNESSES 7

INDETERMINATE SENTENCES—*See*
CONSTITUTIONAL LAW 23, 24

INDICTMENT AND INFORMATION.
PERJURY.
1. An information for perjury is not defective because it fails to give notice of the specific statements alleged to be false where it specifically charges that the defendant "stated falsely a material fact" at a preliminary examination on another charge; if the defendant is uncertain as to the exact statements alleged to be false, his remedy is to request a bill of particulars (MCL 750.422, 767.44, 767.73; MSA 28.664, 28.984, 28.1013). *People v White,* 411 Mich 366.

INDUSTRY PRACTICE—*See*
NEGLIGENCE 6

INFECTION—*See*
HOSPITALS 1

INFERENCES—*See*
HOSPITALS 1

INFLUENCING LEGISLATION—*See*
ATTORNEY AND CLIENT 12

INHERENT POWER—*See*
ATTORNEY AND CLIENT 17, 20
CONSTITUTIONAL LAW 28

INSTRUCTIONS TO JURY—*See*
CRIMINAL LAW 19-21
DAMAGES 2
FORGERY 1
HOMICIDE 1, 2
KIDNAPPING 3
WITNESSES 2

INSURANCE.
See, also, ACTIONS 5; CONTRACTS 1; HUSBAND AND WIFE 6.

FRAUD.
1. An insured's right to recover on an insurance policy on real property is determined by the rights under the contract of insurance, not by the insured's interest in the property insured. *Morgan v Cincinnati Ins Co,* 411 Mich 267.
2. The provision of a fire insurance policy that it will be void if "the insured" has committed fraud must be read as applying only to the insured who committed the fraud and makes claim under the policy; the provision has no application to any other person described in the policy as an insured (MCL 500.2832; MSA 24.12832). *Morgan v Cincinnati Ins Co,* 411 Mich 267.
3. To read the provision of a fire insurance policy that it will be void if "the insured" has committed fraud as creating a joint obligation of suretyship would be contrary to the reasonable expectations of an insured where the policy names a husband and wife, without more, as the insured under the policy; an ordinary person seeing his or her name included in an insurance contract without limiting language would suppose his or her interest in the property insured to be covered (MCL 500.2832; MSA 24.12832). *Morgan v Cincinnati Ins Co,* 411 Mich 267.
4. The fraud of a husband will not bar the wife's recovery on an insurance policy on real property which the husband and wife owned as tenants by the entireties where the insurance policy names the husband and wife, without more, as the insured under the policy. *Morgan v Cincinnati Ins Co,* 411 Mich 267.
5. *The general rule is that if the interests of insured parties are considered joint and non-separable an innocent coinsured party is barred from recovery on an insurance policy following an act of fraud or other misconduct by another coinsured party. Morgan v Cincinnati Ins Co,* 411 Mich 267.
6. *The wrongful conduct of a husband may not be imputed to his wife and serve to bar her from recovering the proceeds of an insurance policy for property which the husband and wife owned as tenants by the entireties; to hold that the husband and wife are "one" would impermissibly ignore the separate legal status of the innocent spouse. Morgan v Cincinnati Ins Co,* 411 Mich 267.

INSURANCE—Cont'd

7. *A wife may recover benefits under a fire insurance policy of one-half of the damages within the limits of the policy for a house which the wife and her estranged husband owned as tenants by the entireties where the husband had intentionally started the fire which damaged the house and the wife was the innocent coinsured party on the policy. Morgan v Cincinnati Ins Co,* 411 Mich 267.

NO-FAULT INSURANCE.

8. The apparent tension between the personal protection insurance section of the no-fault insurance act requiring compensation for injuries incurred in the maintenance of a vehicle and the section excluding injuries incurred in the maintenance of a parked vehicle with three stated exceptions should not be resolved solely by focusing on the term "parked", but through an assessment of the policies appearing from the requirement of coverage and the exclusion from the required coverage for parked vehicles (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106). *Miller v Auto-Owners,* 411 Mich 633.
9. The phrase in the no-fault insurance act, "arising out of the ownership, maintenance or use" of a vehicle, appeared in automobile liability insurance policies long before no-fault, and was apparently used in the no-fault act in awareness of its history; the maintenance aspect of the phrase covers the act of repairing the covered automobile (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106). *Miller v Auto-Owners,* 411 Mich 633.
10. The policy embodied in the personal protection insurance requirement of the no-fault act that coverage extend to injury arising out of the maintenance of a motor vehicle as a motor vehicle is to provide compensation for injuries incurred in the course of repairing a vehicle (MCL 500.3105[1]; MSA 24.13105[1]). *Miller v Auto-Owners,* 411 Mich 633.
11. The underlying policy of the exclusion of parked vehicles from the operation of the no-fault insurance act is that, except in three general types of situations, a parked car is not involved in an accident as a motor vehicle but as a stationary object, and that it is therefore inappropriate to compensate for injuries arising from its non-vehicular involvement within a system designed to compensate for injuries involving motor vehicles as motor vehicles (MCL 500.3106; MSA 24.13106). *Miller v Auto-Owners,* 411 Mich 633.
12. Nothing of the policy behind the parked-vehicle exclusion of the no-fault insurance act, to exclude injuries not resulting from involvement of a motor vehicle as a motor vehicle, conflicts with the policy of compensating for injuries incurred in the course of maintaining a motor vehicle under the personal protection insurance provision of the no-fault act (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106). *Miller v Auto-Owners,* 411 Mich 633.
13. An injury which a plaintiff suffered when his automobile fell on his chest while he was replacing its shock absorbers clearly involved the maintenance of his vehicle as a motor vehicle, and

INSURANCE—Cont'd
compensation is thus required by the no-fault insurance act without regard to whether his vehicle might be considered "parked" at the time of injury (MCL 500.3105[1], 500.3106; MSA 24.13105[1], 24.13106). *Miller v Auto-Owners,* 411 Mich 633.

SURETYSHIP AND GUARANTEE.

14. The implication of a mutual obligation of suretyship among several insured persons is in effect a limitation on recovery under the insurance policy and not to be permitted, because such limitations on recovery must be clearly stated in the insurance contract. *Morgan v Cincinnati Ins Co,* 411 Mich 267.

INTEGRATED BAR—*See*
ATTORNEY AND CLIENT 13, 14, 16
CONSTITUTIONAL LAW 7, 8, 28

INTEGRITY OF JUDICIARY—*See*
JUDGES 3, 4, 9, 11, 21, 23

INTENT—*See*
CRIMINAL LAW 18, 27
HOMICIDE 1, 2, 5, 8-10
KIDNAPPING 5-7

INTEREST—*See*
WITNESSES 7, 12

INTERPRETERS—*See*
CRIMINAL LAW 34

INTERSTATE AGREEMENT ON DETAINERS—*See*
PRISONS AND PRISONERS 1-3

JOB SHOPS—*See*
NEGLIGENCE 6, 8, 11
PRODUCTS LIABILITY 2

JOINT INSUREDS—*See*
INSURANCE 5

JOINT OBLIGATIONS—*See*
INSURANCE 3

JONES ACT—*See*
COURTS 1, 2, 4

JUDGES.

ASSIGNMENT OF JUDGES.

1. *Former judges who are assigned judicial duties pursuant to the constitutional power of the Supreme Court are assigned in the exercise of the Court's discretion, and have no tenure and no*

JUDGES—Cont'd

right to discharge judicial functions except as authorized by the Court; assignments in the exercise of constitutional power should be made after individual review, and only those ex-judges who have enhanced the judiciary in the past and who can be expected to do so in the future should be recalled to the bench (Const 1963, art 6, § 23). In the Matter of Probert, 411 Mich 210.

CONSTITUTIONAL LAW.

2. *The power to forbid the electorate from ever again exercising the franchise in favor of a particular person by permanently enjoining the person from holding judicial office has not been expressly granted to the Supreme Court, and should not be inferred (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

DISCIPLINE OF JUDGES.

3. The Supreme Court is obliged in a judicial discipline case to respond to individual considerations and also an institutional consideration, the preservation of the integrity of the judicial system (Const 1963, art 6, § 30; GCR 1963, 932). *In the Matter of Probert,* 411 Mich 210.

4. The censure of a former judge, if deserved, may be entirely expedient and essential to the preservation of the integrity of the judicial system because the alternative, silence, may be construed by the public as an act of condonation (Const 1963, art 6, § 30; GCR 1963, 932). *In the Matter of Probert,* 411 Mich 210.

5. A judicial discipline case does not become moot the instant the judge leaves office, because the possibilities of censure and conditional suspension remain after a judge charged with misconduct steps down or fails to be re-elected (Const 1963, art 6, § 30; GCR 1963, 932). *In the Matter of Probert,* 411 Mich 210.

6. A judge charged with misconduct should not have the power simply by leaving office to short-circuit investigation by the Judicial Tenure Commission against him, leaving the proceedings incomplete and subject to the abrasion of time (Const 1963, art 6, § 30; GCR 1963, 932). *In the Matter of Probert,* 411 Mich 210.

7. There is good reason for proceedings of the Judicial Tenure Commission to continue until completed, notwithstanding the judge's resignation or failure to be re-elected after the filing of a complaint of judicial misconduct (Const 1963, art 6, § 30; GCR 1963, 932). *In the Matter of Probert,* 411 Mich 210.

8. A policy of the Judicial Tenure Commission that it declines to act further after the termination of a respondent's judicial office by resignation, failure to be re-elected, or death should not be transformed into a fast, inflexible rule of law that would preclude contrary action when the commission deems it appropriate (Const 1963, art 6, § 30; GCR 1963, 932). *In the Matter of Probert,* 411 Mich 210.

9. To hold that the Supreme Court has no power to discipline a former judge after he has left office would mean that the

JUDGES—Cont'd

Court's power to vindicate the integrity of the judiciary could be negated by wholly irrelevant occurrences, such as the expiration of the judge's term of office, his resignation, or the length of time the Court takes to decide the case (Const 1963, art 6, § 30; GCR 1963, 932). *In the Matter of Probert,* 411 Mich 210.

10. Actions by a judge which, taken as a whole, constitute conduct clearly prejudicial to the administration of justice, misconduct in office, and persistent failure to perform judicial duties, all proscribed by the constitution and the General Court Rules of 1963, certainly warrant the imposition of disciplinary measures (Const 1963, art 6, § 30; GCR 1963, 932.4). *In the Matter of Probert,* 411 Mich 210.

11. It is important not only that the integrity of the judiciary be preserved but that the appearance of that integrity be maintained, and consequently the Supreme Court cannot ignore judicial misconduct, even though the judge has left office since. *In the Matter of Probert,* 411 Mich 210.

12. *The Judicial Tenure Commission is not empowered to recommend discipline of, nor may the Supreme Court, on the commission's recommendation, impose discipline on, a person who no longer holds judicial office (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

13. *Censure was intended to be the least severe form of discipline of a judge, reserved for situations where, while some disciplinary action is indicated, the judge is expected to correct his conduct with a minimum of reprobation (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

14. *It skews the constitutionally prescribed scheme of discipline of judges to construe censure as a discipline which may be imposed on a person determined to be unfit to continue serving as a judge (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

15. *The disciplines which the Supreme Court may impose on judges who are guilty of misconduct are listed by the constitution in the alternative, and their gradation in severity indicates that it was contemplated that a choice of discipline would be made according to the severity of the misconduct; a decision by the Court to impose both censure and conditional suspension for the same misconduct is at odds with the apparent intent of the constitution (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

16. *The interests in punishing a former judge, making an example of him, or informing the public of his misdeeds are not functions of the Judicial Tenure Commission and do not warrant continuation of the proceedings against a person who no longer holds judicial office (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

17. *The Attorney Grievance Commission has power to investigate and recommend discipline for conduct by a lawyer which has been the subject of proceedings in the Judicial Tenure Commission, and the record of the tenure commission proceedings is*

JUDGES—Cont'd

admissible into evidence at the hearing of the Attorney Grievance Commission; however, the Attorney Grievance Commission must find the facts itself and recommend the discipline it thinks appropriate even where conduct which is the basis of the discipline is the same (GCR 1963, 965). In the Matter of Probert, 411 Mich 210.

18. *The Attorney Grievance Commission and the Judicial Tenure Commission operate independently to protect distinct interests and maintain distinct professional standards; a judge's conduct might be prejudicial to the administration of justice while identical conduct by a lawyer might not be, and a person's conduct or temperament might render him unfit to hold judicial office while not substantially affecting his fitness to be a member of the State Bar (GCR 1963, 932, 950 et seq.). In the Matter of Probert,* 411 Mich 210.

19. *A judge is subject to discipline for conduct prior to his taking office or during a previous tenure; if a judge who is accused of judicial misconduct ceases to hold office before disciplinary proceedings run their course and then regains judicial office, the Judicial Tenure Commission may reactivate the inquiry into the judge's conduct and may recommend that the Supreme Court impose discipline for that conduct (GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

20. *Discipline of a judge which is not intended to rehabilitate the judge or protect the judicial office is mere punishment and not within the disciplinary power of the Judicial Tenure Commission (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

21. *The public's interest in judicial discipline is in assuring that justice is administered properly, in preserving the integrity of the courts and the judicial process, and in maintaining public confidence in the judiciary by assuring that judges conduct themselves in a manner befitting the judicial office (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

22. *The termination of proceedings of the Judicial Tenure Commission against a judge because he no longer holds judicial office does not preclude the operation of attorney disciplinary proceedings against the judge; if his misdeeds as a judge were such as to render him unfit to be a member of the State Bar, the Attorney Grievance Commission may recommend discipline (Const 1963, art 6, § 30; GCR 1963, 932, 950 et seq.). In the Matter of Probert,* 411 Mich 210.

23. *The suspension from judicial office of a person who is not a judge and censure which cannot correct judicial conduct is not, in any proper sense, judicial discipline; the procedures provided by the constitution for the discipline of judges should not be employed to proclaim displeasure, however justified, with judicial misconduct because the primary purpose should be the protection of the public and the integrity of the judicial process by preventing the abuse of judicial authority by persons who are in a position to abuse it (Const 1963, art 6, § 30; GCR 1963, 932). In the Matter of Probert,* 411 Mich 210.

JUDGES—Cont'd

DISQUALIFICATION OF JUDGES.

24. Merely proving that the district judge who conducted a preliminary examination on a charge of perjury was the same judge who conducted the prior proceeding against the defendant at which the perjured testimony was given does not amount to proof of bias for purposes of disqualification of the examining judge (GCR 1963, 912.2). *People v White,* 411 Mich 366.

SUPERINTENDING CONTROL.

25. The constitutional power of superintending control invests the Supreme Court with the power to determine that a person is unfit for judicial office and to prevent him from exercising judicial power in this state for as long as he is, in the judgment of the Court, judicially unfit, even though the constitution, in granting the power of superintending control, explicitly prohibits its use to remove a judge from office (Const 1963, art 6, § 4). *In the Matter of Probert,* 411 Mich 210.

26. The constitutional power of superintending control does not give the Supreme Court the power to enjoin a person permanently from holding judicial office because a permanent injunction might implicate the right of the voters to choose those who would hold judicial office and prevent the electorate from ever again exercising its constitutional suffrage in favor of a particular person (Const 1963, art 2, § 1; art 6, §§ 2, 4, 8, 12, 16). *In the Matter of Probert,* 411 Mich 210.

JUDICIAL TENURE COMMISSION—*See*
JUDGES 6-8, 12, 16-20
SUPERINTENDING CONTROL 2

JURISDICTION—*See*
COURTS 1-6

JURY SELECTION—*See*
CRIMINAL LAW 46-48

KEYS—*See*
BURGLARY 1, 2

KIDNAPPING.

ASPORTATION.

1. The element of movement or asportation in a kidnapping must not be merely incidental to the commission of another crime, it must be incidental to the kidnapping (MCL 750.349; MSA 28.581). *People v Barker,* 411 Mich 291.

2. The element of asportation must be shown to be movement having significance independent of any accompanying offense, whether the accompanying offense charged carries equal punishment or is a lesser offense (MCL 750.349; MSA 28.581). *People v Barker,* 411 Mich 291.

3. An instruction to the jury that the element of asportation in a

KIDNAPPING—Cont'd

kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the concurrent commission of first-degree criminal sexual conduct is reversible error (MCL 750.349, 750.520a *et seq.;* MSA 28.581, 28.788[1] *et seq.). People v Barker,* 411 Mich 291.

4. There may be a concurrent commission of first-degree criminal sexual conduct and kidnapping arising from the same conduct; a jury which is properly instructed could find under the facts of a particular case, for example, that movement of the rape victim was sufficient to satisfy the requisite element of asportation for a conviction of kidnapping (MCL 750.349, 750.520a *et seq.;* MSA 28.581, 28.788[1] *et seq.). People v Barker,* 411 Mich 291.

5. *An element of asportation need not be read into the kidnapping statute to save it from being unconstitutionally overbroad; unless the kidnapping charged involves carrying or sending a person out of Michigan, no element of asportation is implicated in the statute (MCL 750.349; MSA 28.581). People v Barker,* 411 Mich 291.

INTENT.

6. *Any overbreadth of the kidnapping statute would be avoided by requiring proof of the intent specified in the statute as the ultimate purpose of the confinement of the person kidnapped,* i.e., *either the intent to extort money or other valuable thing, or the intent to cause the person to be secretly confined, or the intent to cause the person to be held to service against his or her will, where the kidnapping charged does not involve carrying or sending a person out of Michigan (MCL 750.349; MSA 28.581). People v Barker,* 411 Mich 291.

7. *Confinement of a person in Michigan for the ultimate purpose of committing criminal sexual conduct is not covered by the kidnapping statute (MCL 750.349, 750.520a et seq.; MSA 28.581, 28.788[1] et seq.). People v Barker,* 411 Mich 291.

KNOWLEDGE—*See*
NEGLIGENCE 4-11

LABORERS—*See*
TRUSTS 1

LABOR RELATIONS.

CONSTITUTIONAL LAW.

1. The primary purposes of the constitutional provision permitting local civil service systems were to allow them to be adopted without the express approval of the Legislature, to prohibit local political officials from unilaterally changing the merit system, and to protect local public employees from political purges; its purpose was not to diminish the Legislature's power to enact laws for the resolution of disputes concerning public employees (Const 1963, art 4, § 48; art 11, § 6). *Local 1383 v City of Warren,* 411 Mich 642.

LABOR RELATIONS—Cont'd

PUBLIC EMPLOYMENT.

2. Seniority, promotions, and promotional criteria for public employees are "other terms and conditions of employment" under the public employment relations act and, thus, are mandatory subjects of collective bargaining (MCL 423.215; MSA 17.455[15]). *Local 1383 v City of Warren,* 411 Mich 642.

3. The constitutional power of the Legislature to enact laws providing for the resolution of disputes concerning public employees must fairly be construed to include disputes regarding promotion and seniority (Const 1963, art 4, § 48). *Local 1383 v City of Warren,* 411 Mich 642.

4. The Legislature has determined that collective negotiation is the appropriate method for public employers and employees to develop and specify terms and conditions of employment; once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject, and neither party may take unilateral action on the subject absent an impasse in negotiations (Const 1963, art 4, § 48; MCL 423.215; MSA 17.455[15]). *Local 1383 v City of Warren,* 411 Mich 642.

5. The public employment relations act prevails over conflicting legislation, municipal charters, and ordinances regarding public employers' powers; it must be regarded as the dominant law regulating labor relations in public employment (Const 1963, art 4, § 48; MCL 423.201 *et seq.;* MSA 17.455[1] *et seq.). Local 1383 v City of Warren,* 411 Mich 642.

6. A collective-bargaining agreement under the public employment relations act concerning seniority and promotions of employees of a city's fire department is valid and enforceable, and prevails over the statute concerning civil service for police and fire departments; the statutory authority and duties of a city's police and fire civil service commission are diminished *pro tanto* to the extent required for the free administration of mandatory collective bargaining under the public employment relations act (Const 1963, art 4, § 48; MCL 38.501 *et seq.,* 423.201 *et seq.;* MSA 5.3351 *et seq.,* 17.455[1] *et seq.). Local 1383 v City of Warren,* 411 Mich 642.

7. The public employment relations act requires a public employer to bargain in good faith about seniority and promotions, but does not require the public employer to agree to a proposal made by its employees (MCL 423.215; MSA 17.455[15]). *Local 1383 v City of Warren,* 411 Mich 642.

8. The system of promotions in the statute concerning civil service for police and fire departments continues to have effect in municipalities that adopt the civil service system of the statute unless a different system or plan is incorporated into a collective-bargaining agreement under the public employment relations act (MCL 38.501 *et seq.,* 423.201 *et seq.;* MSA 5.3351 *et seq.,* 17.455[1] *et seq.). Local 1383 v City of Warren,* 411 Mich 642.

9. The Constitution of 1963 authorizes the Legislature to enact state-wide laws regulating disputes concerning local public

LABOR RELATIONS—Cont'd
employees; therefore, the collective-bargaining system mandated by the public employment relations act, which was enacted under the constitutional provision, when read together with the constitutional provision requiring the voters to approve a local civil service system should not unnecessarily hinder the free administration of mandatory collective bargaining under the public employment relations act (Const 1963, art 4, § 48; art 11, § 6; MCL 423.201 *et seq.;* MSA 17.455[1] *et seq.). Local 1383 v City of Warren,* 411 Mich 642.

10. To require an affirmative vote of the electorate to permit a collective-bargaining agreement entered under the public employment relations act to modify a local civil service system would unduly hinder and frustrate the free administration of the public employment relations act, which the Legislature has determined to be the public policy of the state as to labor relations in public employment (Const 1963, art 4, § 48; art 11, § 6; MCL 423.201 *et seq.;* MSA 17.455[1] *et seq.). Local 1383 v City of Warren,* 411 Mich 642.

11. The home-rule power of local public employers is subject to collective bargaining under the public employment relations act, and the constitutional provision for local civil service systems was not intended to preclude the application of the public employment relations act to provide for free and full collective bargaining on the subjects of promotions and seniority of employees in a city's fire department (Const 1963, art 4, § 48; art 11, § 6; MCL 423.201 *et seq.;* MSA 17.455[1] *et seq.). Local 1383 v City of Warren,* 411 Mich 642.

12. *A collective-bargaining agreement under the public employment relations act concerning seniority and promotions of employees of a city's fire department cannot alter or modify conflicting local civil service system provisions for police and fire departments in the statute and city charter because the Constitution of 1963 confers the paramount authority on the citizens of the city to determine the kind of public employment system by which they will be served (Const 1963, art 11, § 6; MCL 38.501 et seq., 423.201 et seq.; MSA 5.3351 et seq., 17.455[1] et seq.). Local 1383 v City of Warren,* 411 Mich 642.

LACK OF SAFETY GUARDS—*See*
NEGLIGENCE 6-8, 11
PRODUCTS LIABILITY 2

LAW ENFORCEMENT—*See*
ARMED SERVICES 1, 2

LAWYERS—*See*
ATTORNEY AND CLIENT 1-10
LIMITATION OF ACTIONS 4

LEARNED TREATISES—*See*
EVIDENCE 1-3

LEGAL SERVICES—*See*
ATTORNEY AND CLIENT 19
CONSTITUTIONAL LAW 3

LEGISLATIVE ACTIVITIES—*See*
ATTORNEY AND CLIENT 12
CONSTITUTIONAL LAW 10-12, 15, 16, 18

LEGISLATIVE INTENT—*See*
CRIMINAL LAW 22, 24-26
HOMICIDE 3, 6
PARENT AND CHILD 2
STATUTES 2, 4, 5

LEGISLATIVE PURPOSE—*See*
ATTORNEY AND CLIENT 16

LEGISLATURE—*See*
LABOR RELATIONS 3

LESSER INCLUDED OFFENSES—*See*
CRIMINAL LAW 7, 19, 24
FORGERY 1

LIABILITY IN TORT—*See*
AUTOMOBILES 2-4, 6-10, 12

LICENSE TO PRACTICE—*See*
CONSTITUTIONAL LAW 19

LIMITATION OF ACTIONS.
See, also, STATUTES 7-9.

ATTORNEY AND CLIENT.

1. The two-year limitation period for malpractice actions applies to actions against attorneys (MCL 600.5805; MSA 27A.5805). *Sam v Balardo,* 411 Mich 405.

MALPRACTICE.

2. The word malpractice, as it is used in the statute of limitations, although it is clear and explicit, is nowhere defined in the Revised Judicature Act; the Legislature intended that malpractice would be defined according to the common-law usage at the time of the passage of the statute and that only those professions traditionally liable for malpractice would benefit from the two-year statute of limitations for malpractice actions (MCL 600.5805; MSA 27A.5805). *Sam v Balardo,* 411 Mich 405.
3. An attorney is called upon to make decisions that involve the exercise of independent professional judgment of essentially the same serious quality as those made by a physician; considerations of public policy, therefore, support a decision that attorneys are deserving of the same protection afforded to physicians, surgeons, and dentists by the statutory two-year limita-

LIMITATION OF ACTIONS—Cont'd
tion period for malpractice actions (MCL 600.5805; MSA 27A.5805). *Sam v Balardo,* 411 Mich 405.
4. *Because it is clear that attorneys were subject to liability for malpractice at common law, it is unnecessary in a case for legal malpractice to construe other sections of the Revised Judicature Act and thus implicitly to decide whether the two-year statute of limitations for malpractice actions applies to actions against members of all state-licensed professions (MCL 600.5805; MSA 27A.5805). Sam v Balardo,* 411 Mich 405.
5. *The Supreme Court should not adopt a construction of the two-year statute of limitations for malpractice actions which has the effect of rendering uncertain the period of limitation applicable to any given profession until the Court has concluded that an action for the negligent practice of that profession was considered an action for malpractice at common law because the purpose of the revision of the statutes pertaining to the judiciary and the court rules by the enactment of the Revised Judicature Act was to consolidate, simplify and clarify the jurisprudence of the state, not to create uncertainty (MCL 600.5805; MSA 27A.5805). Sam v Balardo,* 411 Mich 405.
6. *The two-year statute of limitations for malpractice actions applies only to the malpractice of physicians, surgeons and dentists until the Legislature clearly expresses an intent to expand the application of the two-year limitation period by specifying the types of actions for the negligent practice of other professions to which it applies and the ones to which it does not (MCL 600.5805; MSA 27A.5805). Sam v Balardo,* 411 Mich 405.

LOBBYING—*See*
ATTORNEY AND CLIENT 12
CONSTITUTIONAL LAW 10-12, 15, 16

LOCAL CIVIL SERVICE—*See*
LABOR RELATIONS 1, 6, 8-12

LOSS OF CONSORTIUM—*See*
AUTOMOBILES 1
DEATH 1

LOSS OF SOCIETY—*See*
ACTIONS 1, 2, 4-8
CONSTITUTIONAL LAW 5

LOVE—*See*
ACTIONS 7

MAILING LIST—*See*
CONSTITUTIONAL LAW 27

MAINTENANCE—*See*
AUTOMOBILES 4, 11, 12

MAINTENANCE—Cont'd
INSURANCE 8-10, 12, 13

MALICE—*See*
HOMICIDE 1, 2, 5

MALICIOUS CONDUCT—*See*
DAMAGES 1, 2

MALPRACTICE—*See*
ATTORNEY AND CLIENT 11
EVIDENCE 2, 3
HOSPITALS 1-3
LIMITATION OF ACTIONS 1-6
STATUTES 7-9
WITNESSES 2-5, 8, 9, 11, 13, 14
WORDS AND PHRASES 1

MANDATORY SUBJECT OF BARGAINING—*See*
LABOR RELATIONS 2, 4, 6, 7

MANSLAUGHTER—*See*
CRIMINAL LAW 4, 18

MARIJUANA—*See*
WITNESSES 1

MARRIED WOMEN'S PROPERTY ACT—*See*
HUSBAND AND WIFE 2, 4

MATERIAL FACTS—*See*
PERJURY 4

MATERIALMEN—*See*
TRUSTS 1

MEDICAL MALPRACTICE—*See*
HOSPITALS 1-3
WITNESSES 2-5, 8, 9, 11, 13, 14

MEDICAL TEXTBOOKS—*See*
EVIDENCE 2, 3

MEMBERSHIP IN STATE BAR—*See*
ATTORNEY AND CLIENT 14

MILITARY PERSONNEL—*See*
ARMED SERVICES 1, 2
WITNESSES 1

MINIMUM SENTENCE—*See*
CONSTITUTIONAL LAW 24, 26

MINIMUM WAGE—*See*
UNEMPLOYMENT COMPENSATION 4

MISCONDUCT—*See*
CRIMINAL LAW 15, 16

MISCONDUCT OF JUDGES—*See*
JUDGES 3, 4, 6, 7, 9-11, 15, 17

MODIFICATION OF DISCIPLINE—*See*
ATTORNEY AND CLIENT 10

MOOTNESS—*See*
JUDGES 5

MULTIPLE PROSECUTION—*See*
CRIMINAL LAW 8

MULTIPLE PUNISHMENT—*See*
CRIMINAL LAW 5-8, 22-26
HOMICIDE 3, 4, 6

MUNICIPAL CORPORATIONS—*See*
LABOR RELATIONS 9

MURDER—*See*
CRIMINAL LAW 55
HOMICIDE 1-10

MUTUAL OBLIGATION—*See*
INSURANCE 14

NAMED INSURED—*See*
INSURANCE 2-4

NATURE OF CHARGE—*See*
CRIMINAL LAW 27

NEGLIGENCE.
See, also, ACTIONS 1-5; AUTOMOBILES 8-10; HOSPITALS 1-3; LIMITATION OF ACTIONS 2, 5; STATUTES 9; WORDS AND PHRASES 1.

COMMON LAW.

1. *The 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; the bounds of recovery, no less than the conditions of liability, are judicially drawn and subject to judicial alteration. Berger v Weber,* 411 Mich 1.
2. *Decisions delineating the extent of tort liability are more than exercises in logic: they are pronouncements of social policy which should reflect the often subtle balance of interests involved; logic and even abstract justice must defer to overall*

NEGLIGENCE—Cont'd

policy in the appraisal of the justification for judicial changes in the common law. Berger v Weber, 411 Mich 1.

DUTY.

3. *The concepts of duty and proximate cause, reserved for judicial determination, serve to limit the scope of a defendant's liability for negligence; both depend in part on whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable, but foreseeability is not the only criterion. Berger v Weber,* 411 Mich 1.

NEGLIGENT ENTRUSTMENT.

4. To sustain a cause of action for negligent entrustment of a chattel to another party a plaintiff must prove that the defendant knew or should have known of the propensities of the party entrusted for taking unreasonable risks of injury. *Fredericks v General Motors,* 411 Mich 712.

5. Sufficient peculiarities of the party entrusted by a defendant with a chattel to put the defendant on notice of the likelihood that the chattel would be used in an unsafe manner must be demonstrated by the plaintiff to prove a claim that the entrustment was negligent in the absence of proof that the defendant knew of the propensities of the party entrusted for taking unreasonable risks of injury. *Fredericks v General Motors,* 411 Mich 712.

6. A plaintiff failed to prove a claim that a defendant negligently entrusted a set of dies without a safety guard to the plaintiff's employer for use in a power press to make parts for the defendant where the plaintiff generally complained of poor safety conditions throughout the parts jobbing industry and argued that the defendant was in an economic position to require improvements in the conditions under which its parts were made but failed to prove that the defendant knew that all job shops were unsafe or that the defendant had special knowledge of the plaintiff's employer which would put the defendant on notice that the employer was likely to use the defendant's dies in an unsafe manner. *Fredericks v General Motors,* 411 Mich 712.

7. Evidence of accidents involving other dies without safety guards belonging to a defendant manufacturer was irrelevant and inadmissible to prove that the defendant should have known that the dies it supplied to the plaintiff's employer would be used in an unsafe manner where the evidence concerned accidents which occurred after the injury in issue. *Fredericks v General Motors,* 411 Mich 712.

8. Writings and publications of a defendant manufacturer criticizing the use of dies without safety guards are inadmissible on the issue of whether the defendant should have known that such dies were likely to be used in an unsafe manner by the plaintiff's employer in a power press to make parts for the defendant where there was no showing of the relevance of the proffered evidence to the plaintiff's injury or to the testimony of

NEGLIGENCE—Cont'd
the defendant's safety engineers. *Fredericks v General Motors,* 411 Mich 712.
9. *A defendant may be liable for negligent entrustment of a chattel to another if the defendant had reason to know that the one entrusted is likely to use the chattel in a manner involving an unreasonable risk of physical harm. Fredericks v General Motors,* 411 Mich 712.
10. *A defendant had reason to know that the dies it supplied to the plaintiff's employer would be used in an unsafe manner where the defendant had information from which a person of reasonable intelligence, or the superior intelligence of the defendant, would infer that the risk in question exists, or such a person would govern his conduct upon the assumption that the risk exists. Fredericks v General Motors,* 411 Mich 712.
11. *Whether a defendant manufacturer had reason to know that a set of dies without a safety guard, entrusted to the plaintiff's employer for use in a power press to make parts for the defendant, would be used in an unsafe manner is for the jury where an expert on safety employed by the defendant testified that many job shops manufacturing parts require their employees to reach between dies mounted on power presses, the hand-loading process is a standard procedure at job shops, and the cost of providing guards for power presses and dies may be prohibitive for such job shops. Fredericks v General Motors,* 411 Mich 712.

NEGLIGENT ENTRUSTMENT—*See*
NEGLIGENCE 4-11

NEWLY DISCOVERED EVIDENCE—*See*
ATTORNEY AND CLIENT 4-6

NEXUS OF LITIGATION—*See*
COURTS 3-6

NO-FAULT INSURANCE—*See*
AUTOMOBILES 1-9, 11, 12
INSURANCE 8-13

NONECONOMIC LOSS—*See*
AUTOMOBILES 4, 5

NOTICE—*See*
INDICTMENT AND INFORMATION 1

OBJECTIVE TEST OF ENTRAPMENT—*See*
CRIMINAL LAW 9-11, 14

OCCUPATIONAL SAFETY ACT—*See*
PRODUCTS LIABILITY 2

ORDER OF DISCIPLINE—*See*
ATTORNEY AND CLIENT 2, 7-10

OTHER CRIMES—*See*
KIDNAPPING 1, 3

OWNERSHIP—*See*
AUTOMOBILES 4, 11, 12

PARENT AND CHILD.
See, also, ACTIONS 1, 6-8; CONSTITUTIONAL LAW 5.
CHILD CUSTODY ACT.
1. Review by the Supreme Court of the trial court's determination in a child custody case is *de novo,* but the Court is bound by the provisions of the Child Custody Act, and must affirm a judgment granting custody of a child to one of the parents unless it finds that the trial court committed clear legal error in making the decision, made findings of fact against the great weight of the evidence, or committed a palpable abuse of discretion (MCL 722.28; MSA 25.312[8]). *Baker v Baker,* 411 Mich 567.
2. The Child Custody Act attempts to standardize the criteria for resolving child custody cases by declaring that the ultimate standard for the award of custody, *i.e.,* the best interest of the child, is to be determined by evaluation and consideration of ten specifically identified factors; the Legislature also intended to minimize the prospect of unwarranted and disruptive orders changing custody and to erect a barrier against removal of a child from an established custodial environment, except in the most compelling cases (MCL 722.21 *et seq.;* MSA 25.312[1] *et seq.). Baker v Baker,* 411 Mich 567.
3. The Child Custody Act provides that an established custodial environment of a child may not be changed by the trial court unless there is presented clear and convincing evidence that the change is in the best interest of the child; absent a showing of an established custodial environment the trial judge is free to award custody of the child who was living with one parent at the time of trial either to his mother or his father simply by determining, upon a showing of a preponderance of the evidence, that the child's best interests called for a change of custody (MCL 722.27; MSA 25.312[7]). *Baker v Baker,* 411 Mich 567.
4. An "established custodial environment" under the Child Custody Act depends on a custodial relationship of a significant duration in which the child is provided the parental care, discipline, love, guidance, and attention appropriate to his age and individual needs, and a relationship between the custodian and child which is marked by qualities of security, stability, and permanence (MCL 722.27; MSA 25.312[7]). *Baker v Baker,* 411 Mich 567.
5. The contacts of a child with the community and familiar associations in the town in Michigan where he was raised by his mother and father with his sister are not sufficient to preserve the established custodial environment where the family is dissolved and the child enters into a new custodial relation with his father alone, with a radically altered life in a

PARENT AND CHILD—Cont'd
new home, after repeated changes in custody between the child's parents and changes of residence between Michigan and Colorado over a five-month period (MCL 722.27; MSA 25.312[7]). *Baker v Baker,* 411 Mich 567.

6. The standards of the Child Custody Act for deciding a custody dispute, taken as a whole, fully embrace the significant long-term community contacts which the child has established during his life in a certain community and should be considered by the trial court (MCL 722.23; MSA 25.312[3]). *Baker v Baker,* 411 Mich 567.
7. Neither the Child Custody Act nor the General Court Rules require a trial court deciding a child custody dispute to comment upon every matter in evidence or declare its acceptance or rejection of every proposition argued by the parties (MCL 722.21 *et seq.;* MSA 25.312[1] *et seq.;* GCR 1963, 517.1). *Baker v Baker,* 411 Mich 567.
8. A trial court's determination in a divorce case that the best interest of a child of the parties required the award of custody to his mother rather than to his father is not against the great weight of the evidence where the court considered the factors required by the Child Custody Act to determine the custody dispute, decided to give the child's preference to live with his father little weight, finding that it was unduly influenced by the father and inconsistent with the child's best interest, and found that the mother had been the guiding force in the care, education and discipline of the child until the breakdown of the parties' marriage disrupted the child's life with repeated changes in custody and residence over a five-month period (MCL 722.23; MSA 25.312[3]). *Baker v Baker,* 411 Mich 567.
9. *The ties which an 11-year-old child has with the community where he was raised, such as his school, playmates, family and participation in extra-curricular activities, are especially important in his life when his parents are separated or divorced; therefore, they should not be cast aside lightly by a trial court in deciding whether the child has an "established custodial environment" in that community under the Child Custody Act (MCL 722.27; MSA 25.312[7]). Baker v Baker,* 411 Mich 567.

PARKED VEHICLES—*See*
INSURANCE 8, 11-13

PARTICIPATION OF DEFENDANT—*See*
CRIMINAL LAW 38

PARTS JOBBERS—*See*
NEGLIGENCE 6, 8, 11
PRODUCTS LIABILITY 2

PAYMENTS—*See*
TRUSTS 1

PERJURY.

See, also, CRIMINAL LAW 27, 28; INDICTMENT AND INFORMATION 1; JUDGES 24.

COLLATERAL ESTOPPEL.

1. A defendant's prosecution for and conviction of perjury committed at preliminary examination on another charge against him is not barred by the doctrine of collateral estoppel where the defendant was bound over for trial on the other charge; in order to apply collateral estoppel, an issue of ultimate fact must have once been determined by a valid and final judgment in previous litigation between the same parties (MCL 750.422; MSA 28.664). *People v White,* 411 Mich 366.

CONSTITUTIONAL LAW.

2. The constitutional protection against double jeopardy does not ordinarily bar the defendant's prosecution for and conviction of perjury committed at a criminal proceeding against him because the perjury is not the same offense as the substantive offense charged at the proceeding (US Const, Am V; Const 1963, art 1, § 15; MCL 750.422; MSA 28.664). *People v White,* 411 Mich 366.

DEFENDANT TESTIFYING.

3. The evils that might result from permitting the prosecutor to retry ultimate facts by charging a defendant with perjury are not present where an accused elected to testify at the preliminary examination on a charge of delivery of heroin and falsely testified that he had not participated in the transaction; there was no prior determination that the accused's story was the truthful version, and, there having been no trial, the prosecutor cannot be said to be seeking a more satisfactory result in the drug matter by presenting the same issues in a trial for perjury (MCL 750.422; MSA 28.664). *People v White,* 411 Mich 366.

4. A defendant charged with delivery of heroin lied about what were clearly material adjudicative facts, lies which will support a charge and conviction of perjury, as well as about the assertedly ultimate fact of participation in the drug transaction, where he falsely denied knowing the undercover police officer who was the complaining witness, denied having "any business dealings" with the officer, and denied riding with him in an automobile from Oscoda to Detroit and back to make the transaction (MCL 750.422; MSA 28.664). *People v White,* 411 Mich 366.

PLEA OF GUILTY.

5. The proper remedy for a defendant convicted, on his plea of guilty, of perjury on the inadequate factual basis that he falsely denied only an ultimate fact would be a remand to the trial court to give the prosecutor an opportunity to adduce facts supporting the plea; however, there is no reason for a *pro forma* remand where the evidence would only consist of the transcript of the defendant's false testimony, and the accuracy of the transcript is not questioned (MCL 750.422; MSA 28.664). *People v White,* 411 Mich 366.

6. The transcript of the defendant's false testimony in a prelimi-

PERJURY—Cont'd
nary examination on a charge of delivery of heroin and the defendant's statement at a guilty-plea proceeding that he had falsely denied any participation in the heroin transaction adequately establishes a factual basis for his plea of guilty of perjury where the defendant, in the same plea-taking proceeding, admitted he participated and pled guilty of attempted delivery of heroin (MCL 750.422; MSA 28.664). *People v White,* 411 Mich 366.

WITNESSES.
7. Nothing should impede legitimate efforts to punish perjury; however, the trial is the primary safeguard against inaccurate testimony, through cross-examination, rebuttal, and impeachment (MCL 705.422; MSA 28.664). *People v White,* 411 Mich 366.

PERMANENT REMOVAL—*See*
JUDGES 2, 26

PERSONAL INJURY—*See*
ACTIONS 8
CONSTITUTIONAL LAW 5

PERSONAL PROTECTION INSURANCE—*See*
INSURANCE 8, 10-13

PERSONAL REASON—*See*
UNEMPLOYMENT COMPENSATION 5-8

PHYSICIANS AND SURGEONS—*See*
EVIDENCE 2, 3
HOSPITALS 1-3
LIMITATION OF ACTIONS 6
WITNESSES 3, 4, 8, 9, 11, 13, 14

PLAINTIFFS' WITNESS—*See*
WITNESSES 2-5, 9-15

PLEADING—*See*
ATTORNEY AND CLIENT 3
INDICTMENT AND INFORMATION 1

PLEA OF GUILTY—*See*
CRIMINAL LAW 10, 27-34
PERJURY 5, 6

POLICE AND FIRE DEPARTMENTS—*See*
LABOR RELATIONS 6, 8, 11, 12

POLICY—*See*
ACTIONS 3, 5

POLITICAL ACTIVITIES—*See*
CONSTITUTIONAL LAW 10-12, 18

POSSE COMITATUS ACT—*See*
ARMED SERVICES 1, 2
WITNESSES 1

POSSESSION OF FIREARM—*See*
CRIMINAL LAW 1
WEAPONS 1, 2

POSSESSION OF WEAPONS—*See*
STATUTES 6

POST-OPERATIVE INFECTION—*See*
HOSPITALS 1-3

POWER OF SUPERINTENDING CONTROL—*See*
JUDGES 25, 26
SUPERINTENDING CONTROL 1

POWER PRESS—*See*
NEGLIGENCE 6, 8, 11
PRODUCTS LIABILITY 2

PRACTICE OF LAW—*See*
ATTORNEY AND CLIENT 14
CONSTITUTIONAL LAW 8, 9, 19

PREJUDICE—*See*
CRIMINAL LAW 42
WITNESSES 7

PREJUDICIAL EFFECT—*See*
CRIMINAL LAW 52, 54, 55

PRELIMINARY EXAMINATION—*See*
CRIMINAL LAW 2
JUDGES 24
PERJURY 1, 3

PREMEDITATION—*See*
HOMICIDE 2, 8-10

PRESENCE OF DEFENDANT—*See*
CRIMINAL LAW 35, 36, 38-43

PRESENTENCE CONFERENCE—*See*
CRIMINAL LAW 39, 42, 43

PRESENTMENT—*See*
FORGERY 2, 3

PRESERVING QUESTION—*See*
CRIMINAL LAW 3, 30, 31, 47

PRESUMPTIONS—*See*
STATUTES 3

PRETRIAL PROCEDURE—*See*
COURTS 5

PRIOR ASSAULTS—*See*
CRIMINAL LAW 4, 18

PRIOR CONVICTIONS—*See*
CRIMINAL LAW 49, 51-55

PRIOR INCONSISTENT STATEMENTS—*See*
CRIMINAL LAW 37

PRIOR MISCONDUCT—*See*
ATTORNEY AND CLIENT 2, 3

PRISONERS—*See*
STATUTES 6

PRISON OVERCROWDING EMERGENCY POWERS ACT—*See*
CONSTITUTIONAL LAW 24, 25

PRISONS AND PRISONERS.
See, also, CONSTITUTIONAL LAW 23-26.
INTERSTATE AGREEMENT ON DETAINERS.
1. The Interstate Agreement on Detainers is a congressionally sanctioned interstate compact, construction of which presents a federal question (MCL 780.601 *et seq.;* MSA 4.147[1] *et seq.). People v McLemore,* 411 Mich 691
2. A decision by federal authorities to honor a writ of habeas corpus *ad prosequendum* issued by Recorder's Court of Detroit as a matter of comity does not bring into operation the provisions of the Interstate Agreement on Detainers, including the requirement that trial commence within 120 days (MCL 780.601 *et seq.;* MSA 4.147[1] *et seq.). People v McLemore,* 411 Mich 691
SPEEDY TRIAL.
3. A writ of habeas corpus *ad prosequendum* is not a detainer within the meaning of the Interstate Agreement on Detainers (MCL 780.601 *et seq.;* MSA 4.147[1] *et seq.). People v McLemore,* 411 Mich 691

PRIVACY—*See*
CONSTITUTIONAL LAW 27

PROBATION—*See*
CRIMINAL LAW 45

PROBATIVE VALUE—*See*
CRIMINAL LAW 50-52, 54, 55

PRODUCTS LIABILITY.
DEFECTIVE PRODUCT.
1. A product is unreasonably dangerous and therefore defective so that its supplier is liable for personal injuries sustained by its use if the product is not reasonably safe for its foreseeable uses. *Fredericks v General Motors,* 411 Mich 712.
2. It cannot be held as a matter of law that it was foreseeable to a defendant that a set of dies without a safety guard which the defendant owned and supplied to the plaintiff's employer for use in a power press to make parts for the defendant would be used in an unsafe manner without guards where an unguarded die may be used in a reasonably safe manner by other methods of guarding the point of operation of a power press and at the time of the plaintiff's injury the occupational safety act required each employer to maintain conditions of work which are reasonably safe and healthful for employees (MCL 408.852; MSA 17.49[2]). *Fredericks v General Motors,* 411 Mich 712.

PROFESSIONAL MISCONDUCT—*See*
ATTORNEY AND CLIENT 2, 3

PROFESSIONAL NEGLIGENCE—*See*
LIMITATION OF ACTIONS 2, 5
STATUTES 9
WORDS AND PHRASES 1

PROFESSIONAL WITNESS—*See*
WITNESSES 2-5, 9, 10, 12

PROMOTIONS—*See*
LABOR RELATIONS 2, 3, 6-8, 12

PROPERTY—*See*
HUSBAND AND WIFE 1-6
INSURANCE 4, 6, 7

PROXIMATE CAUSE—*See*
NEGLIGENCE 3

PUBLIC CONTRACTS—*See*
TRUSTS 1

PUBLIC EMPLOYMENT—*See*
LABOR RELATIONS 1-12

PUBLIC INTEREST—*See*
JUDGES 21

PUBLIC POLICY—*See*
AUTOMOBILES 3

PUBLIC POLICY—Cont'd
COURTS 2, 6
CRIMINAL LAW 29
INSURANCE 10-12
LABOR RELATIONS 10
LIMITATION OF ACTIONS 3

PUBLIC PURPOSE—*See*
CONSTITUTIONAL LAW 4

PURPOSES OF STATE BAR—*See*
ATTORNEY AND CLIENT 13

RAPE—*See*
KIDNAPPING 3, 4, 7

REAL PROPERTY—*See*
HUSBAND AND WIFE 1-6
INSURANCE 1, 4, 6, 7

REASONABLE EXPECTATIONS—*See*
INSURANCE 3

REBUTTAL—*See*
PERJURY 7

RECKLESS DISREGARD OF RIGHTS—*See*
DAMAGES 1, 2

RECORD OF PROCEEDINGS—*See*
JUDGES 17

RECORD ON REVIEW—*See*
ATTORNEY AND CLIENT 10

REDUCTION OF SENTENCES—*See*
CONSTITUTIONAL LAW 23-26

RE-ENACTMENT—*See*
STATUTES 1, 6

REGULATION—*See*
ATTORNEY AND CLIENT 15, 16

REIMBURSEMENT—*See*
AUTOMOBILES 7

RELEVANCE—*See*
CRIMINAL LAW 4, 17, 18
NEGLIGENCE 7, 8

REMARRIAGE—*See*
DEATH 1, 2

REOPENING DISCIPLINARY PROCEEDINGS—*See*
JUDGES 19

REPAIRING AN AUTOMOBILE—*See*
INSURANCE 9, 13

REPUTATION—*See*
CRIMINAL LAW 15, 16

REQUEST FOR INSTRUCTIONS—*See*
CRIMINAL LAW 19

RESENTENCING—*See*
CRIMINAL LAW 44, 45

RES IPSA LOQUITUR—*See*
HOSPITALS 1

RESOLUTION OF DISPUTES—*See*
LABOR RELATIONS 3

REVERSE WRIT—*See*
CONSTITUTIONAL LAW 22
HABEAS CORPUS 2

REVISED JUDICATURE ACT—*See*
LIMITATION OF ACTIONS 4-6
STATUTES 7-9

RIGHT OF ALLOCUTION—*See*
CRIMINAL LAW 39

RIGHT OF CONFRONTATION—*See*
HOMICIDE 9

RIGHT OF PRIVACY—*See*
CONSTITUTIONAL LAW 27

RIGHT TO BE PRESENT—*See*
CRIMINAL LAW 36, 38

RIGHT TO SILENCE—*See*
CRIMINAL LAW 37

ROBBERY.
ARMED ROBBERY.
1. The belief of the victim of a robbery that the assailant was armed must have been induced by the use or fashion of "any article" with which the assailant was armed to sustain a conviction of armed robbery (MCL 750.529; MSA 28.797). *People v Saenz,* 411 Mich 454.
2. Testimony by a victim of a robbery that he thought the

ROBBERY—Cont'd
defendant had a weapon of some kind under his coat but that he saw no article which resembled a weapon, or a bulge under the defendant's coat, or his hand shaped to look like a weapon under the coat, cannot be the basis for a conviction of armed robbery (MCL 750.529; MSA 28.797). *People v Saenz,* 411 Mich 454.

RULE OF LENITY—*See*
CRIMINAL LAW 26
HOMICIDE 3

RULES OF EVIDENCE—*See*
CRIMINAL LAW 49, 51-55
WITNESSES 15

RUNNING AT LARGE—*See*
AUTOMOBILES 11

SAFETY GUARDS—*See*
NEGLIGENCE 6-8, 11
PRODUCTS LIABILITY 2

SAME OFFENSE—*See*
CRIMINAL LAW 8

SEAMEN—*See*
COURTS 1, 2, 4

SECONDARY VICTIMS—*See*
ACTIONS 3-5, 8

SELECTION OF JURY—*See*
CRIMINAL LAW 46-48

SENIORITY—*See*
LABOR RELATIONS 2, 3, 6-8, 12

SENTENCE REDUCTION—*See*
CONSTITUTIONAL LAW 24-26

SENTENCING—*See*
CRIMINAL LAW 38-45

SEPARATION OF POWERS—*See*
CONSTITUTIONAL LAW 23

SERVICE—*See*
ACTIONS 7

SETOFF—*See*
AUTOMOBILES 7

SETTING ASIDE SENTENCE—*See*
CRIMINAL LAW 44

SOCIETY—*See*
ACTIONS 1, 2, 6, 7

SOLACE—*See*
ACTIONS 7

SPECIFIC ACTS—*See*
CRIMINAL LAW 15, 16

SPEEDY TRIAL—*See*
PRISONS AND PRISONERS 3

STANDARD OF CARE—*See*
HOSPITALS 3

STATE ACTION—*See*
CONSTITUTIONAL LAW 6

STATE BAR—*See*
ATTORNEY AND CLIENT 12-20
CONSTITUTIONAL LAW 2-4, 7-21, 27, 28

STATE CONSTITUTIONAL RIGHT—*See*
HOMICIDE 4

STATE INTEREST—*See*
CONSTITUTIONAL LAW 1, 7-17, 19, 20

STATUTE OF LIMITATIONS—*See*
LIMITATION OF ACTIONS 2

STATUTES.
See, also, AUTOMOBILES 1, 2, 5, 7; CONSTITUTIONAL LAW 26; CRIMINAL LAW 24-26; HOMICIDE 3, 6, 7; INSURANCE 8, 10-12; KIDNAPPING 5, 6; LABOR RELATIONS 5, 8; PARENT AND CHILD 1-9; PRISONS AND PRISONERS 1; TRUSTS 1; WORDS AND PHRASES 1.

AMENDMENT OF STATUTES.
1. Amendment of the title of an act, after a declaration of unconstitutionality of a portion of the act itself, no matter what the reason for the finding of unconstitutionality, will not suffice to resurrect the voided portion; the constitution clearly provides that in such a case reference only to the title of a law is insufficient for the voided portion to be once again considered a part of the law, and the voided portion must be re-enacted and published at length (Const 1963, art 4, § 25). *People v Clabin,* 411 Mich 472.

CONSTRUCTION OF STATUTES.
2. There is no room for further construction of a statute which has been declared to be unambiguous on its face; the legislative

STATUTES—Cont'd

intent must be gleaned from the clear and explicit words of the statute. *Sam v Balardo,* 411 Mich 405.

3. The omission of words in the amendment of a statute is presumed to have been intentional; any material change in the language of the act is presumed to reflect a change in legal rights, and as a rule courts look to the circumstances surrounding the enactment to determine if the presumption can be fairly supported. *Sam v Balardo,* 411 Mich 405.
4. *The rationale underlying the rule of statutory construction that a court will enforce the plain and unambiguous meaning of a statute is that in doing so the court will be giving effect to the legislative intent. Sam v Balardo,* 411 Mich 405.
5. *Amendatory statutes, as a general rule, are presumed to intend a change in the law; but where the change in the language of a provision occurs as part of a general and comprehensive revision and consolidation of statutes into a code the revised language will be presumed to bear the same meaning as the original provisions, unless the intent to make a substantive change has been clearly expressed. Sam v Balardo,* 411 Mich 405.

RE-ENACTMENT.

6. A conviction of possession by a convict of a weapon is invalid where the applicable statutory prohibition was not re-enacted and published at length after a decision that the prohibition violated the title-body clause of the constitution; amendment of only the title of the act to embrace the subject of the prohibition to remedy the constitutional problem was ineffectual (Const 1963, art 4, §§ 24, 25; MCL 800.283; MSA 28.1623). *People v Clabin,* 411 Mich 472.

REVISED JUDICATURE ACT.

7. The provisions of the Revised Judicature Act do not purport to create or limit the cause of action for malpractice to something other than was recognized at common law; the statute is remedial legislation which was addressed to procedural reform for the courts rather than to substantive rights and liabilities (MCL 600.101 *et seq.;* MSA 27A.101 *et seq.). Sam v Balardo,* 411 Mich 405.
8. The deletion in the Revised Judicature Act of the words "physicians, surgeons or dentists" used in the former statute of limitations for malpractice was not merely a change of phrase but was the purposeful removal of language of limitation, and is a clear and specific indication of legislative intent to change substantively the meaning of the statutory provision (MCL 600.5805; MSA 27A.5805). *Sam v Balardo,* 411 Mich 405.
9. *The legislative history of the Revised Judicature Act indicates that the deletion of the words "physicians, surgeons or dentists" used in the former statute of limitations for malpractice was an effort to simplify the statute rather than to expand the application of the two-year statute of limitations to actions against attorneys for negligent practice of their profession (MCL 600.5805; MSA 27A.5805). Sam v Balardo,* 411 Mich 405.

STRUCK JURY—*See*
CRIMINAL LAW 46

SUBCONTRACTORS—*See*
TRUSTS 1

SUBSTANTIAL RIGHTS—*See*
CRIMINAL LAW 35, 36

SUFFICIENCY OF EVIDENCE—*See*
FORGERY 3
NEGLIGENCE 5, 6, 11
ROBBERY 1, 2

SUFFICIENCY OF INFORMATION—*See*
INDICTMENT AND INFORMATION 1

SUITABLE WORK—*See*
UNEMPLOYMENT COMPENSATION 1-9

SUMMONS—*See*
CRIMINAL LAW 17

SUPERINTENDING CONTROL.

See, also, ATTORNEY AND CLIENT 12, 18; JUDGES 25, 26.

CONSTITUTIONAL LAW.

1. The power of superintending control conferred by the constitution on the Supreme Court is a power separate from its other powers of original jurisdiction and appeal, its purpose being to keep the courts themselves within bounds and to ensure the harmonious working of the judicial system (Const 1963, art 6, § 4). *In the Matter of Probert,* 411 Mich 210.
2. *The Supreme Court's power of superintending control is separate and distinct from the disciplinary powers the Court exercises on recommendation of the Judicial Tenure Commission; the constitutional convention, as a compromise, in effect granted the Court the power of temporary suspension of judges as being essential to the proper superintending of the courts, but expressly withheld from the supervisory power the power to remove judges from office (Const 1963, art 6, §§ 4, 30). In the Matter of Probert,* 411 Mich 210.

SUPREME COURT.

3. *It is the ultimate responsibility of the Supreme Court to ensure that its exercise of discretion to implement its power of superintending control is fully informed (Const 1963, art 6, § 4; MCL 600.215, 600.219; MSA 27A.215, 27A.219; GCR 1963, 711, 851[6]). Falk v State Bar,* 411 Mich 63.
4. *To allow inadequacies in the record in an action for superintending control to shape an order affecting the rights of persons other than the parties would be to cede control of the Court's discretion to the parties; if a more complete factual record is needed to determine the appropriate superintending order, it is*

SUPERINTENDING CONTROL—Cont'd
the Court's responsibility to obtain it (Const 1963, art 6, § 4; MCL 600.215, 600.219; MSA 27A.215, 27A.219; GCR 1963, 711, 851[6]). Falk v State Bar, 411 Mich 63.

SUPREME COURT—*See*
ATTORNEY AND CLIENT 17, 20
CONSTITUTIONAL LAW 28
JUDGES 1, 2, 9, 25, 26
SUPERINTENDING CONTROL 1-4

SURETYSHIP AND GUARANTEE—*See*
CONTRACTS 1
INSURANCE 3, 14

SUSPENSION FROM PRACTICE—*See*
ATTORNEY AND CLIENT 7, 10

SUSPENSION OF JUDGES—*See*
JUDGES 5, 15, 23

TENANTS BY THE ENTIRETIES—*See*
HUSBAND AND WIFE 1, 3-6
INSURANCE 4, 6, 7

TESTIMONY—*See*
WITNESSES 1

TIMELINESS—*See*
CRIMINAL LAW 19

TIME OF MISCONDUCT—*See*
JUDGES 19

TITLE—*See*
STATUTES 1

TITLE-BODY CLAUSE—*See*
STATUTES 6

TORTS—*See*
ACTIONS 1-5
AUTOMOBILES 2-4, 6-12
NEGLIGENCE 2, 3

TRANSLATION—*See*
CRIMINAL LAW 34

TRIAL.
See, also, CRIMINAL LAW 28, 47, 48; PERJURY 3, 7.
ARGUMENT OF COUNSEL.
1. *An allegation of improper argument by defense counsel to the*

TRIAL—Cont'd

jury in a trial for medical malpractice should be decided by the Supreme Court, rather than remanded for consideration by the Court of Appeals, where the transcript shows heated arguments by counsel for the plaintiffs and for the defendant, which included deprecatory remarks about the expert witnesses in the case, the trial court issued a cautionary instruction to the jury, and the statements were not so prejudicial that they could not be cured by a cautionary instruction. Stachowiak v Subczynski, 411 Mich 459.

TRUSTS.

BUILDING CONTRACTORS.

1. The building contract fund act, which provides that a building contract fund paid to a contractor or subcontractor shall be a trust fund for the benefit of the person making the payment, contractors, laborers, subcontractors or material suppliers, does not apply to public construction contracts (MCL 570.151 *et seq.*; MSA 26.331 *et seq.*). *In re Certified Question,* 411 Mich 727

UNDERSTANDING PLEA—*See*
CRIMINAL LAW 33, 34

UNEMPLOYMENT COMPENSATION.

DISQUALIFICATION.

1. A claimant who has been disqualified for unemployment benefits because he left work voluntarily without good cause attributable to the employer and who serves the applicable requalification period and reapplies for benefits may subsequently be disqualified for refusing, without good cause, to return to the same work when offered by the employer where the former work meets the statutory criteria for "suitable work" (MCL 421.29; MSA 17.531). *Dueweke v Morang Greenhouses,* 411 Mich 670.
2. The Employment Security Appeal Board must decide the suitability of the work offered to a claimant and separately assay the reasonableness of the claimant's refusal of suitable work; the claimant's reasons for refusing an offer to return to his former employment, including the fact that he previously quit the job, go to the question of good cause for refusing the offer (MCL 421.29; MSA 17.531). *Dueweke v Morang Greenhouses,* 411 Mich 670.
3. The Employment Security Commission must consider, on the record, the express statutory criteria in determining the issue of the suitability of work offered to a claimant in order to disqualify the claimant for refusing the offer (MCL 421.29; MSA 17.531). *Dueweke v Morang Greenhouses,* 411 Mich 670.
4. An offer of work involving working conditions which are illegal would render the work unsuitable; therefore, the Employment Security Commission in determining the suitability of work offered must consider an allegation by the claimant that the offer would result in an illegal overtime payment procedure

UNEMPLOYMENT COMPENSATION—Cont'd
(MCL 421.29; MSA 17.531). *Dueweke v Morang Greenhouses,* 411 Mich 670.

5. "Good cause" as used in the disqualification provision of the Employment Security Act means nothing more than good reason—a substantial reason—for refusing to accept the proffered employment, and a cause personal to the employee can be good cause (MCL 421.29; MSA 17.531). *Dueweke v Morang Greenhouses,* 411 Mich 670.
6. The Employment Security Commission in considering whether a claimant had good cause for refusing to return to his former employment without an increase in pay because of a "personality conflict" between the claimant and the employer's general manager, if it finds the claimant's former job to be suitable work under the Employment Security Act, should determine whether the claimant's reasons would be deemed valid by reasonable men and women and not indicative of an unwillingness to work (MCL 421.29; MSA 17.531). *Dueweke v Morang Greenhouses,* 411 Mich 670.
7. *A claimant is disqualified for unemployment benefits for refusing to return to his former employment where the claimant testified that he had quit because of a "personality conflict" between him and the employer's general manager and because there was no room for advancement in the job, and that he would not return to his old job unless he received a raise of $20 per week; the failure to receive an increase in pay did not make the work unsuitable and was not good cause to refuse the work (MCL 421.29; MSA 17.531). Dueweke v Morang Greenhouses,* 411 Mich 670.
8. *A standard that "good cause" as used in the disqualification provision of the Employment Security Act is what reasonable persons would believe it to be and that a cause personal to the employee can be good cause is too broad because it focuses on the personal concerns of one party with no provision for balancing the obligations of the other parties; the weight to be given the effects of the Employment Security Act on the parties is a legislative decision, and the Legislature did not intend to make such a broad extension of unemployment benefits (MCL 421.29; MSA 17.531). Dueweke v Morang Greenhouses,* 411 Mich 670.
9. *The concerns of an employee about remuneration and failure to receive desired raises do not alone constitute "good cause" under the disqualification provision of the Employment Security Act to refuse an offer of former employment (MCL 421.29; MSA 17.531). Dueweke v Morang Greenhouses,* 411 Mich 670.

UNINSURED MOTORISTS—*See*
AUTOMOBILES 6

UNREASONABLE RISK—*See*
NEGLIGENCE 4, 5, 9, 10

UNREASONABLY DANGEROUS—*See*
PRODUCTS LIABILITY 1, 2

UNSAFE USE—*See*
NEGLIGENCE 6-8, 10, 11
PRODUCTS LIABILITY 2

USE—*See*
AUTOMOBILES 4, 11, 12

USE OF KEY—*See*
BURGLARY 1, 2

UTTERING AND PUBLISHING—*See*
FORGERY 1-3

VENUE.
CHANGE OF VENUE.
1. The circuit court has no discretion to refuse to transfer a case if it finds that venue was improperly laid, and the Court of Appeals in reviewing the decision must determine whether the trial court erred, not whether it abused its discretion (GCR 1963, 403, 404). *Shock Bros v Morbark Industries,* 411 Mich 696

VICARIOUS LIABILITY—*See*
HOSPITALS 2
HUSBAND AND WIFE 7
INSURANCE 2, 5

VOLUNTARY UNEMPLOYMENT—*See*
UNEMPLOYMENT COMPENSATION 1, 2, 7

WAIVER—*See*
CRIMINAL LAW 29, 30, 32

WEAPONS.
See, also, ROBBERY 1, 2; STATUTES 6.
FIREARMS.
1. A defendant may be guilty of violating the felony-firearm statute, notwithstanding the lack of personal possession of the firearm, if he is shown to have aided and abetted another person who had such possession (MCL 750.227b, 767.39; MSA 28.424[2], 28.979). *People v Johnson,* 411 Mich 50.
2. Possession of a firearm while committing or attempting to commit a felony is a separate crime from the underlying felony; therefore, where the defendant is charged in a felony-firearm prosecution as aiding and abetting another person, the aiding and abetting must be established in each crime to support conviction of each one (MCL 750.227b, 767.39; MSA 28.424[2], 28.979). *People v Johnson,* 411 Mich 50.

WILLFUL AND WANTON MISCONDUCT—*See*
DAMAGES 1, 2

WITNESSES.

See, also, COURTS 4; CRIMINAL LAW 28, 49-55; DEATH 1, 2; HOSPITALS 3; PERJURY 7.

AIRMEN.

1. An airman in the United States Air Force who cooperated with the State Police in making purchases of controlled substances from defendants after one defendant made them available for purchase, and who cooperated because he had been charged with selling marijuana, was giving aid of a personal nature unrelated to his status as a military man, and his testimony should not have been excluded on the ground that his participation violated the Posse Comitatus Act (18 USC 1385). *People v Burden,* 411 Mich 56.

ARGUMENT OF COUNSEL.

2. Failure in a trial for medical malpractice to give a special instruction to the jury to disregard an unfair remark by defense counsel in closing argument about the use of "professional witnesses" does not require reversal of the verdict of no cause of action and a new trial where the unfair reference to the plaintiffs' expert witness was indirect, the request for the cautionary instruction was made after the plaintiffs' lawyer had responded to the statement in his argument, and the trial court did instruct the jury that statements of counsel made in argument are not in evidence. *Wilson v Stilwill,* 411 Mich 587.

3. The conduct of counsel for a defendant physician in cross-examining the plaintiffs' expert medical witness as to his pattern of involvement in actions for medical malpractice and in unfairly arguing to the jury about the use of "professional witnesses" did not deprive the plaintiffs of a fair trial for medical malpractice where the attorney's conduct was not egregious and repetitive, the record reflects no studied purpose to prejudice the jury, the cross-examination did not harass or belittle the witness, there were no accusations of lying, after the trial court sustained the plaintiffs' objection the questioning stopped, and there was only one indirect improper comment in defense counsel's argument. *Wilson v Stilwill,* 411 Mich 587.

4. *Cross-examining the plaintiffs' expert medical witness as to his pattern of involvement in actions for medical malpractice and unfairly arguing to the jury about the use of "professional witnesses" cannot be said with assurance not to have denied the plaintiffs a fair trial in an action for medical malpractice.* *Wilson v Stilwill,* 411 Mich 587.

5. *An expert medical witness who testified that he derived 60% of his income from caring for patients cannot fairly be characterized by counsel in arguing to the jury as a "professional witness", even if it is fair comment to label an expert who derives all or the great bulk of his income from giving testimony and the attendant preparation a "professional witness".* *Wilson v Stilwill,* 411 Mich 587.

CROSS-EXAMINATION.

6. The scope and duration of cross-examination of witnesses rests in the sound discretion of the trial court; the exercise of that

WITNESSES—Cont'd

discretion will not be reversed absent a clear showing of abuse. *Wilson v Stilwill,* 411 Mich 587.

7. The trial court must insure, in its discretion, that questions on cross-examination seeking to elicit evidence of the witness's bias, prejudice, or interest and inconsistent prior testimony or statements are not unduly limited or improvidently extended; the trial court must also be alert to questions which harass, intimidate, or belittle a witness. *Wilson v Stilwill,* 411 Mich 587.

EXPERT WITNESSES.

8. That a substantial part of the medical practice of an expert witness in a trial for medical malpractice involves evaluating disabilities and reporting his findings and conclusions for cases which may come to court is a proper subject for general limited inquiry on cross-examination; it is also proper to bring out on cross-examination the number of times an expert witness testifies in court, or is involved in particular types of cases. *Wilson v Stilwill,* 411 Mich 587.

9. Evidence that an expert witness in a trial for medical malpractice had testified at the request of the plaintiffs' counsel in other malpractice cases is a permissible subject of cross-examination, in the trial court's discretion, for the purpose of affecting his credibility by raising a possible inference that the witness has testified in such a manner that he would be hired in future cases; in response, additional inquiry would be permissible to show that the witness had also been called by many other lawyers to testify on various issues over the years. *Wilson v Stilwill,* 411 Mich 587.

10. A pattern of testifying as an expert witness for a particular category of plaintiffs or defendants is only minimally probative of bias, and impeachment by such evidence should be carefully scrutinized by the trial court. *Wilson v Stilwill,* 411 Mich 587.

11. Permitting cross-examination of an expert medical witness as to his pattern of testifying for plaintiffs in actions for medical malpractice was not reversible error where the trial court limited the cross-examination by sustaining an objection after the witness testified that he could not recollect any involvement in two cases in which plaintiffs' counsel was apparently not involved. *Wilson v Stilwill,* 411 Mich 587.

12. *An expert's history as a witness for other litigants is not probative of interest or bias, and even if it has a modicum of probative value on the issue of credibility, inquiries of that sort should ordinarily be prohibited because of their potential for distracting the jury or creating collateral issues about the use of "professional witnesses". Wilson v Stilwill,* 411 Mich 587.

13. *Defendant's counsel in actions for medical malpractice should not be permitted to turn the practical difficulties that plaintiffs encounter in obtaining expert testimony to the defendant's advantage by questions intended to insinuate that those physicians who do testify are habitual accusers motivated by avarice or vengeance. Wilson v Stilwill,* 411 Mich 587.

14. *The plaintiff's expert witnesses in an action for medical*

WITNESSES—Cont'd
malpractice should not be impugned simply because they have testified for plaintiffs in other cases; it is sufficient that the defendant be permitted to show that a witness has received a fee for his services. Wilson v Stilwill, 411 Mich 587.
15. *Inquiry regarding the number of times an expert witness has testified for other plaintiffs should generally be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury (MRE 403). Wilson v Stilwill,* 411 Mich 587.
16. An exposition of the assumptions on which an expert witness relied in calculating a plaintiff's economic loss is necessary to an intelligent understanding and evaluation of the worth of the expert's opinion on damages; therefore, it is proper to impeach the expert witness by reviewing the assumptions which underlie the expert's opinion and by arguing that the opinion is mere conjecture based on erroneous assumptions. *Schaible v Myers,* 411 Mich 704
IMPEACHMENT.
17. A witness may not be impeached by producing extrinsic evidence of collateral facts. *People v Teague,* 411 Mich 562.

WORDS AND PHRASES.
See, also, ATTORNEY AND CLIENT 15; INSURANCE 9; LIMITATION OF ACTIONS 2; PARENT AND CHILD 4, 9; PRODUCTS LIABILITY 1; UNEMPLOYMENT COMPENSATION 5, 8.
MALPRACTICE.
1. *The common law has not developed a clear definition of which actions for the negligent practice of a profession are "malpractice" actions, and no substantive distinction among actions for negligence in the practice of different professions is implied by the use or nonuse of the term in reported decisions and statutes, because nothing has heretofore hinged on whether an action was characterized as a "malpractice" action. Sam v Balardo,* 411 Mich 405.

WRONGFUL ACT—*See*
AUTOMOBILES 10

WRONGFUL DEATH—*See*
CONSTITUTIONAL LAW 5
DEATH 1, 2